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The Courts and Reapportionment: The Exemption of Judicial Elections

By Philip L. Martin*

In recent years, reapportionment has been one of the most persistent and perplexing questions confronting American courts. When, in 1962, the Supreme Court abandoned its long standing practice of avoiding legislative representation issues as political questions subject to the doctrine of judicial restraint,[1] confusion and uncertainty followed because of two problems: first, the lack of guiding precedents and second, the diverse patterns of electoral schemes used by state and local governments which could not be easily categorized for standardizing solutions. It thus became necessary for the Court to fashion guidelines for achieving equitable apportionment. The initial step was taken in 1964 when the "one man, one vote" requirement was formulated for congressional districts[2] and state legislatures.[3] Then, in 1968, this principle was applied to local governments of general powers,[4] and two years later the coverage was completed as special districts were included under the equality principle.[5]

The Quest for Equality

Defining the constitutional parameters of equal representation the Supreme Court in *Reynolds v. Sims*[6] said:

> [T]he Equal Protection Clause requires that a State make an honest and good effort to construct districts, in both houses of its legislature, *as nearly of equal population as is practicable.* We realize that it is a practical impossibility to arrange legisla-

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1 Baker v. Carr, 369 U.S. 186 (1962).
2 Wesberry v. Sanders, 376 U.S. 1 (1964).
3 Reynolds v. Sims, 377 U.S. 533 (1964).
4 Avery v. Midland County, 390 U.S. 474 (1968).
5 Hadley v. Junior College Dist., 397 U.S. 50 (1970).
6 377 U.S. 533 (1970).

> tive districts so that each one has an identical number of residents, or citizens, or voters. *Mathematical exactness* or precision is hardly a workable constitutional requirement.[7]

In a subsequent case the Court reasoned that in a multidistrict county, state senators elected in a county at-large system pursuant to a district residence requirement were as much the delegates of the entire county as of the district in which they resided.[8] However, the Court took a tougher position several years later when it warned that anything larger than "de minimus" variations in the population among state legislative districts must be justified by an "acceptable state policy."[9]

The most stringent statements concerning congressional districting were made in *Wells v. Rockefeller*[10] and *Kirkpatrick v. Preisler*,[11] both of which emphasized strict adherence to the concept of "one man, one vote." Prior to these decisions it has been thought that variances among districts were justified by:

> . . . [a] legitimate regard for such factors as the representation of distinct interest groups, the integrity of county lines, the compactness of districts, the population trends within the State, the high proportion of military personnel, college students, and other nonvoters in some districts, and the political realities of "legislative interplay."[12]

Yet in *Kirkpatrick*, this argument was almost completely rejected because the Supreme Court, instead of recognizing the need for or the possibility of flexible arrangements, insisted that under the "as nearly as practicable" standard contained in *Reynolds*, a state should make "a good faith effort to achieve precise mathematical equality" because "[e]qual representation for equal numbers of people is a principle designed to prevent debasement of voting power and diminution of access to elected representa-

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[7] *Id.* at 577 (emphasis added).

[8] Fortson v. Dorsey, 379 U.S. 433 (1965). According to Professor Dixon, the significance of this decision was much less than originally thought because "[i]t was not widely realized that plaintiffs' contentions were very narrow and did not reach the crucial issue of unfair impact on political representation needs in the multimember counties, flowing from the winner-take-all aspect of the at-large election system." R. DIXON, DEMOCRATIC REPRESENTATION: REAPPORTIONMENT IN LAW AND POLITICS 477 (1968).

[9] Swann v. Adams, 385 U.S. 440, 444 (1967).

[10] 394 U.S. 542 (1969).

[11] 394 U.S. 526 (1969).

[12] *Id.* at 530.

tives."[13] It was stressed that "[t]oleration of even small deviations detracts from these purposes."[14] Therefore, contrary to the guidelines in *Reynolds*, the *Kirkpatrick* and *Wells* decisions emphasized that mathematical exactness or precision is a workable constitutional requirement which is to be given priority over all other factors in redistricting.

In contrast to congressional apportionment, local government has been accorded a special status which under certain conditions permits population deviation among the districts of an electoral scheme as long as discrimination is not being practiced. This distinction was enunciated in *Abate v. Mundt*,[15] which involved challenges to population inequality and multi-member districting in Rockland County, New York, where, for more than a hundred years, the governing board had been composed of the supervisors of the county's five towns.[16] Since these municipalities were of varying size, there was a total deviation from population equality among the districts of 11.9 per cent. The Supreme Court, however, was willing to accept this departure from the "one man, one vote" concept partly in deference to the interest of preserving the "long history of, and perceived need for, close cooperation between the county and its constituent towns."[17] It was further conceded that the population differences contained in local apportionment systems should not always be governed by the rules applying to national and state legislative districting because "local legislative bodies frequently have fewer representatives than do their state and national counterparts and . . . some local legislative districts may have a much smaller population than do congressional and state legislative districts. . . ."[18]

Although an exception to mathematical stringency was approved by the *Abate* decision, it was not an unqualified endorsement of flexibility. Not only did the Court reserve for future resolution the question of how much variance is constitutionally permissible, but it also noted that exceptions to the *Reynolds* principle could be accepted only if the "particular circumstances

[13] *Id.* at 531.
[14] *Id.*
[15] 403 U.S. 182 (1971).
[16] For a detailed analysis of this case, see Martin, *The Constitutional Status of Local Government Reappointment*, 6 VALPARAISO L. REV. 237, 246-52 (1972).
[17] Abate v. Mundt, 403 U.S. 182, 186 (1971).
[18] *Id.* at 185.

and needs of a local community as a whole . . . justify departures from strict equality."[19] Therefore, the New York ruling 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 a built-in bias tending to favor particular political interests or geographic areas."[20] The *Abate* rationale was subsequently extended to state legislative districting. In *Mahan v. Howell*,[21] the Supreme Court held that deviation as great as 16 percent is justifiable if this is the only way the history and tradition of representation for a state's subdivisions can be preserved.

Thus the *Reynolds'* standard has acquired two meanings: for congressional apportionment, it demands mathematical precision, as *Kirkpatrick* and *Wells* emphasize; for state and local apportionment, vaguely less than mathematical exactness is required, as *Abate* and *Mahan* indicate. This duality of standards and the ad hoc exemptions for special categories have caused much of the criticism of judicial intervention in reapportionment. In the area of judicial redistricting, the Court has not finalized its position, but three recent cases[22] make it clear that the election of judges is subject to yet another standard. Before examining these cases, however, it is necessary to review *Hadley v. Junior College District*[23] which was the basis for both the challenge to judicial elections and its rejection in court.

Hadley Revisited

Constituting the third phase in the Supreme Court's category of local government rulings, the *Hadley* case was concerned with the apportionment of six elected trustees among the constituencies of the Junior College District of Metropolitan Kansas City.[24] The crux of this complaint was that the electoral scheme assigned

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19 *Id.*

20 *Id.* at 187.

21 —— U.S. —— (1973).

22 Kaplan v. Milliken, —— U.S. —— (1973); Wells v. Edwards, —— U.S. —— (1973); Holshouser v. Scott, —— U.S. —— (1973) (discussed *infra*).

23 397 U.S. 50 (1970).

24 The cases concerning local reapportionment from 1967-70 are analyzed in Martin, *The Supreme Court and Local Reapportionment: The Third Phase*, 39 GEO. WASH. L. REV. 102 (1970). For a specific discussion of *Hadley v. Junior College Dist.*, see *Id.* at 111-16.

only three trustees to the district containing approximately 60 percent of the total enumeration used for determining how much representation should be given to each constituency.[25] Designed to equalize voting power among units of disproportionate populations, the plan was nevertheless found to be defective since it "necessarily results in a systematic discrimination against voters in the more populous school districts."[26] It was thus concluded that "[s]uch built-in discrimination against voters in large districts cannot be sustained as a sufficient compliance with the constitutional mandate that each person's vote count as much as another's, as far as practicable."[27]

Although this controversy involved only governments of special powers, the decision was unusual because its effect extended beyond the immediate question. In an effort to eliminate the uncertainty arising from the case by case approach to state and local reapportionment, a general rule was formulated:

> 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 equal 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 number of officials.[28]

This pronouncement was intended to end speculation about which types of governmental arrangements were included under the *Reynolds* requirement; instead, it reopened the issue of judicial elections which had supposedly been decided by several lower federal court cases.[29] In addition, the implementation of this rule was weakened by the qualification that "there might be some case in which a State elects certain functionaries whose

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[25] The formula for computing the enumeration was:

The population between ages six and 20 for an individual district ÷ the population between ages six and 20 for the entire district = enumeration (expressed as a percentage). MO. ANN. STAT. § 167.011 (1959).

[26] Hadley v. Junior College Dist., 397 U.S. 50, 57 (1970).

[27] *Id.*

[28] *Id.* at 56.

[29] See text at notes 33-35 *infra*.

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. . . ."[30] Despite the defendant's claim, the trustees of the junior college district were not considered to fall within the excepted category because "[e]ducation has traditionally been a vital governmental function, and these trustees, whose election the State has opened to all qualified voters, are governmental officials in every relevant sense of that term."[31] Unfortunately, the Supreme Court did not specify what types of elections would be exempted from the *Hadley* rule, and, as a result, this caveat has become a central point in the latest rulings for state judicial elections.

Judges are Exempt—The Aftermath of Reynolds

After the *Reynolds* mandate was announced, the question immediately arose as to the inclusion of judicial elections. In *Stokes v. Fortson*[32] a challenge was filed against Georgia which uses a combination of elections and residency requirements to choose its trial court judges on a partisan ballot. To begin with, the state is divided into judicial circuits, and candidacy for judgeships is restricted to the residents of each circuit.[33] A primary is held in every circuit after which all nominees stand in a statewide election even though the judges only serve in the area from which they are nominated.[34] Since there was a disparity in population among the judicial circuits, a violation of the "one man, one vote" standard was asserted; however, the federal district court rejected this claim by noting that each voter in a circuit casts an equal ballot in the nominating process and all voters cast equal ballots in the state election. The Georgia system for selecting trial judges was deemed to afford proper recognition to all interests inasmuch as the residence requirement and the nomination are combined with the statewide election.

According to the court's interpretation, the primary mandate of the reapportionment rule is that there must not be a dilution of voting power, and the Georgia judicial electoral system was

30 Hadley v. Junior College Dist., 397 U.S. 50, 56 (1970).
31 *Id.*
32 234 F. Supp. 575 (N.D. Ga. 1964).
33 GA. CODE ANN. § 24-2608 (1963).
34 GA. CONST. art. VI, § 3, ¶¶ 1, 2.

deemed to meet this requirement. But, in the event that this construction was incorrect, the *Reynolds* principle was also adjudged inapplicable in the Georgia case on the grounds that even if there is a difference in voting power because the population of election districts varies, the election of judges, who are not representatives in the same sense as legislators, is not controlled by the equality doctrine since a judge's "function is to administer the law, not to espouse the cause of a particular constituency."[35] Moreover, responding to the implicit argument that the size of judicial districts be related to case loads, the court concluded that:

> ... [T]here is no way to harmonize selection of these officials [judges] on a pure population standard with the diversity in type and number of cases which will arise in various localities, or with the varying abilities of judges . . . to dispatch the business of the courts. An effort to apply a population standard to the judiciary would, in the end, fall of its own weight.[36]

The logic of this point coupled with the functional difference between judges and legislators has had an imposing influence in later cases affecting judicial elections.

Two subsequent cases were also concerned with the question of applying the "one man, one vote" concept to the apportionment of judges among their circuits and districts. Although no elections were involved, it was alleged that unless a state distributed its judges on a per capita basis the more populous urban districts were being denied speedy justice while rural counties were being given preferential treatment. Relying on *Stokes* as precedent, this contention was rejected in both cases because there was no voting dilution. In Ohio, the federal district court dismissed the notion that the "one man, one vote" standard was applicable to courts as well as legislatures by emphasizing that "[j]udges do not represent people, they serve people."[37] One year later a federal district court in New York agreed that "[t]he State judiciary, unlike the legislature, is not the organ responsible for achieving representative government."[38] Since the Supreme Court refused

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35 Stokes v. Fortson, 234 F. Supp. 575, 577 (N.D. Ga. 1964).
36 *Id.*
37 Buchanan v. Rhodes, 249 F. Supp. 860, 865 (N.D. Ohio 1966), *appeal dismissed*, 385 U.S. 3 (1966).
38 New York State Ass'n of Trial Lawyers v. Rockefeller, 267 F. Supp. 148, 153 (S.D.N.Y. 1967).

to review the Ohio decision,[39] the "case load" question seems to be settled, but the issue of population equality and judicial elections did not end with *Stokes*.

Are Judges Exempt?—The Aftermath of Hadley

Revived by the general rule enunciated in *Hadley*, two more efforts were made to bring the election of judges under the aegis of *Reynolds*. The first of these cases, *Holshouser v. Scott*,[40] sought to invalidate a North Carolina electoral plan similar to the one upheld in *Stokes*. Using a partisan ballot, trial court judges were nominated by a primary conducted in their residential district and then elected on a statewide basis.[41] Referring to the Georgia decision,[42] a three-judge federal panel approved the North Carolina system by a two to one vote. The dissenter, however, thought there was a significant distinction from the Georgia precedent in that North Carolina's 30 judicial districts are combined into four geographic divisions with the trial judges rotating among the districts of their divisions. Consequently, the judges serve not only the people who nominated them but also people within divisions who had no voice in the nomination process. Since the scheme establishes two groups of voters, those within a district and those outside a district, the dissent contended that the second group is treated unconstitutionally because of nonparticipation in the primary elections. It was thus concluded:

> That each voter can participate fully in the election of the [trial court] judge from his own district does not satisfy his admitted interest in choosing other . . . judges who will function throughout the state.[43]

Disagreeing with this view, the *Holshouser* majority said:

> We hold that the one man, one vote rule does not apply to the state judiciary and therefore a mere showing of a disparity among the voters or in the population figures of the district would not be sufficient to strike down this election

[39] Buchanan v. Rhodes, 249 F. Supp. 860 (N.D. Ohio 1966), *appeal dismissed*, 385 U.S. 3 (1966).
[40] 335 F. Supp. 928 (M.D.N.C. 1971), *aff'd*, —— U.S. —— (1972).
[41] N.C. CONST. art. IV, § 16.
[42] Stokes v. Fortson, 234 F. Supp. 575 (N.D. Ga. 1964); see text at notes 32-36 *supra*.
[43] Holshouser v. Scott, 335 F. Supp. 928, 935 (M.D.N.C. 1971).

> procedure. . . . . A showing of an arbitrary and capricious or invidious action or distinction between citizens and voters would be required. In other words, this court must find that the State has not only distinguished between citizens and voters, but that such distinctions are arbitrary and capricious or invidious.[44]

This ruling was affirmed by the Supreme Court in a memorandum decision,[45] thereby ending speculation about whether the *Reynolds* requirement applied to this kind of judicial election; but, the Supreme Court was not unanimous with regard to a complete exemption.

In the subsequent case of *Wells v. Edwards*,[46] the Supreme Court divided six to three over the applicability of the "one man, one vote" standard to the election of the Louisiana Supreme Court. This case differed from *Stokes* and *Holshouser* inasmuch as the seven Louisiana Supreme Court justices are elected from six districts, one of which is assigned two justices.[47] Since there was no statewide election involved as in the Georgia and North Carolina cases, the *Wells* dissenters insisted that the Louisiana electoral plan based on districts be evaluated in accordance with *Reynolds* and not according to the Georgia and North Carolina cases.[48] The district population disparity challenged in *Wells* ranged from 369,485 to 682,072 for the five single-judge districts with the two-judge sixth district having a population of 1,007,449. The three-judge federal panel, which first heard the case and with whom the *Wells* majority agreed, noted that there was "considerable deviation between the population of some of the districts," but it did not attach any significance to this fact in its ruling.[49] In contrast, the Supreme Court dissenters criticized the population differential on the grounds that the "votes of some qualified voters, depending on the happenstance of residence, were of less value in electing justices than others, cast elsewhere."[50]

Why did the lower court disregard population, the major

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[44] *Id.* at 933.
[45] Holshouser v. Scott, 409 U.S. 807 (1972).
[46] —— U.S. —— (1973).
[47] LA. CONST. art. VII, § 9.
[48] Wells v. Edwards, —— U.S. ——, —— (1973) (dissenting opinion).
[49] Wells v. Edwards, 347 F. Supp. 453, 454 (M.D. La. 1972).
[50] Wells v. Edwards, —— U.S. ——, —— (1973) (dissenting opinion).

factor incorporated from the *Reynolds* philosophy by the *Hadley* pronouncement? To begin with, this court agreed with the earlier decisions that "the rationale behind the one man, one vote principle, which evolved out of efforts to preserve a truly representative form of government, is simply not relevant to the makeup of the judiciary."[51] Yet, this statement did not constitute sufficient grounds in itself to dismiss the plaintiff's contention that the judiciary was included under the *Hadley* rule.[52] The special court, while acknowledging the broad language of the *Hadley* decision, referred to the caveat regarding the exemption from reapportionment mathematics given certain governmental officials whose duties are "far removed from normal governmental activities."[53] All three judges agreed that the Louisiana system fell into this category. Therefore, it was concluded that even though there was substantial population variance among the Louisiana districts, the plaintiff's argument for including the state supreme court election under the *Hadley* rule was in appropriate because:

> [I]n Hadley, as in every other case that we can find dealing with the question of apportionment, the "governmental functions" related to such things as making laws, levying and collecting taxes, issuing bonds, hiring and firing personnel, making contracts, collecting fees, operating schools, and generally managing and governing people. In other words, apportionment cases have always dealt with elected officials who performed legislative or executive type duties, and in no case has the one-man, one-vote principle been extended to the judiciary. On the contrary, several cases have specifically held that principle does not apply to the judiciary.[54]

The Supreme Court dissenters distinguished the use of district elections from the statewide ballot at issue in *Stokes* and *Holshouser*[55] and criticized the lower court's reliance on the *Hadley* caveat. They asserted that this qualification did not delineate among the elected officers of government because:

> Judges are not private citizens who are sought out by their

[51] Wells v. Edwards, 347 F. Supp. 453, 455 (M.D. La. 1972).
[52] See text at note 28 *supra*.
[53] See text at note 30 *supra*.
[54] Wells v. Edwards, 347 F. Supp. 453, 455 (M.D. La. 1972).
[55] See text at notes 32-36, 40-44 *supra*.

> litigious neighbors to pass upon their disputes. They are state officials, vested with state powers and elected (or appointed) to carry out the state government's judicial function. As such, they most certainly 'perform governmental functions.'[56]

This conclusion was supported by reference to *Gray v. Sanders*[57] in which the Supreme Court had invalidated the Georgia county unit system that had been used in the Democratic Party primary elections for all governmental officials, including judges, who run on a statewide ticket. Writing for the dissenters, Justice White pointed out that the Court had not considered the county unit system any less unconstitutional for the election of judges than for the election of United States Senators.

Concerning the *Hadley* rule,[58] the dissenters interpreted it as providing very narrow exceptions to the requirement that once a state decides to elect officials by popular vote, "each qualified voter must be treated with an equal hand and not be subjected to irrational discrimination based on his residence."[59] Moreover, it was indicated by way of illustration that although the office of junior college trustee differs in certain respects from that of judge, the distinction is immaterial because when both are elected, especially by districts, *Hadley* applies. In other words, the Constitution does not authorize such differentiation, and it is the duty of the Supreme Court to protect the right of equal vote regardless of the officials selected. Therefore, the dissenters contended that the issue of the Louisiana case had been misunderstood by the majority and that its questions warranted "plenary review" rather than an affirmation of the lower court's decision. Nevertheless, judicial elections are exempt from the idea of "one person, one vote,"[60] and the cases supporting the exemption continue to grow.[61]

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[56] Wells v. Edwards, —— U.S. ——, —— (1973) (dissenting opinion).

[57] 372 U.S. 368 (1963).

[58] See text at note 28 *supra*.

[59] Wells v. Edwards, —— U.S. ——, —— (1973) (dissenting opinion).

[60] Presumably as a result of the equal rights movement for women, Justice White in the *Wells* case changed the *Reynolds* principle to "one person, one vote."

[61] In Kaplan v. Milliken, —— U.S. —— (1973), the Court reaffirmed a lower court's reliance on *Wells* in dismissing a challenge to Kentucky's scheme for electing judges. The judges of the Kentucky Court of Appeals are elected by district ballot from seven districts which were alleged to be malapportioned. Since only Justices Marshall and White dissented from the Court's decision to dismiss, it is apparent that the exemption from "one man, one vote" given state judiciaries has been strengthened.

The Contradiction of Judicial Elections by District

It is obvious that the series of cases ending with *Holshouser v. Scott* were correctly decided according to the precedents because the use of a statewide election eliminates the constitutional problems arising from the use of a district plan. And, even if in the interest of more effective administration of justice the courts should reconsider the question, there is currently no basis for challenging the relationship between case load, population and the number of judges assigned to a circuit. However, in none of the cases concerning judicial elections or the allocation of judges has there been an accurate understanding of the Supreme Court's original intention for reapportionment. Only the dissenters in *Wells* have properly read the mandate of *Gray v. Sanders*[62] as including administrative, executive and judicial officers as well as legislators, and this point is reinforced by a statement made in *Sailors v. Board of Education.*[63] Speaking for a unanimous Court, Justice Douglas gave the following summary:

> At least as respects non-legislative officers, a State can appoint local officials or elect them or combine the elective and appointive system as was done here. If we assume *arguendo* that where a State provides for an election of a local official or agency—whether administrative, legislative or judicial—the requirements of *Gray v. Sanders* and *Reynolds v. Sims* must be met, no question of that character is presented.[64]

Appraising this statement, Professor Dixon has noted that "Justice Douglas seems to be saying two things: a state may 'appoint' non-legislative officers to avoid 'one man-one vote'; but if there is an election, 'one man-one vote' applies regardless of the character of the duties of the elective officials."[65] This interpretation means, of course, that the election of judges by districts must conform to the *Reynolds* formula. While the issue was never directly faced, it appeared that in early decisions the Supreme Court regarded judicial elections as part of the overall reapportionment picture. Had this question arisen at the time of

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[62] 372 U.S. 368 (1963).
[63] 387 U.S. 105 (1967).
[64] *Id.* at 111.
[65] R. DIXON, DEMOCRATIC REPRESENTATION: REAPPORTIONMENT IN LAW AND POLITICS 548 (1968).

the *Sailors* litigation, the election of judges would have undoubtedly been included under the "one person, one vote" requirement. Now, the situation has changed as recent appointments to the Supreme Court have brought about a reversal in the trend toward mathematical stringency and have been a factor in exempting the judiciary from the equality principle. The current trend is subject to criticism.

To begin with, the *Hadley* qualification states that the duties of an elected official could be "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. . . ."[66] An example of the type of public office included in this stipulation would be a soil conservation district in which the board members are elected only by those people, usually farmers, who are affected by the government's decisions. Also, some counties in southern states elect an officer popularly known as the "cotton weigher" who checks the accuracy of warehouse scales to protect the farmer from fraud, and generally, only farmers can vote for such officials.[67] Throughout the United States there are other special officers who perform unique duties in local government. Their election by the people they serve would not seem to affront the Constitution and subsequent to *Wells*, the Supreme Court rendered a decision which illustrates how the *Hadley* exception should be enforced. *Salyer Land Co. v. Tulare Lake Basin Water District*[68] concerned a California statute providing for the election of the governing board in water storage districts. Under this provision district landowners are allowed to participate even if they are not residents, and votes are apportioned among the landowners according to assessed land valuations. This scheme was upheld in light of the district's limited purposes and the disproportionate effect it had on the landowners. Consequently, voting can be restricted to those who own land in the district, and it is recognized that since some landowners are affected more than others, they should have a greater voice in the elections.

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66 Hadley v. Junior College Dist., 397 U.S. 50, 56 (1970).

67 *See* S.C. CODE ANN. § 13-101 (1962) (election of public weigher by county governing body after petition of at least 50 cotton growers).

68 —— U.S. —— (1973).

Salyer, it is submitted, illustrates the proper application of the *Hadley* caveat, yet not even by the broadest extrapolation is it possible to include judicial elections in the same category. Obviously, the *Wells* three-judge panel read into the *Hadley* caveat only what they wanted to apply. The Supreme Court dissenters seemed to realize the fallacy of the lower court's logic because they charged that it "seized upon the phrase 'persons . . . to perform governmental functions' and concluded that such persons were limited to 'officials who performed legislative or executive type duties.'"[69] But, for some inexplicable reason, even the *Wells* dissent did not deal with the crucial principle that only people disproportionately affected by an elected official are entitled to a greater vote. On this score alone the *Hadley* exemption is inapplicable to the judiciary because the annals of American jurisprudence teach that the courts deal equally with all people who appear before the bench.

Clearly in the situations where courts decide cases between litigant-voters it can be said that judges disproportionately effect voters, yet this context is not analogous to *Salyer* and should not bring judges within the purview of the *Hadley* exception. In the broader and more proper sense, the effect of judicial decision-making is the same for all citizens.

Conclusion

The impact of distinguishing judicial from executive and legislative elections will be significant among the states. Although a variety of systems are used to select judges, the most prevalent method is by election. Currently, nineteen states choose all or most of their judiciary by partisan ballot while eighteen states employ a nonpartisan ballot.[70] It is patently understood by the legal profession, legislators, political scientists, public administrators and others concerned with the judicial process, that rulings by the courts do affect public policy and, in effect, legislate. This is particularly true of the highest courts of appeal where most laws eventually undergo judicial scrutiny. It would seem more consistent with the interests of democracy to require that

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[69] Wells v. Edwards, —— U.S. ——, —— (1973) (dissenting opinion).

[70] COUNCIL OF STATE GOVERNMENTS, THE BOOK OF THE STATES 130-32 (1972).

when judges are chosen by popular election, it must be in pursuance of an egalitarian principle. Otherwise, in the same manner as legislatures, the state courts could, as a result of malapportionment, become unbalanced in favor of particular interests and distort the democratic framework of our governmental and political institutions.