pleading constitutional issues before the state's tribunals. The issues which proved to be the most controversial in 1846-1848 were: banking institutions, financial policy, married women's property rights, suffrage and the elective franchise, and the nature and structure of the judiciary. This article will limit itself to a discussion of how the Wisconsin framers resolved the important questions concerning suffrage and the elective franchise and the nature and structure of the judiciary.

II. THE WISCONSIN CONSTITUTIONAL CONVENTION AND THE EVENTS LEADING UP TO ITS CONVENING

The idea of Wisconsin statehood did not originate as a grassroots movement. The citizenry at that time resolutely refused to lend early support to such a cause. However, territorial governors, in conjunction with prominent politicians, newspaper editors and influential citizens, planned and charted the course which led Wisconsin into the Union. Henry Dodge, Wisconsin's first territorial governor, was a prime mover behind Wisconsin's first popular referendum on statehood. In 1840 the legislature passed a joint resolution authorizing such a referendum.[1] The voters, however, overwhelmingly rejected this original attempt to call a constitutional convention. Subsequent attempts by succeeding Governors, James Doty and Nathaniel Tallmadge, also ended in failure. Between the years 1840 and 1844 the voters on four occasions rejected referendums on the issue of statehood. The election returns of 1844,[2] accurately reflecting the popular mood, demonstrated both widespread apathy and disapproval. Half the counties in Wisconsin failed to file any returns on the referendum and of the eleven counties which did report, only one, Jefferson County, supported the proposition. Ballots elsewhere ran five to one against statehood.[3]

Wisconsin voters, as late as 1844, saw little merit in rushing into statehood. This apparent hesitancy was explicable mainly by then-existing economic and political realities. As a territory,

1. Wis. Terr. Assembly Res. 12 (1840).

2. A.E. SMITH, THE HISTORY OF WISCONSIN: FROM EXPLORATION TO STATEHOOD 648 (1973). [hereinafter cited as SMITH].

3. *Id.* at 648-51. M. STRONG, HISTORY OF THE TERRITORY OF WISCONSIN, FROM 1836 TO 1848, 430-31 (1885). R. NESBIT, WISCONSIN: A HISTORY 212 (1973). [hereinafter cited as NESBIT].

Wisconsin enjoyed the economic benefit of having the operating costs of the government primarily paid for with funds provided from Washington.[4] A change from territorial status to statehood would fully shift this financial burden onto the shoulders of Wisconsin taxpayers. Closely related to this matter was the fact that internal improvements also were financed largely from the federal treasury. A second consideration, which also had monetary overtones, involved a strip of disputed land on the Illinois-Wisconsin border. Wisconsin officials steadfastly claimed that this area belonged to the Wisconsin Territory, despite the fact that the United States Congress had included this land within the borders of Illinois when it passed the Illinois Enabling Act.[5] Early referendums on statehood included an invitation to the residents of this disputed area to send delegates to the Wisconsin constitutional convention. Wisconsinites, however, were dubious about the wisdom of such a proposal since the disputed area was debt-ridden and cession of the land to Wisconsin would thus result in the transfer of the debts to Wisconsin taxpayers. For these reasons, Wisconsin residents perceived a clear financial advantage in remaining a territory. Aside from the financial reasons for forestalling statehood, the political parties also contributed to Wisconsin's myopia by busily defining their differences and establishing themselves as viable territorial parties, concerning themselves more with local than national issues. The rank and file, as yet, did not share the vision of some party leaders that Wisconsin had a role to play in national politics.[6]

Within the short span of approximately eighteen months, however, several national and local events shifted the scales of popular opinion in favor of statehood. The financial arguments for remaining a territory suddenly lost their significance. Congress, it seems, had become less generous in appropriating funds for territorial governments and as a result Wisconsin fell into debt. Aggravating this situation, President James K. Polk opposed financing internal improvements from the federal treasury and in 1846 vetoed an important rivers and harbors bill.[7] Wisconsin Democrats were disturbed over these acts but

4. SMITH, *supra* note 2, at 641.
5. Ch. 67, 3 Stat. 428 (1818).
6. SMITH, *supra* note 2, at 651.
7. *Id.* at 462.

were powerless to reverse them. Realizing that the financial burdens of the territorial government were being forced upon them, territorial residents concluded that the benefits of statehood might just as well be enjoyed. Besides, after 1845, it appeared certain that a request for statehood would pass Congress. In that year Florida[8] and Texas[9] were admitted as slave states and in order to restore the delicate balance between slave and free states it was expected that Iowa and Wisconsin would be the next territories to apply for admission to the Union. Iowa, in fact, already had taken the first important step when Iowa voters in 1844 authorized the convening of a constitutional convention. Iowa's action, however, was only part of a larger trend that seemed to be sweeping the nation. Michigan, Illinois, Missouri and Ohio were all drafting new constitutions. Distant New York, the former home of many of Wisconsin's settlers, also had begun selecting delegates to write a new basic law for that state. Some twenty constitutions were written between 1839 and 1850, the watershed of Jacksonian Democracy. For Wisconsin, then, it appeared to be a case of either falling into step with the march of democracy or being left behind.

The proponents of statehood were keenly sensitive to the change in the popular pulse and adapted their arguments to take advantage of the new change of events. At this crucial juncture, the popular Henry Dodge, the territory's first governor and one of the original leaders of the statehood movement, was reappointed territorial governor.[10] He and his fellow Democrats, who now controlled the legislature, wasted no time in emphasizing the advantages of statehood. A joint select committee of the legislature reported that Wisconsin stood to receive large grants of land should it become a state. For instance, it was revealed that the future state would automatically acquire 500,000 acres of land under the Land Law of 1841;[11] section sixteen of every township for schools; and seventy-two sections, totaling some 50,000 acres, for the establishment of a university. Besides the land, Wisconsin, as a state, would also receive five percent of the net proceeds from the sale of all federal lands within its borders. This latter sum,

8. Ch. 68, 3 Stat. 742 (1845).
9. H.R.J. Res. 1, 29th Cong., 1st Sess. (1845).
10. SMITH, *supra* note 2, at 331.
11. Ch. 16, 5 Stat. 453 (1841).

calculated for the year of 1845, would have exceeded the amount Congress had allocated for the territory in that same year.

The people were also informed that statehood would end the federal presidential patronage system and permit Wisconsinites to elect their own officials and appoint their own judges and state's attorneys. The idea of self-government, no doubt, was attractive to many of the new settlers in the territory. Wisconsin's population had mushroomed from some 30,000 residents in 1840 to more than 155,000 five years later. The majority of these new voters had migrated from New York and New England where the benefits of statehood and self-rule were fully understood and enjoyed. This new coalition of early and recent settlers, combined with the changed financial condition of the territory, made the outlook for statehood appear brighter than ever.[12]

On the last day of January, 1846, the Democratic legislature again resolved to test the popular mood when it passed a resolution entitled, "An Act in Relation to the Formation of a State Government in Wisconsin."[13] The resolution set aside the first Tuesday in April for a referendum vote on statehood. It qualified as electors any white male inhabitant, over twenty-one years of age, who was a citizen of the United States or who had declared his intention to become a citizen according to the naturalization laws, and who had resided in the territory for six months prior to the date set for the referendum. The act simultaneously authorized the governor to conduct a census in each county and, presuming the resolution on statehood was accepted, apportion delegates for every 1,300 persons in each county. The governor was to further insure that each county have at least one delegate. The census was to be completed by mid-July and the results forwarded to the secretary of the territory. By the first day of August, the governor was to announce by proclamation the precise number of delegates alloted to each county and establish a date for the election of delegates to the constitutional convention. The resolution also provided that the qualifications for voting in this election were to be the

12. SMITH, *supra* note 2, at 651. *See also* NESBIT, *supra* note 3, at 212-15; 1960 WISCONSIN BLUE BOOK 242.

13. 1846 WIS. TERR. LAWS 5-12.

same as those on the question of statehood. Anyone qualified to vote in the referendum was also qualified to serve as a delegate to the convention. The legislative act stipulated that the delegates thus elected were to assemble in the Madison capitol on the first Monday in October and have "full power and authority to form a republican constitution for the state of Wisconsin." The constitution, however, would not be valid unless approved by a majority of the eligible voters.[14]

The qualified voters went to the polls on the first Tuesday in April to cast their ballots for or against statehood as prescribed in the legislative guidelines. The turnout was heavier than expected and much larger than on any of the previous referendums on statehood. The election results were overwhelmingly in favor of a constitutional convention, with 12,334 people voting in favor of the convention and 2,487 against it. The second step of the legislative plan, the census, revealed that there were 155,276 residents in the Wisconsin Territory, excluding three counties which failed to file a census return. Governor Dodge issued a proclamation on the first day of August, apportioning 125 delegates among the twenty-seven organized counties. Racine County, with a population of 17,983, would have the largest representation with fourteen delegates, Milwaukee County would be next with twelve, while Waukesha and Iowa Counties would have eleven delegates each. Eleven counties were so sparsely populated that each was entitled to only one delegate. In order to coincide with the territory's annual elections, Governor Dodge set the first Monday in September as the day on which the voters in each county would elect their delegates. The September elections resulted in a victory for the Democrats. The convention that was scheduled to assemble the following month would comprise 103 Democrats, 18 Whigs and 3 Independents.[15]

Party affiliation was only one of the factors that influenced the 124 men who assembled in Madison on the fifth day of October. Professional and occupational backgrounds, personal experiences and ethnic heritage also shaped their ideas, hopes and visions for the future state. Forty-nine farmers made up

14. *Id.*

15. Madison Express, Aug. 4, 1846. *See also* 1960 WISCONSIN BLUE BOOK 242; NESBIT, *supra* note 3, at 212.

the largest occupational group at the convention, while twenty-six lawyers formed the largest professional one. Various other occupations were also represented: merchants, mechanics, manufacturers, mine owners, lumbermen, surveyors, physicians, newspaper editors, one Indian agent and the founder of a cooperative community. The delegates' occupational status proved to be a distinction without a difference since regardless of their listed occupations most delegates owned and operated farms as well. The individual members were, however, more diverse in their places of origin. Most had migrated from the northeastern states: forty-six were born in New York, forty-two in New England and ten in the middle Atlantic states. The remainder of the native-born were from the south and middle west. Thirteen were foreign-born: seven Irish, three German, and three English. The delegates were relatively young with almost half in their thirties, sixteen thirty years or younger, and only fifteen over fifty. Eleven delegates had attended or graduated from college and seventeen had prior experience in government, either in the Wisconsin territorial government or in the other states. A delegate from Racine County, assessing the stature of his colleagues on opening day, wrote that the delegates appeared to be "a crowd of very fine, intelligent looking men," who, as far as a stranger could judge by appearances, "could well compare with any similar body of the same size anywhere." The delegates, he continued, evidenced "a steady and earnest disposition for the important work before them."[16]

The enthusiastic delegates set to work immediately, selecting Moses Strong, a resident of Mineral Point in Iowa County and a graduate of Dartmouth College, as president pro tempore. Two committees were formed: one to report on the number of necessary officers for the convention and the other to recommend rules for governing the body. While the former committee was still out, Henry Baird, a Brown County Whig, moved that the election of officers be by a majority vote of all delegates. The convention passed the Baird resolution. The convention then accepted the recommendation of the committee on officers which provided for the election of the president,

16. THE CONVENTION OF 1846, 800 (M. Quaife ed. 1919). [hereinafter cited as Quaife]. *See also* Brown, *The Making of the Wisconsin Constitution,* 1949 WIS. L. REV. 657. [hereinafter cited as BROWN]; Racine Advocate, Oct. 14, 1846.

two secretaries, two doorkeepers, two messengers, and a sergeant at arms. Andrew Elmore, a Waukesha Whig, moved that the convention immediately proceed to the election of officers. At this point, the apparent harmony of the morning session was shattered and the Democratic ranks divided. Racine Democrats Edward Ryan and Marshall Strong tried in vain to slow the pace of events. Ryan, speaking for himself and Strong, suggested that the Democrats go into party caucus to choose the officers. He pointed out to the 103 Democratic members that they had been elected to form a constitution; consistent with party principles and in order to accomplish that goal, the selection of a president who had the support of a firm majority of the party's delegates would be "a great step towards that end." The Racine lawyer thought that this could best be achieved "without admitting a corporal's guard of Whigs" to make the choice between several competing Democratic candidates. He therefore strongly urged a party caucus before balloting on the president.

Dodge County Democrat Stoddard Judd supported a contrary Whig resolution and, expressing the opinion of many Democratic party members, refused to be straightjacketed by a party caucus. Henry Baird, a Whig and minority party member who earlier had proposed the election of officers by a majority of delegates, objected to injecting party principles into the election of officers. This was not so much motivated by an untainted public spirit than it was by a recognition of his party's minority status. The Ryan-Strong faction, sensing that the mood of the delegates was shifting towards immediate elections, tried to short-circuit the proceedings. They moved to table these resolutions but the motion was defeated. The convention then proceeded to a ballot on the three front-runners: D.A.J. Upham, a moderate from Milwaukee County; Marshall Strong, who represented the Dodge Democrats; and Moses Strong, the president pro tempore, who had the support of the radical Democrats. A coalition of Democrats and Whigs elected D.A.J. Upham president on the fourth ballot. One Democrat moaned that "upon a Whig motion and virtually by Whig votes the election of president was decided against the safe and settled usage of the party." He noticed a "most self-satisfying expression" on the "shrewd and smiling" face of James Doty, the former Whig Governor and lone delegate from Winnebago County. Upham's election, however, was the result of a minor

struggle for power between the conservative party regulars called "Hunkers" and progressive Democrats or "Tadpoles" rather than an irreparable breach in the Democratic ranks or the power and political cunning of Doty and the Whigs.[17]

The split within the Democratic party and the early influence of the Whigs was again more clearly made evident when the convention selected an official reporter. The "Hunkers" or regular Democrats favored the *Wisconsin Argus* since it was the official organ of Governor Dodge. John Y. Smith, the editor of the *Argus* and a delegate from Dane County, was considered a proponent of "sound" Democratic principles and "hard" on the bank issue. The party insurgents or "Tadpoles" supported Beriah Brown's recently established *Wisconsin Democrat.* The new paper served as the voice of the young Democrats who wanted progressive reforms on organizational and social questions. The "Hunkers" and "Tadpoles," who had been vying with one another for control of the party and debating the depth to which Jacksonian Democracy would be rooted in Wisconsin, now focused their fight on the selection of the convention printer. The post would bring with it financial benefits and, more importantly, serve as a symbolic victory for the more powerful faction. The Whigs, not wishing to miss an opportunity to drive another wedge into the political breach and believing that the "Tadpoles" might be more sympathetic to the "soft" position on banking and finance, threw their support behind the insurgents. Fifty votes were cast for the *Democrat* as opposed to the *Argus'* forty-four. The party regulars, however, did not view the outcome as a major defeat for their faction or as a rejection of Democratic principles because the *Democrat's* success was due to Whig support. Edward Ryan cautioned against becoming alarmed at the vote. He noted how dozens of Democrats had voted from personal or local considerations, or out of utter ignorance of the political maneuvering that had taken place. The Racine lawyer realistically noted that "sound" Democratic party principles still maintained a "handsome" working majority over the Whigs and the "softs." Once the hall was sufficiently agitated "to true Democratic heat," the Dodge Democrat optimistically predicted, even the "softs" would become "hardened" in the process.[18]

17. Quaife, *supra* note 16, at 17; Racine Advocate, Oct. 14, 1846.

18. Quaife, *supra* note 16, at 56-57; Racine Advocate, Oct. 14, 1846. *See also* A. BREITZINGER, EDWARD G. RYAN: LION OF THE LAW 15 (1960).

A semblance of tranquility returned to the proceedings as the members turned their attention to the procedures and rules for conducting the business of the convention. The delegates, after a mild debate, decided that the presence of fifteen members would be necessary for a call of the house. They also created twenty-two standing committees of five members each. These standing committees would draft articles on the specific subjects assigned to them and report back to the full convention where the draft articles would serve as the basis for debate. There were, for example, standing committees on the executive of the state, on suffrage and elective franchise, on banks and banking, and on miscellaneous provisions. The committee system added a degree of chaos to the proceedings because there was no specific schedule drawn up as to when paticular committees were to make their reports to the convention. Whenever a committee completed its article it was immediately placed on the calendar for debate. This lack of scheduling proved to be an extremely haphazard way to draft a constitution. The decision to allow unlimited debate also proved to be an enemy to efficiency. The delegates' time was often well-spent when listening to logical discourses and legal lectures, but wasted when petty disputes and personal harangues marred the proceedings. The official journal, however, read like an accountant's ledger since the convention agreed to confine the record primarily to the resolutions, articles, amendments and recorded votes. The reading public was exposed to the debates and diatribes of the delegates through the press. The convention's proceedings were always open to the press and the Madison newspapers, as well as others throughout the territory, carried weekly summaries of the debates and noted the progress as the important issues were presented and resolved. Some delegates sent first-hand reports back to local newspapers, or returned to their districts to discuss significant issues and assess local opinions. The convention also voted to provide each delegate with twenty copies of the Madison newspapers so he could forward them to constituents in his county. The people, therefore, were kept fully abreast of the constitutional proceedings.[19]

19. Quaife, *supra* note 16, at 57-58. *See also* SMITH, *supra* note 2, at 655; Brown, *supra* note 16, at 661-62.

Most provisions in the constitution of 1846 were passed without extended debate. The nature and powers of the executive and legislature, for example, were similar to those of other states and met with no serious opposition. The provisions of the Bill of Rights were modeled on the United States Constitution and the state constitutions of Michigan and New York. The spirit of Wisconsin's constitution was revealed in the debates surrounding the elective franchise and the nature of the judiciary.

III. Elective Franchise

On October 8, Moses Strong, an Iowa County Democrat, was appointed chairman of the five-member committee on suffrage and the elective franchise. Francis Huebschmann, a Milwaukee physician and a native of Germany, was the only foreign-born member of the committee while Charles Burchard of Waukesha County was the sole Whig. Two Democrats, Hopewell Coxe from Washington County and John Manahan from Dodge County, rounded out the committee's membership.[20] These men set to work immediately and presented their report to the convention on the following day. The report from the committee on suffrage was the second one to reach the full convention and, thus, its provisions constituted some of the earliest issues to be discussed by the convention as a whole.

The committee report made a distinction between persons who resided in the territory prior to the adoption of the constitution, and those who settled in the state after that date. It qualified as electors all white males twenty-one years of age and older, who resided in the state at the time of the ratification of the constitution and who were citizens of the United States. Moreover, resident aliens who declared their intention to become citizens were also qualified to vote. Any person settling in the state after the ratification of the constitution had to meet the same age, sex, and race requirements as those already residing in the state and, in addition, any alien in this class of residents had to take an oath to support the constitutions of the United States and Wisconsin, and file that oath in the office of the clerk of the district court of the county in which

20. Quaife, *supra* note 16, at 58, 63, 67; Madison Express, Oct. 10, 12, 1846; Wisconsin Argus, Oct. 13, 1846.

he resided. Such persons, however, did not have to declare their intention to become citizens. Both citizens and aliens settling in the state after the adoption of the constitution had to reside in the state six months before becoming qualified to vote. The committee report also provided that whenever Congress dispensed with the declaration of intention required to become a citizen,[21] the same would be dispensed with as a qualification for electors in the state. Under another section in the proposed article, all votes were to be *viva voce,* except for township officers who might be chosen in other manners. Four members of the committee on suffrage signed the majority report, but one, Charles Burchard, gave notice that he intended to submit a minority report at a later date.

The minority report took issue with the majority on four issues. It retained the age and sex requirements but removed the stipulation as to race, opening the suffrage to males of the Negro race. Burchard's report also made no distinction between persons residing in the territory prior to the adoption of the constitution and those entering after that date; both were required to reside in the state six months before becoming eligible to vote. Noncitizens, the minority report stated, did not have to declare their intentions to become citizens of the United States, but only had to file an oath to support the Constitution of the United States. A separate section in Burchard's report required that all votes be by ballot rather than *viva voce.*

The convention easily resolved some preliminary technical issues before it focused upon the important questions of extending the franchise to aliens and Negroes. All male Indians who met the age requirement and who Congress had declared citizens of the United States were eligible to vote in state elections. On the other hand, the issue of female suffrage was raised once and rejected with little discussion. The convention also rejected two motions attempting to change the voting age to twenty-five and then eighteen. The delegates, however, did raise the residency requirement for persons settling in the state after the adoption of the constitution from six months to one year.

21. Wisconsin Argus, Oct. 27, 1846.

The delegates took up the issues of alien suffrage when English-born Edward Ryan offered two amendments to the committee report. One would continue to require foreigners to declare their intentions to become citizens of the United States before being allowed to vote, even in the event that Congress repealed the requirement as a necessary step to becoming a citizen. The other would impose the declaration of intention to become a citizen on aliens who settled in the state after the ratification of the constitution, in addition to the oath of allegiance already specified in the committee report. German-born Francis Huebschmann and Irish-born Daniel Harkin supported Ryan's amendment on the grounds that it placed the same requirements on foreigners yet to come into the territory as was on those already settled within its borders. Aliens already in the territory, they said, had to declare their intentions to become citizens before being allowed to vote and the same rule should apply to future aliens settling in Wisconsin. Huebschmann and Harkin also supported the requirement of the oath of allegiance, stating that they hoped no one would be permitted to vote who "begrudged"[22] taking the oath. The convention supported the position of the foreign-born delegates and passed the Ryan amendments.

Huebschmann, Harkin and Ryan joined forces again against Lorenzo Bevans when the latter proposed that aliens who had resided in the United States for six years and who had not become citizens be deprived of the right to vote until they were naturalized. The Grant County Democrat believed that there were many aliens in the territory who did not intend to become citizens, but, under the proposed article, were still entitled to vote. His amendment, it was said, would "induce"[23] foreigners to become citizens. Bevans felt that foreigners should not be permitted to vote unless they first indicated their desire to become citizens and become a full part of the government in which they would participate.

Francis Huebschmann thought that the Bevans amendment could not be enforced on a "just and equitable"[24] basis. There were many circumstances which would unavoidably prevent a man who sincerely wanted to become a citizen from being naturalized even after six years. Edward Ryan supplied

22. Quaife, *supra* note 16, at 207.
23. *Id.* at 218.
24. *Id.* at 220.

the delegates with several examples to reinforce Huebschmann's point. Moses Strong, chairman of the committee on suffrage, also opposed the Bevans amendment and said that the Grant County Democrat had blurred the distinction between citizen and elector. The Iowa County lawyer noted that citizen and elector were not synonymous. A man could be a citizen and not a voter, he said, or a voter and not a citizen. While the United States retained the power to constitute a foreigner a citizen, the states retained the right to prescribe the qualifications of electors.

Daniel Harkin, an Irish-born delegate, joined the assault on the Bevans amendment. While agreeing that foreigners were not as informed as the native-born about the "intricate" workings of territorial politics, Harkin argued that such ignorance was an advantage rather than a handicap. Knowledge of the "wirepullers" of the convention, or the "tricks and chicanery" of "scientific politicians," or the nice distinctions between "tadpole," "regressive" or "progressive" Democrats was irrelevant. Even less important was it for foreigners to understand the "mode and manner of securing a greater or less share of the public stealings" in and about the capitol. What was important was that foreigners were familiar with the "good old Jeffersonian progressive democracy and all the elements and fundamental principles of a republican government." These were the true marks of an informed electorate. No one, Harkin said, asked Steuben, Lafayette, Pulaski, Kosciuszko and Montgomery, men who came to the United States to deal "death and destruction" to the ranks of tyrants, if they had lived here for five years. The Irish-American delegate concluded his argument by noting that Benedict Arnold was a native American and that there were no foreigners at the Hartford Convention. Harkin lamented that "the idolized flag of our country, which so proudly waves over us with its bright constellation of stars, was to have all the stars monopolized by the natives, while its stripes are to be dealt out to the foreigners!"[25]

The words of Harkin and the arguments of Huebschmann, Ryan and Strong seemed to sway the delegates. The convention appeared content to insist upon only a minimum of require-

25. *Id.* at 249-50.

ments for alien suffrage when it rejected the Bevans amendment.

Thomas Burnett, one of Bevans' fellow delegates from Grant County, further divided the convention and posed a more serious threat to the alien franchise when he introduced a substitute article on suffrage. The Burnett article dealt only with the qualifications of electors and differed with the committee report on the foreign vote. The Burnett article extended the franchise only to the aliens who resided in the territory prior to the ratification of the constitution and who had declared their intention to become citizens of the United States and had filed their oaths of allegiance in the office of the clerk of any court of record in the state. According to the Burnett article, aliens settling in the state after the adoption of the constitution would not be entitled to vote until they became citizens.

Burnett claimed that his article was framed in the "spirit of compromise."[26] He revealed the sectional nature of the issue when he noted that the western counties were as opposed to the extension of the suffrage to aliens as the eastern counties were in favor of it. He justified extending the franchise to aliens already in the state on the ground that they had worked to develop the territory and had aided in the formation of the constitution. Aliens who settled later, Burnett said, should not be placed on the same footing as those who preceded them, but should be required to become citizens before voting. The Grant County delegate said that his position reflected the popular attitude in the west and predicted that the constitution would pass if his article was accepted, but would fail if it was rejected.

Burnett further contended that the committee's article, in extending the franchise to aliens, made foreigners citizens of the United States. This, he said, was a power vested exclusively in the government of the United States. Burnett predicted that the committee's article would block Wisconsin's admission into the Union. He noted how Congress had hesitated when it reviewed a similar clause in Michigan's constitution relative to the foreign vote.[27] Michigan's clause, he said, was less broad than the one the committee proposed. Joel Bar-

26. Quaife, *supra* note 16, at 230.
27. Wisconsin Argus, Oct. 27, 1846.

ber, a fellow delegate from Grant County, elaborated further on that point. Citing the heated debates in the U.S. Senate, Barber attributed Michigan's admission to the Union notwithstanding its alien suffrage, primarily to the "desire of the dominant party . . . to increase their strength." The Grant County Whig noted that the dominant party presently felt no need to increase its strength and feared that Wisconsin would ask "in vain" for admission with "these obnoxious provisions."[28]

Joel Barber concurred with Burnett in this belief that the committee's article made aliens citizens, rather than denizens. He quoted Blackstone as defining a denizen as a person not a native or a naturalized citizen having the right to hold and transmit land.[29] The Grant County lawyer noted that aliens already could inherit, hold and transmit real estate under the present laws and that they enjoyed all the rights of citizens except the elective franchise. If the convention conferred the right to vote on aliens, he said, they would become for all intents and purposes, citizens. Further, the implication of this article did not end at Wisconsin's border. Barber quoted the United States Constitution which provided that a citizen of one state was entitled to all the privileges and immunities of the several states[30] and interpreted that clause to mean that if the convention made aliens Wisconsin citizens, the latter would be entitled to citizenship in every other state in the Union. Barber also noted that all the writers on constitutional law concurred and the federal and state courts upheld the proposition that the power to naturalize aliens was exclusively in the general government.[31] Wisconsin's action, he said, was "unwise," "inexpedient," and "unconstitutional."[32] Barber urged his colleagues to support the Burnett article for the sake of the ratification of the constitution and Wisconsin's admission into the Union.

Edward Ryan entered the debate to directly challenge Barber's legal position. He delivered a masterful discourse on the nature of the Union and the intricate distinctions between citizens, denizens and aliens. The Racine lawyer maintained that

28. Quaife, *supra* note 16, at 237.
29. 1 W. BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND 374 (Lewis ed. 1902).
30. U.S. CONST. art. IV, § 2.
31. Wisconsin Argus, Oct. 27, 1846.
32. Quaife, *supra* note 16, at 237.

the states of the Union were sovereign powers and enjoyed the full rights of sovereignty. The government of the American confederacy, he said, was one of limited and delegated powers and had no sovereign character of its own beyond those which the states committed to its charge. Upon becoming a state, Wisconsin would change from a province to a sovereignty. However, as a price for admission into the Union, Wisconsin would have to surrender those rights of sovereignty which the older states had transferred to the general government upon their ratification of the Constitution. Ryan opined that the states had parted with the power of naturalization when they ratified the Constitution, but asserted that if Wisconsin conferred suffrage on aliens it would not violate the naturalization privilege in the Constitution.[33]

Ryan noted that there were three classes of people in a nation: citizens, denizens and aliens. Citizenship, he said, was a relationship between born inhabitants and the sovereignty under whose flag they were born. Such a status could arbitrarily be conferred to one of foreign birth through the process of naturalization. Citizenship involved the duty of allegiance on the part of the citizen and the duty of protection on the part of the sovereignty. Ryan denied that citizenship carried with it the civil right of holding and transmitting real estate or the political right of suffrage. A denizen, on the other hand, was an alien who was granted certain civil and political rights within a sovereignty. Naturalization adopted an alien completely and forever, while denizenation extended certain limited rights to the person which could be limited in time. Naturalization was an exclusive power of the national government, while denizenation was a power belonging to the states.

According to Ryan's construct, conferring the franchise to aliens was denizenation and not, as Barber maintained, naturalization. Ryan claimed to follow the definitions of Blackstone and chided his legal colleague when Barber admitted that his earlier definitions which equated voting with citizenship came from Webster and not the English legal scholar.[34]

Ryan further explained that any rights Wisconsin conferred on aliens as part of its power of denizenation, made them deni-

33. Wisconsin Argus, Oct. 27, 1846.
34. *Id.*

zens of Wisconsin and applicable only within its borders. When a denizen moved beyond Wisconsin's borders, his status as a denizen ceased, and he became an alien. Ryan denied that Wisconsin could make an alien a denizen of the United States or of any other state into which the foreigner moved. He said the convention represented the future sovereignty of Wisconsin and could exercise its "absolute and unrestrained"[35] power to establish the qualifications for alien electors in the same way that it set the qualifications for citizen electors.

Ryan disbelieved that Congress would refuse Wisconsin's admission to the Union on the grounds of its franchise clause. More importantly, he disbelieved that Congress had a right to do so. But should Congress "dare to exact at the door of the Union the toll of an unsurrendered, undelegated right of her supreme authority within herself, I would say to Congress, [s]he will not enter; she will not bow her sovereignty in the dust and strip herself of her sovereign attributes as the price of admission; she will not enter as a submissive province; she will enter in her sovereign right, intact, unsullied, unsurrendered, or she will remain without forever." Ryan thought it was better to remain "a warded territory, than disgrace that Union, a degraded and crippled sovereignty."[36]

Francis Huebschmann also responded to the Barber and Burnett positions labelling as "untrue and unjust"[37] the Barber charge that aliens came to the United States only to better their conditions and not from any love of republican principles. He thought that only persons unfamiliar with the masses of the foreign population could make such accusations. The Milwaukee physician conceded that many aliens came to the United States to better their conditions. He stated, however, that foreigners knew that the opportunity to better their conditions was only made possible by the operation and existence of republican institutions. Huebschmann argued that foreign-born residents realized this and further realized that it was their duty to sustain and support these institutions. As proof, Hueschmann noted that foreigners were willing to bear their share of the burden and pointed to the number of aliens who "flocked" to the colors during the present Mexican War.

35. Quaife, *supra* note 16, at 259.
36. *Id.* at 261-62.
37. *Id.* at 234.

Huebschmann argued that granting aliens the right to vote was the "best stimulant"[38] to make the indifferent among them learn of republican institutions. Throwing political responsibility on aliens, he said, would drive them to investigate the political questions of the day and thus gain experience. The German-born delegate also believed that placing all residents on a politically equal plane would institute best the policy to "unite," "amalgamate," and "form one whole people."[39] The more political distinctions society made between nationalities, the longer would be the delay in achieving an end that was so important to the future welfare of the state.

As for Michigan's experience with the alien suffrage provision in its constitution, which Joel Barber pointed to as militating against the extension of such rights, Huebschmann drew a different conclusion. The Milwaukee Democrat felt that United States Senator James Buchanan's position reflected the true position of the Senate. Senator Buchanan maintained that the United States Constitution left to the states the right to decide, according to their own unrestrained and unlimited discretion, the qualifications and requirements of who could be electors. Huebschmann quoted Buchanan as saying that the states could confer on resident aliens, if they thought proper, the right to vote. Senator Buchanan also asserted that Congress could not reject a state constitution simply because the Senate did not approve of the qualifications for voters established by it. Huebschmann concluded that the Michigan case, and the debate in the Senate, conclusively settled the issue that only the states could decide the qualifications for suffrage.

Before the convention formally moved to vote on the Burnett article, Moses Strong, chairman of the committee on suffrage, introduced an amendment which was an exact copy of the Burnett article and moved that it be voted upon as an amendment rather than a substitute for the article proposed by his committee. The convention appeared to be swayed more by the foreign-born arguments than by those presented by the delegates from Grant County. The vote was fourteen to eighty-one to reject the Burnett article in the form of Strong's amendment.

38. *Id.*

39. Quaife, *supra* note 16, at 235.

The major hurdle to alien suffrage was overcome with the defeat of the Burnett article. Other amendments were proposed and rejected that would have eliminated either the declaration to become a citizen or the oath of allegiance before qualifying as an elector. Another amendment that was rejected would have erased completely the distinction between citizen and alien and required both to take an oath of allegiance to support the constitutions of the United States and Wisconsin as a prerequisite for voting. One compromise that was accepted, however, extended the one-year residency requirement to citizens and aliens already in the territory at the time of the adoption of the constitution. Another elevated to a constitutional mandate the requirement that aliens in the territory prior to the adoption of the constitution file an oath of allegiance in any court of record in the county where they resided before qualifying as an elector. Formerly, this requirement was statutory. Both compromises simply abolished the distinctions between citizens and aliens who resided in the territory prior to the ratification of the constitution and those who came later. Thus completed, the convention substantially accepted the report of the committee on suffrage and established a broad franchise policy relative to the alien population.

At the same time, the convention was debating the question of alien suffrage, the proponents of Negro suffrage were pushing equally hard for the success of their position. The issue of Negro suffrage was first introduced on October 19 when Charles Burchard presented his minority report. The issue was put squarely before the entire convention two days later when David Giddings, the sole delegate from Sheboygan County, offered an amendment which would have struck out the term "white" from the majority report.[40]

Edward Ryan and Moses Strong, both influential men in the convention, led the fight against the Giddings amendment. Ryan feared that Wisconsin would be "overrun" with runaway slaves if Negroes were granted the franchise. He envisioned fugitive slaves remaining in the state rather than completing their journey into Canada if Negroes were accepted into the political community. The Racine lawyer also believed that God had placed an "insuperable mark of separation" upon the two

40. *Id.* at 214-15.

races and, alluding to the Bible, stated that what God had placed apart, no man should bring together. He considered it an "injustice" to both races to place whites and Negroes on the same scale of social equality. To illustrate his belief about the differences between the two races, Ryan pointed to the "abject social condition and habits" of Negroes in New York where "every negro was a thief, and every negro woman far worse."[41]

Moses Strong, chairman of the committee on suffrage, said he personally was "opposed to Negro suffrage in any manner or form that could be devised." The Iowa Democrat thought that the extension of the franchise to Negroes would drive a wedge between the eastern and western counties and perhaps even jeopardize the constitution itself. He assured his colleagues that the constitution would not receive fifty votes west of the Rock River if such a provision were included in it. The voters in the western counties, Strong said, would consider it a deprivation of "their natural rights" to be placed upon the same plane as the colored man.[42]

Warren Chase, taking a politically realistic and cautious approach, supported the Giddings amendment as a "great matter of expediency." He warned the Democrats and the Whigs that the term "white" in the franchise clause would serve as the "very foundation upon which the abolition party would be raised and other parties distracted." Negroes, Chase argued, should be permitted to vote if for no other reason than to keep the abolitionists from gaining a foothold in the state. Moses Strong responded that he was violently opposed to the abolitionist party and believed in confronting the issue head-on rather than avoiding it by granting Negroes the right to vote. He disfavored any half-measures when dealing with the abolitionists and promised to give them "war—war to the knife, and the knife to the hilt!"[43]

Moses Gibson, a Fond du Lac Whig, addressed some remarks to Moses Strong's earlier statements. He noted that the western counties' opposition to free suffrage was only surpassed by the northern and eastern counties' strenuous advocacy of the issue. Gibson also differed with Strong's assessment of New

41. *Id.* at 215.
42. *Id.*
43. Quaife, *supra* note 16, at 214-15.

York's experience with Negroes. The Fond du Lac Whig pointed out that New York was so well satisfied with its experimental, qualified Negro suffrage that it had at its last convention proposed to submit a separate proposition to the people extending the suffrage right without any qualifications. Gibson further argued that he favored Negro suffrage because the very essence of republican institutions, from "foundation to capstone," was opposed to infringing any of the "natural rights of any man." Dodge County Democrat John Manahan also based his support for Negro suffrage on American principles. Manahan would not deprive any man of the right to vote without also excluding him from taxation.

Although the convention as a whole rejected the Giddings amendment, the proponents of Negro suffrage were prepared to try the same tactic that appeared to be successful in the New York convention. John Boyd of Walworth County offered an amendment which would place the question of Negro suffrage before the people on a separate ballot at the same time they voted on the constitution. He defended his amendment on the ground that it met all the objections presented by the opponents of Negro suffrage. If the convention resolved the issue, he said, it could be maintained by opponents that the vote was not representative of the majority will. On the other hand, if the people settled the issue themselves, it would end the controversy and bind all political parties. Boyd believed that a direct vote of the people also would "break up the foundations" of abolitionism. Further, the people who opposed the Negro vote would not be faced with voting against the constitution since the questions would be presented as separate issues. The Walworth Democrat also remained unconvinced that permitting the Negro to vote would cause mass migrations to the new state. It was not true, he said, that the states which permitted Negro suffrage had more Negroes than those which denied the privilege.[44]

Many delegates, however, were opposed to shifting the responsibility to the people. Charles Burchard, for example, supported Negro suffrage but opposed submitting the question to the people. The author of the minority report contended that the people had already decided the issue when they elected the

44. *Id.* at 217, 224.

members of the convention. The delegates, Burchard said, were sent to make "a whole constitution, not a half one." He wanted "no dodging [of] responsibility on the issue." Thomas Burnett of Grant County agreed with Burchard. He thought that sending a separate proposition to the people only tended to distract them from the merits or demerits of the constitution. If submitting separate propositions was a sound policy, he said, why not send the bank question, or the organization of the judiciary, or every other disputed question to the people. Ninian Whiteside, a Democrat from Iowa County, thought that submitting separate questions to the people "showed the representatives wanting in decision of character or willingness to assume responsibility."[45]

Other delegates thought the amendment was a meaningless gesture since it was well-known that a majority of voters were opposed to the Negro vote. Thomas Burnett asserted that no one had declared or even intimated that there was a majority of voters in any county who favored the measure. Burnett believed that even the counties east of the Rock River were opposed to it. D.A.J. Upham, president of the convention, said he believed a "very decided majority" of the voters in Milwaukee County were opposed to Negro suffrage. Peter Brace of Crawford County estimated that there were not more than thirteen delegates who favored Negro suffrage and all agreed there was only a "very small minority" of the people who favored it. He asked why the delegates should spend more time on the subject since it gratified only a small minority.[46]

Some delegates wondered however what effect a popular vote would have on the abolitionist movement, and if it was wise to highlight the issue in view of the limited benefit it would have for the Negro population. Charles Baker, a Walworth County Democrat, thought a popular vote would effectively "destroy the grounds on which the abolitionists stood" and eliminate any influence the party had in the territory. D.A.J. Upham, however, thought that granting suffrage to Negroes would not allay the feelings of the abolitionists. Their object, he said, was not Wisconsin, but to abolish slavery in the South. Upham would not wage war against the abolitionists

45. *Id.* at 217, 228.
46. *Id.* at 227-28.

nor would he go out of his way to gratify their "foolish demands." Moses Strong also was unwilling to upset the people in the western counties for the mere gratification of a handful of "fractious" abolitionists. He argued that no more than fifty Negroes would benefit from the measure even if passed. Charles Baker concurred, saying that the Negro franchise would result in "no particular benefit to the negro race." The Negro, he said, "was despised, abject, and servile, and could not be raised from that condition in which prejudice had placed him, by giving him this privilege." Upham believed that the right to vote was not a natural right but something to be bestowed or withheld as the public good demanded. The Milwaukee Democrat could not see how the public good could be promoted by allowing Negroes to vote. He argued the Democratic doctrine required only that the franchise be extended "as far as could be consistently done. Negroes would not be raised in the scale of beings by [the vote], and many of the whites would be offended."[47]

Thomas Burnett of Grant County thought that the people of the west, who were universally opposed to the Negro vote, would equally be offended by a separate vote as they would by the inclusion of a free suffrage article in the constitution. The people of the west, he said, would look on the measure with "serious apprehension"[48] and interpret the move as an attempt by the east to saddle them with Negro suffrage. The voters in the west, he predicted, would strike against both the separate referendum and the constitution. Moses Strong added that the west was entitled to special deference. The west, he said, was the first-settled area in the territory and its population was increasing as immigrants moved westward. Moreover, westerners were slowly adopting the laws of the east and sacrificing their system of county government for town government. The west looked for a sign of compromise from the east. Strong noted that the west had accepted alien suffrage and expected the east in return to compromise on the question of Negro suffrage. If the spirit of compromise was not forthcoming, Strong warned, the fate of the constitution would be in doubt.

47. *Id.* at 226-28.
48. *Id.* at 226.

Before the convention as a whole proceeded to act on the Boyd amendment, Moses Strong proposed to amend the amendment so that Negro suffrage would be permitted only in those counties that approved the separate referendum. The delegates rejected Strong's amendment thirty-three to forty-nine and then rejected Boyd's amendment by the same margin without a roll call vote.

Charles Baker then proposed an amendment similar to the one just defeated. Baker's amendment, like Boyd's, provided for a separate referendum on Negro suffrage. Only Stoddard Judd, a Dane County Democrat, spoke at length in support of the Baker amendment. He conceded that while the Negro was not a white man, and the convention could not alter that reality, nonetheless it remained a fact that the Negro was residing in the territory, sharing the same birthright, having the same language, laws and government, and was therefore "to all intents and purposes, a citizen of the country." Judd thought it required "no very great stretch" of democratic principles to allow the Negro a voice in the election of officers who were to rule over him. He thought the question should be put to a "full and fair expression of public opinion," and whatever the outcome, no one could justly complain that he had not been "fairly and equitably" treated. He believed a popular referendum would "greatly tend to quiet excitement" and go "far" toward putting the issue "forever at rest." Judd denied any association with the abolitionists and stated he only wanted to do an "act of justice" by giving the Negro a "fair chance before a majority of all the people," which was the "very essence of Democracy."[49]

The Baker amendment was only narrowly defeated, forty-seven to fifty-one. Unlike the prior amendment the delegates' votes were recorded in the official proceedings. This vote revealed that the Rock River was indeed the dividing line on the suffrage question. Of the eleven most populous counties, not one west of the river voted for the Baker amendment. Three of the five largest counties east of the river supported the referendum amendment while one was evenly divided and one, Washington County, voted against it. Three counties which straddled the Rock River supported the Baker amendment. Winnebago County was said to have the largest Negro population in

49. *Id.* at 240-41.

the territory and its delegate, James Doty, voted to support the popular referendum.

The issue of Negro suffrage nevertheless refused to die a quiet political death. Charles Burchard, the Waukesha Whig who had served on the committee on suffrage, offered his minority report as a substitute for the majority article on suffrage. Burchard said he had listened to the speakers defend white suffrage and had waited for the right moment to defend Negro suffrage. The minority report, he said, was based on the principle that no distinction of color ought to be made as a qualification for electors. He stated that the abstract proposition that all men were born free and equal needed no proof beyond a person's existence. The "spirit of progressive democracy," had abolished the barriers of superstitution of the past and looked through the disguises of rank and nation to a common nature coming from an impartial God. The "spirit of the age" looked farther than a man's skin, he said, when determining his rights. The Waukesha Whig said the "tendency of the age" could not be aimed at the serfs of Europe and the barbarism of Asia and leave "untouched and unnoticed" those who had suffered in the United States from the oppression of laws. He labelled any doctrine which held that a man should be disenfranchised simply because he was born with a dark skin a "terrible" and "damnable doctrine," as "false" as it was "terrible." Burchard believed that such a doctrine would not stand the scrutiny of the "spirit of the age" nor would its apologists stand "with clean hands" at a tribunal where there was respect for equality.[50]

Burchard further argued that Negroes possessed certain basic rights which needed protection. The Negroes, he said, were born in the same land as whites, shared the same destiny, and claimed a common humanity. That, he declared, gave Negroes rights; rights which demanded the respect of the people and the protection of government. Burchard specified that Negroes possessed the right to live on the soil, to seek knowledge, to pursue virtue and happiness, and to exercise the powers and affections of men. Since laws protected individual rights, and the laws could only be made, altered or repealed through the ballot box, the ballot was the only means and

50. *Id.* at 243-44.

instrument which could provide Negroes with the necessary security and redress for past wrongs.

Burchard pointed to New Hampshire, Massachusetts and Vermont as examples to prove that Negro suffrage was not a new idea.[51] In states where Negro suffrage had been tested, he said, it proved to be both "beneficial to the black and practicable to the whites." It further proved, he said, that there was nothing to be feared from an influx of Negroes for they were good law-abiding citizens capable of enjoying and rightly using the privileges of citizens. Burchard noted that Wisconsin's constitution would affect posterity for generations yet to come and hoped it would embody a provision that would equally affect each inhabitant of the state. The Waukesha Whig appealed to the delegates' sense of "justice" and "humanity" and trusted that the provision they adopted would mark the "progress of liberal views and democratic principles." The African race had a legitimate claim against the delegates, he said, and the latter could not shrink from a responsibility they were morally and politically bound to meet. Burchard believed that every male inhabitant should be given the same privileges and the same benefits of whatever good flowed from republican institutions.[52]

Charles Burchard's eloquent pleadings failed to move many delegates to action. When his minority report came to a vote, it was defeated twelve to ninety-one. The proponents of Negro suffrage were still unwilling to concede defeat. Alexander Randall, a fellow delegate of Burchard's from Waukesha County, introduced a resolution that provided for a popular referendum on Negro suffrage which, if adopted, would become part of the constitution. The advantage of a resolution was that the provision for a popular referendum would not be printed in the body of the constitution but remain completely separate from that document. Consideration of Randall's resolution was postponed for two weeks when it was read for the first and second times. Further discussion was postponed for two more weeks until it was presented in preparation for its third reading. The delegates' opinions widely varied and echoed sentiments expressed earlier. Moses Strong, for example, again hoped the issue would not be forced on the people in the western counties.

51. Madison Express, Oct. 27, 1846.

52. Quaife, *supra* note 16, at 244, 246.

Daniel Harkin opposed the resolution because it would endanger the constitution while James Moore supported it because it was the right thing to do. David Noggle of Rock County personally opposed Negro suffrage but would support the Randall resolution because a large portion of the people wished the question to be separately submitted. Ninian Whiteside expressed the opposite opinion.

Moses Strong, sensing that the tide was moving in favor of the resolution, offered an amendment to the resolution making Negroes eligible to hold all offices in the state. The Iowa politician admitted that he wanted to make the resolution as "obnoxious"[53] as possible in order to assure its defeat at the polls. The delegates voted sixty to thirty-nine to accept Strong's amendment. The Randall resolution, with the Strong amendment, was read for the third time on November 30 and passed fifty-three to forty-six. When the people went to the polls to cast their ballots on the constitution, they would also vote on a separate referendum which would permit Negroes to vote and hold public office. The Randall resolution shifted the final responsibility from the delegates to the people.

IV. THE JUDICIARY

The judiciary was a controversial issue at the convention and disputes concerning it arose as early as the formation of the judiciary committee. It was not until the article dealing with the judiciary was finally accepted that the conflict over the judiciary finally ended. The first incident arose after William Smith, an Iowa Democrat, introduced a resolution proposing a judiciary committee of seven members. His resolution was referred to a select committee which ultimately reduced the number to five.

President D.A.J. Upham, in a routine fashion, appointed Charles Baker, a lawyer from Geneva in Walworth County, as chairman of the new committee and disclosed the names of the four other members. Immediately after the announcement, Hiram Barber, one of the four who had been appointed to the committee, moved that the membership be expanded to nine. William Smith, who originally favored a large committee, indorsed the Barber motion, stating that there was precedent for

53. *Id.* at 544.

increasing committees when the importance of the business or duty of the committee required it. The Iowa Democrat also noted that the duties of the judiciary committee were "most arduous and responsible" and that its work greatly exceeded that of any other committee. Smith further argued that an issue as important as the judiciary should be "fairly and fully" discussed in committee before being presented to the convention. Accordingly, "the larger the committee the greater the probability that the business before them would be better done, because it would bring more minds to bear upon [the problem]." Barber similarly concluded that a larger committee would more likely produce a "well adjusted" article. These arguments apparently convinced enough delegates to muster a vote passing a motion to increase the size of the committee.[54]

Before Upham had time to appoint the additional members, Edward Ryan sprang to his feet asking to be excused from serving on the committee since he viewed the convention's action as a "censure" of the committee members. He thought the issue over the size of the committee had been settled prior to the announcement of its members. To expand the committee after its members were appointed reflected more on the members than on the size of the committee. Ryan reasoned that to expand the committee at that point could only mean that either the original members were "not likely to carry out the views of the majority of the convention" or that they were "incompetent to perform their duty." Upon learning that the earlier motion to expand the committee had been proposed by one of the members of the original group, Ryan saw even greater reason for not serving. That demonstrated, he said, that a member was dissatisfied with his associates and wished others to be added so the original majority might be swamped.[55]

Hiram Barber denied the motives ascribed to him and in a conciliatory gesture asked Ryan to reconsider his decision. Other delegates also tried to lessen the tension by explaining their reasons for supporting Barber's motion. Henry Baird voted for it because he thought a larger committee would "facilitate" the business before it and benefit the convention. Stoddard Judd, who voted for the Barber motion and did not

54. *Id.* at 59.
55. *Id.* at 60.

view it as a reflection or censure of the committee, cited two reasons for his vote. First, he said he was influenced by the fact that the motion was offered by a member of the committee, and second, he believed that a larger committee would probably result in a more "well-digested and acceptable" report. George Smith, a Dane County Democrat, was willing to go the furthest to set the record straight and to soothe Ryan's hurt feelings. He was prepared to propose a resolution which would state that the addition of four members to the judiciary committee was not intended to raise any question of the original members' competency or trustworthiness.[56]

Other delegates, however, used the occasion to express their doubts about the wisdom of a larger committee and demonstrate their support for Ryan's view that the convention's action was, indeed, a repudiation of the original committee and its members. Moses Strong noted that the main reason for adopting the committee system was to concentrate opinion and bring business before the convention in some intelligible, organized form. Barber's motion, he said, "was calculated to retard the progress of the committee." Marshall Strong, a member of the Territorial Council, added that his political experience proved that "small committees were more likely to make reports in a short[er] time than large ones." Introducing his own theory into the debate, Strong stated that "if there were fewer minds on the committee there [would be] fewer men to conciliate and less probability of counter reports." He warned that there could conceivably be nine reports from a nine-man committee.[57]

Marshall Strong shared Ryan's view concerning the motive behind the move to expand the committee. The Racine lawyer said that it was well-known to any man who was familiar with political bodies that when a committee was appointed which did not reflect the will of the meeting, additions were made so that the original majority could be overwhelmed and a different report made. Daniel Parkinson, a Democrat from Iowa County, more bluntly expressed the opposition's sentiments; the vote to increase the judiciary committee was an "insult" to the original members. Parkinson declared that "no honor-

56. *Id.* at 60, 64.
57. *Id.* at 59, 62.

able man could consent to serve on that committee."[58]

The convention excused Edward Ryan from serving on the committee but voted to retain the larger committee. President Upham then appointed Elijah Steele, a Racine Democrat, who immediately asked to be excused because he was already on two other committees. Upham announced the names of five new appointees, one to replace Ryan and four to enlarge the committee to nine. Moses Strong, who had supported the Ryan position, was one of the new members. Strong asked to be excused, stating that he would not permit the convention to use him as an instrument for censuring the original committee. Strong was excused and a replacement appointed. The judiciary committee finally had nine members and could begin work on an article to present to the full convention.

The committee on the judiciary included eight lawyers and a judge. Personal experience and individual legal philosophies undoubtedly influenced these men, but they were aware that the other delegates and the people of the territory relied on them to produce a most important constitutional article. Charles Baker, the chairman of the committee, wrote that the committee was "deeply impressed with the conviction that next to the existence of good laws nothing tends more to the stability and prosperity of a state than their impartial and efficient administration." In order that a wise system of laws should be so administered, it was necessary that the judiciary be "able, impartial and efficient" and "possess the confidence of the people." The committee members, with these goals uppermost in their minds, fashioned a system to meet the "matured views" of the convention and to realize the "best hopes and wishes of the people." The committee worked for nineteen days on the article on the judiciary and, on October 27, reported the article to the full convention.[59]

The committee report included the details for a judicial system and an accompanying document which explained the reasons for the major features of the plan. The proposed article on the judiciary vested law and equity powers primarily in one supreme court and five circuit courts, with the supreme court separate from the circuit courts. The legislature retained the

58. *Id.* at 63-64.
59. *Id.* at 286.

power to alter, increase, or diminish the number of circuits, but in so doing, could not remove a sitting judge from office. Three justices would comprise the supreme court which would meet at least once annually in each of the five circuits. The justices of the supreme bench would hold their office for six years and receive not less than $1,500 annually. The supreme court would have only appellate jurisdiction unless otherwise provided and under no circumstance could a case appealed to that court be tried by a jury there. The circuit judges were to hold court at least twice annually in each of the counties organized for judicial purposes. The committee report also provided for a rotation of office for circuit judges, subject to change by the legislature, so that no judge could hold court in any one circuit for more than one year in five successive years. Circuit judges would hold their office for five years and receive not less than $1,000 annually. Both the supreme and circuit judges would hold their office by election, but no election for judges could be held within thirty days of other general elections. Any judge who resigned his office would not be eligible for or appointed to any other office within one year after his resignation. Anyone who was a citizen of the United States, male, twenty-five years of age, and a resident in the territory or state for two years prior to the election was qualified to be either a supreme or circuit court judge. Similarly, any male citizen residing in the state who was twenty-one years or older, and of good moral character, and possessing the requisite qualifications of learning and ability, was entitled to practice before all the courts of the state. Finally, the report provided for the legislature to appoint three commissioners to revise, simplify and arrange the rules of practice, pleadings, forms and procedures most suitable for the courts of record in the state. Judges of the supreme and circuit courts were permitted to serve as such commissioners. The commissioners were to submit their report to the legislature which could modify and adopt the report.

In the document accompanying the report of the judiciary committee, the committee singled out the supreme court and the election of judges as features important enough to require additional explanation. The committee explained that after considering the nisi prius system in which the judges of the lower courts or trial courts also served as the court of last resort, it rejected this system due primarily to the territory's "peculiar circumstances" and the sentiments "prevailing" in the com-

munity. The major objection to the nisi prius system was the real possibility that the judges of the supreme bench would sustain another member's prior decisions without proper regard to the true merits of the case. A separate supreme court which possessed only appellate jurisdiction effectively avoided this problem. The proposed system, however, retained one of the best features of the nisi prius system in that it required the supreme court to meet once annually in each circuit and for the circuit court judges to interchange circuits. The committee emphasized the many advantages of the proposed system: it allowed for the prompt dispatch of business by providing a judicial force "sufficiently large" to handle the cases which might arise; the salaries provided were not extravagant but "sufficiently liberal" to attract the best legal talent for judges; and the proposed system brought the judiciary close to the people and made it accessible "at every man's door." The committee document described the proposed system as "simple and efficient" and, therefore, it hoped "popular."[60]

The judiciary committee thought there was one feature of the proposed plan "so prominent and important" and upon which "so decided a difference of opinion" existed, that it demanded an intensive and extended examination — the election of judges by the people. The committee defended the election of judges, in part, on the ground that it was the only procedure compatible with the basic axioms of American government. The political philosophy of the country was that the people were the source of all political power, and that the officers and rulers were directly responsible to the people for the faithful discharge of their duties. The separation of powers also dictated that the judiciary be independent from the other co-equal branches. The election of judges, the argument went, would firmly establish that the judicial power emanated from the people and that judges were directly responsible to them and not to the executive or legislative branches. The report further argued that if the principle that all power originated with the people were true, then it should be extended to the judiciary. On the other hand, if it were false, then it should be discarded entirely. The committee optimistically predicted that Wisconsin electors would "judiciously" exercise the right of suffrage

60. *Id.* at 286-87.

no matter how "liberally extended" and, therefore, it ought to be granted wherever practicable.[61]

The committee then traced the history of the appointive system back to the days when the country was a British Colony and the king appointed the judges. The report concluded that it could "fairly be presumed" that had the colonists been as oppressed by the judiciary, as they had been by the executive and legislative powers of the mother country, they would have surely repudiated the appointive principle and adopted the "true republican basis, election by the people." The past should not confine the delegates, said the report, when the advantage of sixty years experience and the benefit of living in a "day of progress and of light" spoke against such a principle. The appointive system was "so far behind the spirit of the age, so opposed to the genius of republican government" as to distrust the ability of the people for self-government. The elective system was in perfect harmony with the "spirit . . . [and] genius" of the American system of government.[62]

The committee document addressed itself to some of the possible arguments against an elective system. It labeled as "untrue in fact and unsound in conclusion" any proposition which would suggest that judicial candidates would be nominated as party men, irrespective of merit and ultimately elected simply because of party affiliations. Such a proposition, said the report, was based on the false premise that the people were ignorant of the character and qualifications of the men nominated, and that the people would vote in complete disregard of their interests. The report suggested that if such a proposition were true, it would only prove that the people should be excluded from voting on every important government official. The committee noted that the argument was based on a negative view of man whereas American institutions were built upon a "confidence in the people and a belief in the political perfectability of man."[63]

The committee report also responded to the argument that elected judges would render unjust decisions with a view only to re-election. This, said the committee, presupposed weak and

61. *Id.* at 287, 289.
62. *Id.* at 288.
63. *Id.* at 289.

corrupt judges; that the parties in the case were of opposite politics; that one had considerable and the other little political influence; and that a decision was handed down not long before an election. An argument which required the concurrence of so many improbabilities was not entitled to serious weight. All political parties and every honest man would reject a judge who attempted to bend the "line of justice" in order to make political capital out of a case. A judge would be popular, said the report, only if he could show that he was "honest, impartial, decided and fearless" and held the scales of justice "with a steady hand."[64]

The committee switched from the defensive to the affirmative when it noted the degree of politics involved in the appointive system. The governor's choices would be based on politics as would be the recommendations of a secret irresponsible caucus, controlled by interested party leaders. The elective system could thus minimize the influence of the parties. In addition, the people would be more attached to a system so democratic in principle and would more cheerfully acquiesce in the decisions of a court selected by them than one based on the appointive system. Moreover, an elected judiciary would lead each citizen to feel greater responsibility for his part in the policies of the state and it would reaffirm the principle that a portion of its sovereignty resided in him.

The elective system, stated the committee report, was not a novel concept. The people of Mississippi elected all their judges as did nearby Michigan. The committee also reported that circuit judges were elected by provisions in the new constitutions of Missouri and Iowa and that the practice had recently been sanctioned in the New York[65] convention. The actions of these states symbolized the "progressive movement" over the last fifty years. The science of government was wresting power from the few and vesting it with the many, said the committee. The "happiest sign of the times," noted the report, was the decentralization and distribution of political power. To reject the election of judges, concluded the committee, would be to check the extent of Wisconsin's ability to participate in the "onward movement" of the age.[66]

64. *Id.* at 290.
65. Wisconsin Democrat, Oct. 31, 1846.
66. Quaife, *supra* note 16, at 291.

On November 19, the full convention began debating the article of the judiciary in earnest. The delegates agreed to postpone discussion on an elected judiciary until the general system was established. Joel Barber, one of the members of the judiciary committee, set the stage when he moved to amend the report of the judiciary committee so that the judges of the circuit courts would also serve as judges of the supreme court. Charles Baker, the chairman of the judiciary committee, warned the delegates that the Barber amendment would "test"[67] the sense of the convention as to whether there would be two separate courts or a nisi prius system.

The proponents of the nisi prius system envisioned the justices of the separate supreme court sitting idle most of the year and becoming devoid of practical experience; Joel Barber estimated that the supreme court justices would be idle two-thirds of the year. Edward Ryan, the delegate who had refused to serve on the judiciary committee, agreed with Barber. He predicted that judges who were not kept occupied would become "lazy and indolent." This Racine lawyer did not mind paying for work but he refused to pay for "dignity." Ryan also thought that the justices of a separate supreme bench would cease to be "practical men" and become "dry parchment lawyers, knitted to schemes and old sayings of one or two hundred years ago."[68]

John Tweedy, a Milwaukee County Whig, was most critical of the separate supreme court proposal. A separate bench might work in the older states, he admitted, because they had a multitude of men trained in the practical aspects of the law. However, where the probability of placing men with thirty or forty years experience on the supreme court was small, the two courts ought to be combined. Even then it might not be safe, he said, "for an active mind . . . might, if placed in an inactive position, become inbecile [*sic*] and weak and thus be unfitted for the duties of a judge." The Milwaukee Whig warned his colleagues that Wisconsin judges would be young because the territory did not yet have "men of age and judicial experience" as there were in the older states. A supreme court judge on a separate bench could avoid such responsibilities and avoid ac-

67. *Id.* at 501.
68. *Id.* at 496, 502.

quiring the necessary practical knowledge. Such a judge would be insulated from the public view, and be known only by the profession and his brethren on the bench. An incompetent judge had only to agree in a decision and need never write an opinion of his own. If forced to write an opinion the judge could evade the point in issue and decide the case on some other irrelevant point. An incompetent judge on the separate supreme bench could remain a "perfect dummy" for years. The Milwaukee attorney underscored his point by stating that an incompetent judge could "go on the bench a dunce and go off a dunce," and no one would know unless the profession told him.[69]

The supporters of the Barber amendment thought that the nisi prius system combined practical knowledge with legal scholarship. Tweedy felt that the judges who tried the issues of fact became the "most able men." The circuit judges also came in contact with people of all kinds, dispositions and feelings. This, he said, was necessary for the making of a "good judge." The Milwaukee Whig further believed that legal learning was an impediment to sound judicial decisions unless combined with the knowledge of how to apply the law to men and things. There could be no substitute for practical knowledge. Marshall Strong, a lawyer from Racine County, made the point best when he said that supreme judges gained practical knowledge when they served as circuit judges, and that circuit judges had the time for legal research and learning when they sat on the supreme bench. The nisi prius system provided the oppotunity for both.[70]

Marshall Strong and Edward Ryan pointed to the experience in New York to illustrate the point. Ryan noted that under the nisi prius system, New York produced the best common-law reports in the country. When that state changed to a separate bench, the reports grew "worse and worse from day to day." Strong noted that New York's recent convention, with hardly a dissenting voice, returned to the old system. Strong also pointed out that the nisi prius system was in operation in the courts of the United States and had been in operation in England for one hundred years. Ryan added that he preferred

69. *Id.* at 498, 505-06.
70. *Id.* at 497.

the system that had received the "sanction of time in the New World and the Old."

Henry Baird, a member of the judiciary committee, reminded his colleagues of Wisconsin's experience with nisi prius. He said it was common knowledge among the people, and the general opinion of the bar that the system of "logrolling" existed and that the territorial judges sustained each other's opinions, right or wrong. Marshall Strong admitted that Wisconsin's experience with the nisi prius system was "unfortunate," but hoped that their opinion would not be formed by only one isolated case. Tweedy also admitted that Wisconsin's experience was "bad," but said that if the three territorial judges had been appointed with the sole reference to their fitness and been responsible to the people in the territory instead of being sent from a distance, there would not have been a difficulty. Ryan also admitted that the greatest danger in the nisi prius system was "logrolling," but it was only valid if Wisconsin had poor judges. A good judge would never hesitate to review his decisions nor be unable to correct himself if wrong.[71]

The supporters of the Barber amendment further added that it would be more economical to employ only five judges rather than eight. Eight judges were unnecessary as there was only work enough for five. Marshall Strong thought that going from three judges to eight would appear like a desire to create offices. Henry Baird countered, however, by pointing out that five judges were insufficient when viewed against the surprising increase in population. The judicial system was not merely for the present, he said, but for the future as well. Moreover, the expense was negligible when compared with the benefits of the system. Charles Baker, agreeing with Baird that the state's population would shortly double, noted that it would be almost impossible for judges of a single bench to meet in each county twice a year and then act as judges of the supreme bench in each circuit once a year. This work schedule, he said, created far "too much manual labor"[72] for five judges.

Baker used this opportunity to respond to some statements made by the opponents of the separate bench. He believed that

71. *Id.* at 496-97, 499.
72. *Id.* at 513.

reading, research and study made the lawyer who sat on the supreme bench for a length of time a better lawyer than the one who did not. The chairman of the judiciary committee denied that supreme court justices would be idle during the first few years of its existence. Besides reading extensively in the law, he said, the time of the supreme justices would be spent in hearing cases and revising the laws of the state.

After all sides had had sufficient time to express their positions, Nathaniel Hyer, a Dane County Democrat, after considering all the conflicting viewpoints, proposed a compromise amendment to the Barber amendment. The Hyer amendment would allow for a single bench for a minimum of five years, and would continue thereafter until the legislature directed otherwise. Hyer believed that a separate bench was best adopted to the wants of the state but admitted the circuit judges might be sufficient for the present. He cited similar provisions in the constitutions of Florida and Alabama.[73] The Hyer amendment was readily adopted. Edward Ryan attempted to amend the revised Barber proposal three days after it was adopted. The Ryan amendment would have prevented the legislature from altering the nisi prius system after the five years had expired. The Ryan amendment was voted down, thirty to fifty-eight, and the convention voted to officially accept the Barber proposal as amended seventy-seven to twelve, with Ryan voting in the affirmative.

The delegates, after resolving one of the more difficult questions on the judiciary, briefly turned their attention to the qualifications of persons practicing law before the state courts. Moses Strong opened the debate with an amendment that would limit the practice of law to white males. When the convention rejected his amendment, Strong moved to strike out all the provisions concerning "character and qualifications." This amendment widened the debate on the question of qualifications. Edward Ryan, a Racine lawyer, hoped the convention would either "shut the door or open it wide." He thought it would be better for the public, but not in the profession's interest, if the doors were "thrown quite open." If anyone could get in who wanted to, Ryan said, the whole profession would be held responsible "for the blunders and wickedness of men who

73. Madison Express, Dec. 1, 1846.

ought never to have been in it." Hiram Barber did not like the "latitudinarian way" because the practice of law needed study. Jeremiah Drake, a Columbia County Whig, was similarly cautious when he pointed out that the provision in the judiciary article took "great care" to preserve the respectability of the courts, and by so doing preserved the "security of the men doing business at the courts." John Manahan of Dodge County, however, thought it was "antirepublican" to establish a separate profession. He favored freedom "in the fullest sense of the term."[74]

Moses Strong withdrew his amendment and threw his support behind one proposed by Edward Ryan. Ryan offered an amendment that specifically abolished the profession of attorney, counsellor and solicitor in the courts of the state. The amendment further authorized any male person of twenty-one years or older to appear in court for himself or as attorney, counsellor or solicitor for any other person. Ryan must have been taken by surprise when the convention approved his amendment. Later in the day, Francis Huebschmann, a physician from Milwaukee, offered an amendment striking out the first sentence of the section which specifically abolished the legal profession. Perhaps seeing the potential danger in such a blunt statement in a constitution, the convention, forty-three to thirty, adopted the Huebschmann amendment. Ryan, however, again tested the mood of the convention when he proposed a substitute amendment to the article's qualifications to practice law. The new section, if adopted, would license persons to practice law only after a full examination before the supreme court and upon the unanimous certificate of the judges. The applicant was expected to exhibit a "full and abundant ability and learning to practice law with safety to the public" and to produce satisfactory evidence of "good moral character." Ryan's attempt to shut the door was rejected fifty-four to thirty-six.[75]

Six days after the convention had rescinded the vote to abolish the legal profession, amendments to the article on the judiciary were read to the convention for their approval. William Dennis, a delegate from Dodge County, offered an amend-

74. Quaife, *supra* note 16, at 531-32.
75. *Id.* at 536.

ment which indirectly restored the legal profession and expressed the true sentiments of the convention. It permitted any person in a state court to defend the suit himself or by an attorney or agent of his own choice. The Dennis amendment passed forty-four to fourteen and settled the question on the qualifications to practice or plead cases before the state courts.

The convention thus cleared the way for its discussion of an elective judiciary. The issue was brought to the fore when Daniel Burt, a delegate from Grant County, proposed an amendment to the article on the judiciary which would substitute for the term "elected" the word "appointed." A person would be appointed judge, stated the amendment, by nomination of the governor and the confirmation of the senate. Henry Baird, a member of the judiciary committee who had opposed the elective system, expressed the sentiments of some when he spoke in defense of the Burt amendment. He proposed three major objections to the elective system. First, the elective system was a new experiment "for the most part untried." Second, he noted that the suffrage article had made some people electors who were not "sufficiently acquainted to make a proper selection." Third, Baird feared that judges would be selected along party lines. He wished the judiciary to be "really independent of both the executive and the people."[76]

Baird was immediately overwhelmed by the proponents of the elective system who echoed some of the arguments presented by the judiciary committee when it first presented the article to the convention. Lorenzo Bevans, a Democrat from Grant County, affirmed the principle that all political power resided with the people. He saw no reason to place the judiciary beyond the reach of the electorate. Bevans felt that the probability of getting good judges was just as great under the elective system as under the appointive method. Moses Gibson, a Fond du Lac Whig, also stressed the arguments made in the report of the judiciary committee. He sincerely believed the people were the source of all political power and capable of self-government. The nearer the officeholders were to the people the better. Gibson, unlike Baird, did not fear the foreign-born vote. He refused to believe that a foreign-born or native-born voter would elect an incompetent judge to office as they fully

76. *Id.* at 587.

realized that that officer might be called upon to sit in judgment over their property and, perhaps, their lives. Moses Gibson recalled his experience under the appointive system when he lived in New York. It was a "notorious fact," he said that a few politicians formed themselves into a kind of "regency." When a judgeship became vacant, the Fond du Lac Whig said, the "wire workers" came together and recommended some "brawling" politician whom the governor appointed. Gibson personally knew judges who achieved their office by appointment who could not have received the votes of one-third of the people for the same office. In his mind the elective method was far superior to the appointive system. The Burt amendment, providing for an appointive judiciary, was rejected nine to eighty-five.[77]

Edward Ryan stated that he was not in favor of either the simple appointment of judges or the elective system. He proposed a plan that would satisfy all the objections raised to both the appointive and the elective systems. According to the Ryan plan, the governor would appoint judges with the consent of three-fourths of the senate. The first five judges would serve for one, two, three, four and five year terms with all further appointees serving the full five years. When a judge's term was about to expire, the senate would vote whether to continue him in office. If three-fourths of the senate voted continuance, the judge would remain on the bench for another term. The governor would nominate a successor only if the senate failed to authorize the continuance.

The delegates listened while Ryan explained the merits behind his plan. He believed that a delegate could oppose the elective system and still adhere to democratic principles. Ryan reaffirmed his belief in man, in the capacity for self-government, in the American system, and in bringing government into the direct power of the people "as far as . . . practicable to bring it." He labeled true democracy as "an idle dream of impossible systems," and noted that the American government was representative in nature. The Racine Democrat realized that political power and the right of government originated from the people. Political power, he said, was divided into legislative and elective. People elected executives and leg-

77. *Id.* at 587-88.

islatures to do for them that they could not do in the aggregate. These officials, he said, were the representatives of the people to be the "mere creatures of the popular will, the mere echoes of the popular voice." Ryan believed both had to be elected because the legislature was a "mere agency to record the popular will and the executive was "to enact the public will." The law, he said, should be the "just will of the people."[78]

Ryan boldly asserted that the judicial power was not a political power and, therefore, the principle of representative democracy did not apply to it. The judiciary administered the law, he said, and that involved judgment and interpretation, neither of which can be a representative function. Ryan noted that the judiciary represented "no man, no majority and no people." The judiciary held the balance and weighed the rights "between man and man, between the rich and the poor, between the weak and the powerful, between the stranger and the lord of the soil, between one man and many men, between the criminal and the whole people." Ryan feared the worst if "any influence of people or power" touched the "hesitating scale" or swayed the "trembling balance." He said it was "idle fiction" and "baseless plausibility" to say the principle of representative government required the election of the judiciary. Ryan concluded that it was only "expediency" which required an elected judiciary.[79]

Ryan admitted that the executive patronage of the old system was undesirable and conceded that what Moses Gibson had said about the influence of dictating cliques and party caucuses was true. Yet, he charged, the very same objection could be applied "as strongly" to the nominating conventions. Ryan believed that nominating conventions, by their very nature, were "unrecognized and irresponsible" bodies, while the governor and senate would owe "a deep responsibility for a bad and unworthy appointment." Furthermore, he said, a nominating convention limited the choice of the people to particular candidates. When the people went to the polls, they had only a choice of candidates but not a choice of judges; the politicans had already decided the latter matter.[80]

78. *Id.* at 593-94.
79. *Id.* at 594-95.
80. *Id.* at 595-96.

Ryan said that he did not distrust the people or even the choice of the people so much as the adverse effects which an elective system would have on judges. He predicted that the election of magistrates for short terms would have the same effect on the judges as it had on political officers. It would subject judges to the same influences and force upon them the same political considerations as were felt by political office-holders. Elect judges for short terms, he continued, and the judges would "look forth to mark the blowing of the popular breeze and . . . steer the course of public justice by the popular current." If this happened, Ryan said, the "virtue of the political system will become the vice of the judicial," and the "vitality of political representation" would mark the "corruption of the judiciary," and the "beauty of the one" would become the "deformity of the other." This would follow, he said, not because of corrupt judges or the depravity of man, but because of the "weakness of human nature." The judges would probably be unaware of what was happening. Ryan had seen capable judges, of the most "pure motives and unbiased" judgment, become "uneasy of public opinion" and "flinch" from the full responsibilities of their positions.[81]

Ryan listed the many advantages of his proposal. The people could hold the governor and senate responsible for appointments to the bench. It greatly reduced the element of patronage since a governor could only make one appointment during the tenure of his office. Moreover, the governor could make an appointment only if the senate refused to continue a judge in office. The three-fourths vote of the senate placed a great restraint on arbitrary choices and assured worthy appointments. The constitutional renomination of incumbents permitted the senate to "sift the bench" of bad judges and retain the good ones. The Ryan plan mitigated the chance of a judge courting the favor of the governor, since his office depended upon three-fourths of the senate, a body whose composition could not be anticipated.[82]

Ryan admitted that his proposal was not perfect, but he argued, that merely showed that it was human. He was not optimistic about its adoption but at least the convention was

81. *Id.* at 597-98, 600.
82. *Id.* at 601.

presented with a viable alternative to the elective system. Ryan opined that his plan avoided the evils of election and eliminated the objections to the appointive method while incorporating the desirable features of both procedures. The convention rejected Ryan's proposal twenty to seventy-eight. The recommendation of the judiciary committee survived the lengthy attack of its leading critic.