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NOTES

THE EQUAL-POPULATION PRINCIPLE: DOES IT APPLY TO ELECTED JUDGES?

I. Introduction

The Supreme Court's "one man, one vote"¹ decisions triggered a reapportionment revolution during the 1960's which has virtually remade the political map of the nation. One commentator has remarked that these decisions involved "[T]he most remarkable and far-reaching exercise of judicial power in our history"² and Chief Justice Warren has called them the most important decisions rendered during his tenure on the Court.³

Since 1963 when the "one man, one vote" rule was first enunciated in *Gray v. Sanders*,⁴ an increasing number of elective governmental officials have been brought within its scope. The "revolution" has not yet run its course, however, and numerous unsettled issues remain as to the precise applications and limits of the rule.⁵ One such unsettled issue is whether the "one man, one vote" rule applies to elected judges. This article surveys the cases which have dealt with that issue and analyzes the issue in terms of the historical and philosophical background of judicial elections in the United States and with respect to some of the leading Supreme Court voting rights and apportionment cases.

II. Judicial Elections in the United States: A Historical Introduction

Popular election is the prevailing method of selecting state court judges.⁶ This was not always the case, however. Colonial judges were appointed by the crown and, as the Ninth Specification in the Declaration of Independence recites, the King "[m]ade judges dependent upon his will alone for the tenure of their offices and the amount of their salaries."⁷ After independence the thirteen states established judicial selection systems designed to eliminate dominance of the judiciary by one person. Seven states provided for the selec-

1 The expressions "one man, one vote" and "equal population principle" are used interchangeably in this article and stand for the proposition that the equal protection clause of the fourteenth amendment requires the states to insure, insofar as is practicable, that each qualified voter's vote counts the same. Weighting of votes or drawing of election districts such that equal numbers of voters could not vote for proportionally equal numbers of officials would be contrary to the principle for which these expressions stand.

2 R. CORTNER, *THE APPORTIONMENT CASES* 253 (1970).

3 *Id.*

4 372 U.S. 368 (1963).

5 Other important questions regarding the "one man, one vote" rule concern its applicability to elections of officials of limited purpose special districts, see *Thompson v. Bd. of Directors of Turlock Irrigation Dist.*, 247 Cal. App. 2d 587, 55 Cal. Rptr. 689 (1967), of county and state political party officials, see *Irish v. Dem.-Farmer-Labor Party of Minn.*, 399 F.2d 119 (8th Cir. 1968), and of delegates to presidential nominating conventions, see Note, *Constitutional Safeguards in the Selection of Delegates to Presidential Nominating Conventions*, 78 YALE L.J. 1228 (1969).

6 ABA SECTION OF JUDICIAL ADMINISTRATION, *THE IMPROVEMENT OF THE ADMINISTRATION OF JUSTICE* 44 (1971).

7 Ninth Specification, Declaration of Independence.

tion of judges by the legislature, five by the governor and council, and one by the governor and legislature.⁸ New states entering the Union adopted the legislative or gubernatorial selection system until the entry of Texas, which provided in its 1845 Constitution for a gubernatorial appointment system with confirmation by the state senate.⁹

Popular sovereignty and popular control of public affairs through the elective system were hallmarks of the Jacksonian era, and, not surprisingly, the movement for popular election of judges dates from this period. Dissatisfaction with the judiciary was widespread among Jacksonians. It arose from several factors including a general disaffection with the legal profession, abuses in the judicial appointment systems, and a feeling, carried over from the Jeffersonian period, that the courts were basically undemocratic.¹⁰ Consequently, the abolition of tenure during good behavior and the adoption of the elective system were advocated as reform measures and were hailed as in accord with the egalitarian spirit of the times.¹¹

In 1812 Georgia adopted the first judicial election system, limited to trial court judges,¹² and in 1832 Mississippi adopted a completely elective system for its judiciary.¹³ But it was not until 1846, when New York adopted an all elective system for its judges, that the movement secured widespread acceptance.¹⁴ In the next eleven years, seventeen states followed New York's lead and converted to elective systems and all states entering the Union after 1846, until the entrance of Alaska in 1958, came in with elective judiciaries.¹⁵

Today twenty states select some or all of their major trial and appellate court judges under some form of the merit selection plan.¹⁶ Nine states employ a gubernatorial appointment and legislative confirmation system,¹⁷ while in four states the legislature exercises the appointment power.¹⁸ Thirty-five states continue to provide for formal election of some or all of their major trial and appellate court judges.¹⁹ Thus, although in recent years a number of states have converted back to appointive systems for their judiciaries, the prevailing method of selecting judges continues to be popular election.

III. The Apportionment and Voting Rights Cases: An Expanded Concept of Political Equality

The precursor of the reapportionment revolution of the 1960's was the landmark decision in *Baker v. Carr*,²⁰ decided in March 1962, in which the Supreme

8 Winters, *Selection of Judges—An Historical Introduction*, 44 TEXAS L. REV. 1081, 1082 (1966).

9 *Id.*

10 E. HAYNES, *THE SELECTION AND TENURE OF JUDGES* 93 (1944). Thomas Jefferson's much publicized criticism of the courts contributed significantly to the feeling that popular election of judges to short terms was feasible and desirable. *Id.*

11 W. CARPENTER, *JUDICIAL TENURE IN THE UNITED STATES* 179 (1918).

12 Winters, *supra* note 8, at 1082.

13 *Id.*

14 W. CARPENTER, *supra* note 11, at 181.

15 Winters, *supra* note 8, at 1082.

16 AM. JUDICATURE Soc'y, REPORT NO. 7, *JUDICIAL SELECTION AND TENURE* 2 (1970).

17 *Id.*

18 *Id.*

19 *Id.*

20 369 U.S. 186 (1962).

Court surmounted the threshold issues of jurisdiction and justiciability. In *Baker* the Court abandoned its initial hesitancy to enter the "political thicket" of legislative apportionment²¹ and clearly asserted that equal protection challenges to apportionment were within the jurisdiction of the federal courts and were justiciable. One year later in *Gray v. Sanders*,²² the Court set aside the Georgia "county unit" system²³ which had the effect of according a disproportionate influence to residents of rural counties in the selection of state-wide officers. Speaking for the majority, Justice Douglas noted that "The idea that every voter is equal to every other voter in his State when he casts his ballot in favor of one of several candidates underlies many of our decisions,"²⁴ and he concluded that "The conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing—one person, one vote."²⁵ In *Wesberry v. Sanders*,²⁶ decided in February 1964, the Court invoked article I, § 2 of the Constitution²⁷ and struck down the Georgia congressional districting statute which provided for districts of grossly disparate population. And in *Reynolds v. Sims*,²⁸ decided in June of the same Term, the Court struck down Alabama's legislative apportionment as violative of the equal protection clause of the fourteenth amendment and declared that the "one man, one vote" rule was applicable to both houses of state legislatures. Units of local government were brought within the scope of the rule in *Avery v. Midland County*,²⁹ decided in March 1968. In setting aside the apportionment scheme of a Texas county governing body (the Midland County Commissioners' Court) as violative of the equal protection clause, the Court said: "[T]he Constitution permits no substantial variation from equal population in drawing districts for units of local government having general governmental powers over the entire area served by the body."³⁰ The long line of apportionment decisions seemingly culminated in a sweeping general rule announced in February 1970 in the case of *Hadley v. Junior College District*.³¹ In *Hadley* the Court set aside a consolidated junior college district apportionment plan which accorded the Kansas City School District, containing 60% of the consolidated school population, only three of the six trustees who were empowered to levy taxes, hire teachers, and generally manage the junior college.³² Justice Black, speaking for a majority of six Justices, stressed that the long series of cases involving elections required the states to maintain substantial equality among

21 See *Colegrove v. Green*, 328 U.S. 549 (1946).

22 372 U.S. 368 (1963).

23 Winners of state elections were determined by counting county unit votes. Each county was allocated two county unit votes for each representative it had in the lower house of the state legislature, itself a malapportioned body. Each candidate receiving the highest number of votes in a county received that county's unit votes. *Id.* at 370-71.

24 *Id.* at 380.

25 *Id.* at 381.

26 376 U.S. 1 (1964).

27 *Id.* at 7-8. The Court interpreted the provision in article I, § 2 of the Constitution that says Representatives shall be chosen "by the People of the several States" to mean that, as nearly as is practicable, each man's vote in a congressional election must have equal worth. *Id.*

28 377 U.S. 533 (1964).

29 390 U.S. 474 (1968).

30 *Id.* at 485.

31 397 U.S. 50 (1970).

32 *Id.* at 51-52.

voters.³³ He noted that although the powers of the trustees were not as broad as those of the Midland County commissioners, the trustees did perform important governmental functions³⁴ and he concluded that:

As a general rule, whenever a state or local government decides to select persons by popular election to perform governmental functions the Equal Protection Clause of the Fourteenth Amendment requires that each qualified voter must be given an opportunity to participate in that election and when members of an elected body are chosen from separate districts, each district must be established on a basis that will insure, as far as is practicable, that equal numbers of voters can vote for proportionally equal numbers of officials.³⁵

Justice Black qualified the general rule by saying: "It is of course possible that there might be some case in which a State elects certain functionaries whose duties are so far removed from normal governmental activities and so disproportionately affect different groups that a popular election in compliance with *Reynolds* . . . might not be required."³⁶ In dissent, Justice Harlan objected to the extension of the holding in *Avery* and added that the general rule announced in *Hadley* presaged the extension of the "one man, one vote" rule to "every elective public body, no matter what its nature."³⁷

What seemingly emerges from these cases is a pervasive and expanded concept of political equality required under the equal protection clause.³⁸ While the particular elective offices involved have varied widely, the Court has consistently stressed the requirement that, insofar as is practicable, each person's vote count the same. In *Gray*, Justice Douglas said: "The concept of 'we the people' under the Constitution visualizes no preferred class of voters but equality among those who meet the basic qualifications."³⁹ Chief Justice Warren accentuated this theme in *Reynolds* when he said: "To the extent that a citizen's right to vote is debased, he is that much less a citizen."⁴⁰ And in *Hadley*, the Court made its most comprehensive statement of the rationale underlying the course of these decisions when it said:

This Court has consistently held in a long series of cases, that in situations involving elections, the States are required to insure that each person's vote

33 *Id.* at 54.

34 *Id.* at 53-54.

35 *Id.* at 56.

36 *Id.*

37 *Id.* at 60 (Harlan, J., dissenting). In fact, the courts have been relatively cautious in adjudicating the scope of the *Hadley* rule. *See, e.g.*, *Girth v. Thompson*, 11 Cal. App. 3d 325, 89 Cal. Rptr. 823 (1970) (probably not applicable to the election of officials of an irrigation district); *Dundee v. Orleans Parish Bd. of Supervisors of Elec.*, 434 F.2d 135 (5th Cir. 1971) (applicable to the election of members of the parish board of assessors); *Maxey v. Washington State Democratic Comm.*, 319 F. Supp. 673 (W.D. Wash. 1970) (applicable to the election of delegates to state and national political conventions); *Dahl v. Republican State Comm.*, 319 F. Supp. 682 (W.D. Wash. 1970) (inapplicable to the election of state committeemen by county committees of a political party).

38 Justice Harlan described these cases as reflecting the commitment of some members of the Court to the principle of "pure majoritarian democracy." *Whitcomb v. Chavis*, 403 U.S. 124, 166 (1971).

39 372 U.S. at 379-80.

40 377 U.S. at 567.

counts as much, insofar as it is practicable, as any other person's. The consistent theme of these decisions is that the right to vote in an election is protected by the United States Constitution against dilution or debasement. While the particular offices involved in these cases have varied, in each case a constant factor is the decision of the government to have citizens participate individually by ballot in the selection of certain people who carry out governmental functions.⁴¹

The pervasiveness of the expanded concept of political equality which emerges from these cases was well illustrated in *Hadley* wherein the Court rejected a "purpose" test, an "importance" test, or a "nature of the office" test for determining the applicability of the equal-population principle and the "one man, one vote" rule to a particular election.⁴² The Court made it clear that the focus of its attention was on equality of voting power and equal treatment under the law and not the purpose of a particular election or the nature of the elective office involved.⁴³ The key consideration in each case appears to be the decision by the state to employ popular election to select persons who perform governmental functions.⁴⁴ Once this decision is made, the principle of "one man, one vote" applies.⁴⁵ Thus, in light of the Court's vindication of an almost absolute right to cast an undiluted, undebased vote, the following judicial election cases which rejected the applicability of the "one man, one vote" rule may well be questioned.⁴⁶

IV. The Elected Judges Cases: A Right to Equal Judicial Services or a Right to Equal Voting Power in Judicial Elections?

The early apportionment cases prompted efforts to extend the equal-population principle to the election and allocation of judges. Most of the cases, however, sought to use equal protection arguments and the "one man, one vote" rule to achieve a reallocation of judicial services on a per capita basis. The courts have unanimously rejected this reasoning and, without adequate exposition of the underlying constitutional question, some courts have further concluded that the "one man, one vote" rule or equal-population principle has no applicability to judicial elections.

The first case to deal with the "one man, one vote" rule and elected judges was *Stokes v. Fortson*⁴⁷ in which the United States District Court for the Northern District of Georgia held the rule inapplicable to the election of state judges and state solicitors general. State law required that candidates for the offices of circuit judge and solicitor general be nominated from and be residents of their respective circuits.⁴⁸ Election, however, was on a state-wide basis. Plaintiffs contended that

41 397 U.S. at 54.

42 *Id.* at 55.

43 *Id.* at 54-55.

44 *Id.* at 54.

45 *Id.* at 56.

46 In fairness it must be said that most of the cases dealing with elected judges and the "one man, one vote" rule were decided before the fruition of the political equality doctrine in *Hadley*.

47 234 F. Supp. 575 (N.D. Ga. 1964).

48 GA. CONST. art. VI, § III, para. I; § XI, para. I.

in the general election the choice of the circuit voters could be overridden by the state electorate. This, they claimed, denied them equal protection of the law and violated the "one man, one vote" rule.⁴⁹ In denying plaintiffs' request for injunctive relief, the court noted that the vote of each voter in the state-wide election was equal and that there was no discrimination among voters or weighting of votes of the type prohibited by the "one man, one vote" rule.⁵⁰ The court went on to say that:

[E]ven assuming some disparity in voting power, the one man-one vote doctrine, applicable as it is now to selection of legislative and executive officials, does not extend to the judiciary. Manifestly, judges and prosecutors are not representatives in the same sense as are legislators or the executive. Their function is to administer the law, not to espouse the cause of a particular constituency.⁵¹

In *Buchanan v. Rhodes*⁵² the United States District Court for the Northern District of Ohio held the rule inapplicable to the allocation of trial court judges within the Ohio state court system. Plaintiffs sought to have declared unconstitutional the Ohio constitutional provision⁵³ which guaranteed each county at least one common pleas (trial court) judge. They alleged that as residents of populous urban counties they were denied equal treatment under the law in that they had fewer judges per population unit and that the malapportionment of judges operated to their prejudice by delaying their litigation far longer than litigation in less populous counties with more judges per population unit.⁵⁴ In dismissing the complaint the court said that the allocation of judges within a state court system was essentially a political question which was not susceptible of judicial resolution.⁵⁵ It also noted that Ohio's desire to conveniently locate trial courts in each county of the state was a reasonable objective and did not conflict with the fourteenth amendment's equal protection clause.⁵⁶ Rejecting plaintiffs' analogy to the legislative apportionment cases, the court said: "It is the dilution of power in the vote of citizens situated in districts suffering from inadequate *representation* which brings into play the Equal Protection Clause."⁵⁷ The court went on to say that the functions of legislators and judges are essentially different, that judges serve people and must be conveniently located to them, and that the legislature could reasonably consider location when implementing its mandate to establish an effective judicial system.⁵⁸

In *Romiti v. Kerner*⁵⁹ the United States District Court for the Northern District of Illinois was asked to enjoin the enforcement of the Illinois regulations, statutes and constitutional provisions relating to the 1962 amendments to the Judicial Article of the Illinois Constitution. Among other things, the amend-

49 234 F. Supp. at 577.

50 *Id.*

51 *Id.*

52 249 F. Supp. 860 (N.D. Ohio 1966).

53 OHIO CONST. art. IV, § 3.

54 249 F. Supp. at 861.

55 *Id.* at 863.

56 *Id.* at 865.

57 *Id.* (Emphasis added.)

58 *Id.*

59 256 F. Supp. 35 (N.D. Ill. 1966).

ments provided for the redistricting of the Illinois Supreme Court districts into five new districts.⁶⁰ The First Judicial District consisted of Cook County with 50.9% of the state's population and was allocated three supreme court judges.⁶¹ Four other districts, substantially equal in population, were allocated one supreme court judge each.⁶² The judicial article required that the judges reside in and be elected from their respective districts,⁶³ but phased implementation of the new article was provided for to allow the incumbent judges to remain in office although the redistricting made them nonresidents of their respective districts.⁶⁴ Plaintiffs, residents of Cook County, did not object to the redistricting provided for in the amendments but alleged a denial of a free and equal right to vote in that the redistricting provisions would not be immediately implemented. Finding no federal constitutional issues raised by the residency and incumbency questions involved in the implementation schedule, the court dismissed the complaint.⁶⁵ In *Romiti* the parties specifically asked the court to decide whether the equal right to vote must be preserved in all elections for state office, irrespective of the nature of that office, and whether reapportionment requirements applied to an elected judiciary.⁶⁶ In noting that the facts of the case did not require it to decide these "interesting questions," the court said: "We have little doubt that, in a proper case, there is a valid distinction between applying the 'one man, one vote' rule in a legislative reapportionment case to the election of a state supreme court as provided in the 1962 Judicial Article."⁶⁷

*Skolnick v. Kerner*⁶⁸ arose from the same basic facts as did *Romiti*. In *Skolnick* the plaintiffs, Sherman H. Skolnick, a Jew, and Dick Gregory, a Negro, both residents of Cook County, brought a class action and endeavored to show that the failure to immediately implement the new Illinois Supreme Court districting scheme effectively debased and diluted the votes of Cook County's Jewish and Negro residents.⁶⁹ The court summarily rejected plaintiffs' claims by noting that as voters in Cook County they were treated identically with the plaintiffs in *Romiti* and all other Cook County voters and that they could not avoid the result of *Romiti* by injecting ungrounded religious and racial claims.⁷⁰

In *New York State Association of Trial Lawyers v. Rockefeller*⁷¹ the United States District Court for the Southern District of New York dismissed an action which sought declaratory and injunctive relief to require a "judicial reapportionment" to eliminate court delay in the supreme court and other state courts of New York.⁷² Plaintiffs analogized to the legislative apportionment cases and contended that the equal protection clause of the fourteenth amendment required New York to allocate its judges among the judicial districts and counties so as to prevent any

60 ILL. CONST. art. 6, § 3 (1962).

61 *Id.* § 4.

62 *Id.*

63 *Id.* §§ 4, 15.

64 *Id.* sched. para. 13 (1962).

65 256 F. Supp. at 46.

66 *Id.*

67 *Id.*

68 260 F. Supp. 318 (N.D. Ill. 1966).

69 *Id.* at 320.

70 *Id.*

71 267 F. Supp. 148 (S.D.N.Y. 1967).

72 *Id.* at 149.

greater delay in the disposition of cases in one area or subdivision of the state than another.⁷³ In essence, plaintiffs alleged that the malapportionment of state trial court judges denied them equal protection of the law and not that their individual votes were debased or diluted by the existing apportionment scheme. In dismissing the complaint, the court commented on the traditional freedom of the states to structure and manage their court systems in any reasonable manner.⁷⁴ Finding no purposeful discrimination against areas of the state, but merely inequality in the processing of court calendars, the court concluded that there was no federal constitutional or statutory basis for plaintiffs' complaint.⁷⁵ Having, it seems, adequately disposed of plaintiffs' equal protection argument, the court went on to reject plaintiffs' analogy to the legislative apportionment cases by saying: "Nor can the direction that state legislative districts be substantially equal in population be converted into a requirement that a state distribute its judges on a per capita basis."⁷⁶ The court also quoted approvingly from the *Buchanan* and *Stokes* opinions regarding the essential differences between legislative and judicial officers and concluded by concurring with the holding in *Stokes* that the legislative apportionment decisions had no applicability to the election of state judges.⁷⁷

In *Kail v. Rockefeller*,⁷⁸ decided in the United States District Court for the Eastern District of New York, plaintiffs also sought to use the apportionment decisions to deal with the questions of court delay and the distribution of state judicial services. Plaintiffs alleged that a malapportionment of supreme court judges in the eleventh judicial district (Queens County) caused excessive congestion and delay in the processing of their cases and violated their constitutional rights to equal protection of the laws.⁷⁹ They also noted that the judicial districts have "arbitrarily varying numbers of judges [who] are elected by unequal numbers of the population."⁸⁰ Relying on *Buchanan* and *Trial Lawyers*, the court rejected plaintiffs' equal protection claim that the state should be required to distribute its trial judges on a per capita basis and emphasized that the states have wide latitude in structuring their judiciaries.⁸¹

In *Cox v. Katz*,⁸² plaintiffs sought to enjoin enforcement of various statutes implementing the establishment of a city-wide court of civil jurisdiction for New York City. Amendments to the New York State Constitution, adopted in 1961, had provided for the abolition of the city court and the municipal court and for the creation of a city-wide court of civil jurisdiction.⁸³ Provision was made to retain judges of the city court and municipal court as judges of the newly created

73 *Id.* at 151.

74 *Id.* at 151-52.

75 *Id.* at 152.

76 *Id.* at 153.

77 *Id.* at 154.

78 275 F. Supp. 937 (E.D.N.Y. 1967).

79 *Id.* at 939-40.

80 *Id.* at 940.

81 *Id.* at 940-41.

82 30 App. Div. 2d 432, 293 N.Y.S.2d 829 (1968), *aff'd per curiam*, 22 N.Y.2d 903, 241 N.E.2d 747, 294 N.Y.S.2d 544 (1968), *cert. denied*, 394 U.S. 919 (1969).

83 N.Y. CONST. art. 6, § 15 a provides in part:

The judges of the court of city-wide civil jurisdiction shall be chosen for terms of ten years by the electors of the counties included within the City of New York from districts within such counties established by law.

Civil Court of New York City.⁸⁴ The legislature further provided that former city court justices and their successors would be elected on a county-wide basis and that former municipal court judges and their successors would be elected from sub-county districts corresponding to the old municipal court districts.⁸⁵ In 1968 the legislature provided for the election of 25 additional civil court judges and allocated them among the five counties of New York City.⁸⁶ Plaintiffs alleged, *inter alia*, that the statutes providing for the allocation and election of judges of the Civil Court of the City of New York violated the equal protection clause of the fourteenth amendment.⁸⁷ In affirming the trial court's dismissal of the complaint, the Supreme Court, Appellate Division, First Department, noted that there were many relevant factors that could properly be considered in allocating judges, including population, volume and nature of litigation, location of governmental agencies and officials, and transportation facilities.⁸⁸ The court went on to say that although the election of legislators involved the constitutionally protected right to cast an equal, undiluted vote, there was no requirement to allocate judges on a per capita basis.⁸⁹ In a *per curiam* opinion,⁹⁰ the New York Court of Appeals agreed with the appellate division that there was no basis for applying the "one man, one vote" rule.⁹¹ Echoing a theme first heard in *Stokes*, the court went on to say, "That doctrine, designed to assure representative government in a democracy such as ours, was never intended to regulate the election of judges whose functions are solely judicial."⁹² The court added that legislatures, unlike the judiciary, were responsible for achieving representative government and therefore must be responsive to the popular will, but a population standard, applicable as it was to the legislature, was not the sole or most relevant criterion for determining the allocation of state judges.⁹³

In *De Kosenko v. State of New York*,⁹⁴ decided by the United States District Court for the Southern District of New York, the plaintiff sought a judgment that the congested court calendar situation in New York County was depriving her of due process of law and equal protection of the law and punishing the exercise of her right to a jury trial, all in contravention of the seventh and fourteenth amendments to the Constitution.⁹⁵ She asked the court to direct defendants to correct the situation so as not to deprive her of these rights or in the alternative

84 New York City Civil Court Act § 2201 (McKinney 1963) provides:

The justices of the City Court of the city of New York and the justices of the Municipal Court of the city of New York in office on the day such courts are abolished shall, for the remainder of the term for which each was elected or appointed be judges of this court.

85 The provision for the election of former city court and municipal court judges and their successors was made by annual amendment to § 2201 of the New York City Civil Court Act. *Id.*

86 New York City Civil Court Act § 102 (McKinney 1970). New York County was allocated seven judges, Kings County seven judges, Queens County six judges, Bronx County four judges, and Richmond County one judge. *Id.*

87 30 App. Div. 2d at 435, 293 N.Y.S.2d at 832.

88 *Id.* at 435, 293 N.Y.S.2d at 832-33.

89 *Id.* at 435, 293 N.Y.S.2d at 833.

90 *Cox v. Katz*, 22 N.Y.2d 903, 241 N.E.2d 747, 294 N.Y.S.2d 544 (1968).

91 *Id.* at 905, 241 N.E.2d at 748-49, 294 N.Y.S.2d at 545-46.

92 *Id.*

93 *Id.* at 905, 241 N.E.2d at 748-49, 294 N.Y.S.2d at 545-46.

94 311 F. Supp. 126 (S.D.N.Y. 1969).

95 *Id.* at 127.

for the court to correct the situation.⁹⁶ The court quoted approvingly from *Trial Lawyers and Kail* and concluded that the so-called right to equal processing of court calendars did not arise under the Constitution or statutes of the United States and that the complaint must therefore be dismissed.⁹⁷

Passing mention should also be made of *Sullivan v. Alabama State Bar*⁹⁸ in which the United States District Court for the Middle District of Alabama held that the "one man, one vote" rule had no relevance to the Board of Commissioners of the Alabama State Bar, an elective body, judicial in nature, which exercised broad power and authority over Alabama attorneys under the auspices of the Alabama Supreme Court.⁹⁹ The court concluded that the judicial nature of the board's functions rendered the rule inapplicable.¹⁰⁰ The Supreme Court affirmed in a *per curiam* opinion.¹⁰¹

In *Buchanan*, *Trial Lawyers*, *Kail*, and *De Kosenko*, plaintiffs sought to remedy the problem of court delay by petitioning the courts to direct the re-allocation of judges and judicial services on an equal population basis. In each case, plaintiffs attempted to analogize to the equal-population requirement applied to legislators in the apportionment cases. In these four cases the distribution of judicial services rather than equal voting rights was the central issue. *Romiti* raised in its purest form the question of the applicability of the "one man, one vote" rule to judges who are elected to a court from separate districts. Unfortunately, the timing of the plaintiffs' action in *Romiti* made it unnecessary for the court to reach this question.¹⁰² *Skolnick* raised a variant of the basic question posed in *Romiti*. *Cox* attacked the allocation of judges but also raised the question of whether plaintiffs' votes for judges of the Civil Court of New York City were debased and diluted because some judges were elected on a county-wide basis while others were elected from sub-county districts. Although the issue was not raised as clearly in *Cox* as in *Romiti*, the *per curiam* opinion of the New York Court of Appeals does not, it seems, adequately treat the equal voting power aspects raised by this case. *Stokes* also raised a potential "one man, one vote" issue in that control over the elective local circuit judge was denied to the local voters by the provision for state-wide voting.

In the cases dealing with the distribution of judicial services, it would seem that the analogy to the "one man, one vote" rule of the legislative apportionment cases was properly rejected. In *Missouri v. Lewis*¹⁰³ the Supreme Court upheld Missouri's appellate court structure which provided that appeals from certain counties would lie directly to the state supreme court whereas appeals from certain

96 *Id.*

97 *Id.* at 129-30.

98 295 F. Supp. 1216 (M.D. Ala. 1969), *aff'd per curiam*, 394 U.S. 812 (1969).

99 *Id.* at 1222.

100 *Id.*

101 *Sullivan v. Alabama State Bar*, 394 U.S. 812 (1969).

102 Had plaintiffs raised their challenge to the apportionment of the Illinois Supreme Court districts before adoption of the amendments to the judicial article, the question confronting the court would have been whether the election of state supreme court judges from unequally populated districts debased plaintiffs' votes and denied them equal protection of the law. Prior to adoption of the 1962 amendment to the judicial article, the population of the Illinois Supreme Court judicial districts varied from 6,020,520 to 452,934. 59% of the voters elected one judge and less than one-third of the state's persons could elect a majority of the high court. Davis, *Redistricting the Court*, 50 ILL. B.J. 699, 700 (1962).

103 101 U.S. 22 (1880).

other counties would lie to an intermediate court of appeals. The entire tenor of the Court's holding in this case was that legislative classifications as to jurisdiction, structure, procedure, and treatment within a state court system do not deny equal protection of the laws unless shown to be palpably arbitrary and without any reasonable basis.¹⁰⁴ This would seem to support the conclusion reached by some of the courts that there are numerous relevant criteria, other than population, which a state might reasonably consider in allocating judicial services including convenience to litigants and the nature and volume of judicial business in different areas of the state. The following analysis, however, rejects the conclusion reached by some courts that the equal-population principle or "one man, one vote" rule has no applicability whatsoever to elected judges.

V. Conclusion

The expanded concept of political equality¹⁰⁵ which underlies the Supreme Court's apportionment and voting rights decisions would seem to require the application of the equal-population principle to almost all elective governmental offices including the judiciary. In *Hadley*, the Court discussed a narrow exception to the equal-population requirement¹⁰⁶ for elections of governmental officials "whose duties are so far removed from normal governmental activities and so disproportionately affect different groups. . . ."¹⁰⁷ This exception, however, hardly seems appropriate to the judiciary considering its broad policy-making powers.¹⁰⁸ It is therefore difficult to avoid the conclusion that the *Hadley* rule and the expanded concept of political equality which underlies it require the application of the equal-population principle to judicial elections. Such a rule could be phrased as follows: Whenever the state chooses to select judges for a particular court by popular election, and those judges are elected from separate districts served by that court, the equal protection clause of the fourteenth amendment requires that the districts be so drawn as to insure, insofar as is practicable, that equal numbers of voters can vote for proportionally equal numbers of judges.

Some would argue, though, that the entire rationale of the "one man, one vote" requirement is to achieve maximum institutional responsiveness and that by common agreement judges need not be responsive to the popular will or whim and therefore the rule has no applicability to them.¹⁰⁹ Although there is some

104 *Id.* at 30-32. For a discussion of legislative classifications as to treatment and procedure within a state court system, see *Whittaker v. Superior Court of Shasta County*, 68 Cal.2d 357, 66 Cal. Rptr. 710, 438 P.2d 358 (1968).

105 See text accompanying notes 38-46 *supra*.

106 See text accompanying notes 35-36 *supra*.

107 397 U.S. at 56.

108 One commentator has noted that:

The important focus for determining the outreach of the "one man, one vote" doctrine is not policy making, because all officials—including judges obviously—share in policy making. Rather, at some point we get down to appearances and a concept of *per se* invalidity. If *any set* of offices, including judicial offices, is made elective, thus creating expectation of direct citizen control over the officers, how can it be just to give some voters more influence than others by the device of malapportionment? R. DIXON, *DEMOCRATIC REPRESENTATION, REAPPORTIONMENT IN LAW AND POLITICS* 564 (1968).

109 Note, *The Apportionment Cases: An Expanded Concept of Equal Protection*, 1965 Wis. L. REV. 606, 632.

language in *Reynolds* that would support this argument,¹¹⁰ to focus on it exclusively would be to overlook the more basic concept of political equality which underlies that decision and its progeny, namely, that irrespective of the elective office involved, full and effective citizenship requires that each man's vote count the same. It should also be noted that a requirement of equal judicial districts in no way implies that the judges elected from those districts need be responsive.¹¹¹ Finally, judicial nonresponsiveness could be used to argue against *any* elective system for the judiciary, but as already noted judicial elections are firmly rooted in our history.¹¹²

The requirement of equal judicial districts is not only consistent with the new concept of political equality but it is also consistent with the history of judicial elections in the United States.¹¹³ The egalitarianism of the Jacksonian period, which gave birth to the movement for an elective judiciary, celebrated popular interest in government and popular control of public affairs. There was no office to which the elective principle could not be applied. In a sense the expanded concept of political equality which underlies the apportionment decisions is a refinement of and a natural progression from the Jacksonian ideal, i.e. the modern egalitarianism manifests itself in the requirement that maximum equality of voting power be preserved.

Application of the equal-population principle to elected judges probably would not significantly alter existing patterns of judicial selection. At present only seven states, Illinois,¹¹⁴ Kentucky,¹¹⁵ Louisiana,¹¹⁶ Maryland,¹¹⁷ Mississippi,¹¹⁸

110 In *Reynolds* Chief Justice Warren noted that: "Full and effective participation by all citizens in state government requires . . . that each citizen have an equally effective voice in the election of his state legislature." 377 U.S. at 565.

111 Note, *supra* note 109, at 629. An alternative explanation might well be that such a requirement comports with a reasonable state objective of having judges on the high bench who are aware of the problems of the state's populous areas. *Id.* at 630.

112 Another objection that could be raised would arise in the situation where each district elects one high court judge who, in addition to meeting with his brethren, also rides circuit within his district. The fact that the court meets as a body would seem to require districts of equal population but each judge's circuit duties might make it more reasonable to determine district size by case load. Note, *Reapportionment*, 79 HARV. L. REV. 1226, 1278 (1966).

113 The requirement of equal judicial districts is hardly new. Two state constitutions, adopted during the heyday of the movement for elected judges, illustrate this point. The Judicial Article of the Illinois Constitution of 1848 provided that:

The State shall be divided into three grand divisions, as nearly equal as may be, and the qualified electors of each division shall elect [one supreme court judge] for the term of nine years ILL. CONST. art. V, § 3 (1848). Similarly, the Judicial

Article of the Indiana Constitution of 1851 provided that:

The State shall be divided into as many districts as there are Judges of the Supreme Court; and such districts shall be formed of contiguous territory, as nearly equal in population, as, without dividing a county, the same can be made. One of said Judges shall be elected from each district, and reside therein; but said Judges shall be elected by the electors of the State at large.

IND. CONST. art. 7, § 3 (1851).

114 Illinois elects three judges from the first district (50.9% of the population) and one judge from each of the other four districts which are required to be substantially equal in population. ILL. CONST. art. 6, §§ 2,3.

115 KY. CONST. § 116 requires that high court districts be of nearly equal population.

116 Louisiana elects two judges from the first district and one from each of the other five districts. Districts of equal population are not required. LA. CONST. art. 7, § 9.

117 Maryland elects two high court judges from Baltimore City and one from each of the other five appellate judicial circuits. There is no requirement that the districts be equal in population and in fact the districts are severely malapportioned. MD. CONST. art. IV, § 14.

118 Mississippi elects three high court judges from each of its three judicial districts without regard to the population of these districts. MISS. CONST. art. 6, §§ 145, 145A, 145B.

South Dakota,¹¹⁹ and Tennessee¹²⁰ elect their high court judges from separate districts. Sixteen states elect intermediate appellate court judges,¹²¹ but only a few elect them from separate districts.¹²² And although the vast majority of the states elect their major trial court judges, most states provide for at-large election.¹²³ Additionally, those states affected by the rule could probably avoid reapportioning their judicial districts by adopting some form of an appointive system¹²⁴ or converting to at-large election systems.¹²⁵

Although it would seem logical and consistent for the Court to extend the equal-population principle to judicial elections, the ultimate resolution of the question posed by this article must remain somewhat in doubt because of what Justice Harlan described during the 1970 term as an "evident malaise" among the members of the Court with prior decisions in the area of voter qualification and reapportionment.¹²⁶ In three voting rights cases decided in June of the 1970 term, Justice Harlan's observation was borne out. In *Gordon v. Lance*¹²⁷ the Court upheld the West Virginia constitutional and statutory requirement that political subdivisions of the state could not incur bonded indebtedness or raise tax rates without the approval of 60% of the voters in a referendum election.¹²⁸ Chief Justice Burger, speaking for a majority of six Justices, including Justices Black and Douglas, two consistent voting rights advocates, concluded that: "[S]o long as such provisions do not discriminate against or authorize discrimination against an identifiable class they do not violate the Equal Protection Clause."¹²⁹ In *Abate v. Mundt*¹³⁰ the Court sustained the apportionment of the Rockland County, New York, board of supervisors which provided for an 18-member county legislature elected from five districts, corresponding to the county's five towns, with a total deviation from population equality of 11.9%.¹³¹ In approving the apportionment scheme, Justice Marshall emphasized that the Court's decision was based on the "long tradition of overlapping function and dual personnel in Rockland County government and on the fact that the plan . . . does not contain

119 South Dakota elects its high court judges at large but requires that one high court judge reside in each of the five judicial districts. S.D. CONST. art. V, §§ 6, 11.

120 Tennessee elects its high court judges at large from three grand divisions. TENN. CONST. art. 6, §§ 2,3.

121 REPORT No. 7, *supra* note 16, at 10-27.

122 The Washington Court of Appeals consists of three divisions which are subdivided into districts from which the judges are elected. WASH. REV. CODE ANN. § 2.06.020 (1970). Louisiana has four court of appeal circuits which are also subdivided into districts from which the judges are elected. LA. CONST. art. 7, § 21 A,B,C,D. The following states also elect their intermediate appellate court judges from districts: *Arizona*, ARIZ. REV. STAT. ANN. §§ 12-120, 12-120.02 (1967); *Illinois*, ILL. CONST. art. 6, § 5; *Maryland*, MD. ANN. CODE art. 26, § 130 (1970).

123 REPORT No. 7, *supra* note 16, at 10-27.

124 For an explanation of the American Judicature Society's merit selection plan for judges, see REPORT No. 7, *supra* note 16, at 2.

125 In an at-large election system each voter's vote is technically equal to every other voter's vote and absent a showing of discrimination against a racial or political element of the voting population there is no infringement of a constitutional right in such a system.

126 *Oregon v. Mitchell*, 400 U.S. 112, 218 (1970).

127 403 U.S. 1 (1971).

128 *Id.* at 8.

129 *Id.* at 7.

130 403 U.S. 182 (1971).

131 *Id.* at 185-87.

a built-in bias tending to favor particular political interests or geographic areas."¹³² Only Justices Brennan and Douglas dissented.¹³³ And in *Whitcomb v. Chavis*¹³⁴ the Court reversed a district court finding that the multimember districting plan for Marion County, Indiana, was unconstitutional in that it minimized or canceled out the voting strength of racial and political elements.¹³⁵ These three decisions prompted Justice Harlan to remark in *Whitcomb* that in his view the line of apportionment cases from *Gray* to *Hadley* reflected "deep personal commitments by some members of the Court to the principles of pure majoritarian democracy"¹³⁶ and had that philosophy been given its head "it would have led to different results in each of the cases decided today."¹³⁷

If, as Justice Harlan implies, *Gordon*, *Abate* and *Whitcomb* signal a retrenchment on the part of the Court in the apportionment and voting rights area, then these cases add an important caveat to the conclusion reached in this article that the fourteenth amendment's equal protection clause requires the application of the equal-population principle to judicial elections.

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132 *Id.* at 187.

133 *Id.*

134 403 U.S. 124.

135 *Id.* at 140-70.

136 *Id.* at 166.

137 *Id.* at 167.

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