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THE CONSTITUTIONALITY OF PROPORTIONAL REPRESENTATION AS APPLIED TO ELECTIONS IN THE STATE OF MISSOURI

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The question to be discussed herein is whether it would be possible under the present constitution of Missouri to change the method of electing certain representative bodies so as to put into effect the system of proportional representation known as the Hare System, or some other plan accomplishing in essentials the results which the Hare system is designed to effectuate.

Proportional representation may be defined as any plan of selecting the members of a representative body in such a way as to enable each political party or other more or less like-minded group of any considerable size to elect a number of members bearing approximately the same ratio to the total membership of the body as the votes cast by such group bear to the total votes cast. Proportional representation is offered by its advocates as an improvement on the plurality system of voting which at the present time prevails in the election of most representative political bodies in the United States, under which the members of the body are either elected at large, in which case a majority of the electorate elects all the representatives and the minority, no matter how large, is unrepresented, or else they are elected by geographical districts, in which case the majority of the voters resident in any one district casts the only effective vote for the representative or representatives from that district. Proportional representation is designed not only to give minorities representation in proportion to their voting strength, but also to prevent a majority or plurality being denied its due share of representation as it frequently is under the geographical voting district method, when a majority or plurality of the whole electorate is so distributed that it does not have a plurality of the votes in a majority or plurality of the districts. Under the schemes of proportional representation most in use, geographical divisions of the electorate are not entirely abolished, but there are relatively few such geographical divisions, the number of

representatives to be elected from each is relatively large, and within each district the principle of proportional representation is observed.

The Hare System is a particular method of securing proportional representation which is generally favored by the proponents of proportional representation in this country as perhaps the most nearly perfect practicable scheme which has yet been devised. It combines with the principle of proportional representation the idea of the preferential ballot and makes it possible, without undue inconvenience, not only for each political party of any considerable size to receive its proportional share of representation, but also for the individual voter to express his preferences between different candidates of the same party, or among all the candidates regardless of party and for the voters to group themselves automatically according to their real preferences without being limited to groupings according to organized political parties.

An adequate appreciation of the issues involved in a consideration of the constitutionality of the Hare System can hardly be gained without a more detailed knowledge of the workings of the Hare System than can be given in the space here available. However, the essential features of the plan may perhaps be summarized as follows: Whereas, under the plurality system of voting, the voter votes for as many candidates as there are representatives to be selected, if the voting is at large, or for as many candidates as there are representatives allotted to his district, if the voting is by districts, and each vote is of equal effect, under the Hare System the voter may vote for as many or as few candidates as he pleases, but in a serial order of preference, indicating a single first choice, a single second choice, and so on for as many choices as he desires to express. He is given to understand that his vote will help elect his first choice if there are sufficient other votes for that candidate to elect him, but will be counted for his second choice if it cannot help elect his first choice, and so on down the line. Any candidate is deemed entitled to a seat on the body to be elected if his vote equals or exceeds a certain "quota", calculated by dividing the total number of valid votes cast by the number of places to be filled, plus one, and taking the next largest whole number. This quota is (or purports to

be)[1] the smallest possible number of votes which might be received by each of as many candidates as there are places to be filled, without leaving enough other votes to give an equal or greater vote to any other candidate. All candidates who receive at least a quota of first-choice votes are first declared elected. If a candidate receives more than a quota, his surplus votes are distributed, or transferred, in accordance with the indicated second choices, among candidates having less than a quota, until the total of first and second choice votes for such candidates amounts to a quota. If the candidate indicated as second choice on a particular ballot which is to be transferred has already received a quota of votes, that ballot is transferred to the candidate indicated as third choice, or to the one highest in order of preference who has not yet received a quota. If the places are not all filled by the vote for candidates who receive a quota of first choice ballots, together with the transference of surplus ballots of candidates who have received more than a quota, then the candidates who have not yet received a quota are eliminated, one by one, beginning with the one with the smallest number of first choice votes, and their ballots distributed among the remaining unelected candidates according to the indicated second or subsequent choices in the same manner as surplus ballots are distributed, until as many candidates have received a quota of first choice and transferred votes combined, as there are places to be filled, or until the successive eliminations have left no more than enough candidates to fill all the positions. For a more detailed explanation of the Hare System, reference may be had to the cases of *Wattles ex rel. Johnson v. Upjohn* and *Reutener v. City of Cleveland, et al., infra,* or to the publications of the Proportional Representation League.[2] Various modifications of the Hare System have been devised, but for present purposes the main features of the scheme may be taken to be as above outlined, except where attention is called in the course of this discussion to specific modifications thereof.

[1] Certain refinements on this method of calculating the quota have been devised, but the method above described is sufficiently accurate for ordinary purposes. See Hoag & Hallett, Proportional Representation (1926) pp. 378 ff.

[2] For a still more complete exposition of the Hare system and of proportional representation in general, see Hoag & Hallett, *op. cit. supra,* n. 1.

As there can obviously be no such thing as proportional representation in the case of a single official, the only officers in Missouri in whose election the use of the Hare System might reasonably be suggested are members of (a) the State legislature, (b) the legislative bodies of municipalities, and (c) local school boards or boards of education.[3] None of these bodies is now elected by the Hare System or any other plan of proportional representation. In considering whether the Hare System, with or without modifications, could be made applicable to the election of any of these representative bodies without amending the Constitution of Missouri, it is necessary to classify the bodies according to whether the provisions regulating their election are found in the Constitution, the statutes or elsewhere. The classification is as follows:

(I) The State legislature or General Assembly of the State of Missouri is in a class by itself, since it derives its existence directly from the State Constitution, which specifically provides how its members shall be elected.[4] The Constitution prescribes that members of the upper house shall be elected by single member districts, which of course excludes the possibility of proportional representation without constitutional change. Members of the lower house are required to be elected by single member districts, except in certain cases, where the number of representatives from any one district may in no case exceed four. There seems to be nothing in this particular portion of the Constitution which would preclude the legislature from prescribing the Hare System for elections within these multiple-member districts, but since only a very remote approximation to proportional representation could be achieved where there are only two, three or four representatives to be elected by a particular body of voters, and since it is questionable whether proportional representation would be of much value unless extended to the whole legislative body, or at least to the whole of one house thereof, the idea of the adoption of the Hare System limited to the multiple-member districts may be dismissed from consideration. It may

[3] The Hare system might conceivably be applied to the selection of presidential electors and representatives in Congress from Missouri, but since these offices derive their existence from the Federal Constitution and not from the State, they are not within the scope of this discussion.

[4] Art. IV, Secs. 2, 3, 5, 6.

therefore be said, for all practical purposes, that to apply the principle of proportional representation in any form to the election of the members of either or both houses of the Missouri legislature, it would be necessary to amend those sections of the Constitution which provide for the organization of that body and the election of its members.

(II) Section 16 of Article IX of the Constitution of Missouri authorizes cities of more than one hundred thousand inhabitants to adopt charters for their own government, "consistent with and subject to the Constitution and laws of the State". Section 17 provides for the amendment of such charters without specifically repeating the words "consistent with and subject to the Constitution and laws of the State"; but it must undoubtedly be presumed that no provision could be inserted in a municipal charter by way of amendment which it would not be lawful to include in an original charter. Separate provision is made by sections 20 to 26, inclusive, of this Article, for the adoption and amendment of a charter by the City of St. Louis, but the same provision with respect to consistency with the Constitution and laws as is found in section 16, is three times repeated in the sections applicable to St. Louis.[5] It therefore follows that to determine whether chartered cities, including St. Louis, have the right, in the exercise of their home-rule privileges, to adopt proportional representation in the election of their governing bodies, it is necessary to inquire whether there is anything which expressly or impliedly forbids it, first, in the Constitution, or, second, in the laws of the State applicable to such cities.

(III) Cities other than those referred to in the preceding paragraph are not specifically mentioned in the Constitution, and they derive their form of government solely from acts of the legislature, which prescribe how the governing body of each class of city shall be elected. Local boards of education likewise are not mentioned by the Constitution and derive their existence directly from legislation. With respect to these two classes of bodies it may be said that the introduction of proportional representation could be accomplished by changes in the pertinent statutory law, unless there is some constitutional provision of general application which expressly or impliedly prohibits it.

[5] Secs. 20, 22 and 23.

Since it is beyond the scope of this discussion to suggest the specific changes in the statutory law which would be necessary to authorize the use of the Hare System in the election of particular bodies, it is apparent from the foregoing analysis that the chief subject of inquiry in the remainder of this discussion must be whether there is any provision of a general nature in the Constitution of Missouri,—for example, in the article entitled "Suffrage and Elections"[6]—which expressly or impliedly authorizes or prohibits the introduction of the Hare or a similar system of proportional representation in the election of such bodies as municipal boards of aldermen or city councils, and local boards of education. There are no provisions of the Constitution which either authorize or prohibit, by express language, or by obvious implication, the adoption of a plan of proportional representation anywhere in the State. It is therefore necessary to inquire whether there are any provisions which, though not in terms directed against proportional representation, might be expected to be construed by the courts as impliedly prohibiting the Hare System, because inconsistent with some of its essential features.

In considering this question it will be most helpful to begin with an examination of what the courts of other states have said with respect to the constitutionality of the Hare system, and of other systems of voting which have something in common with it. It must be remembered, however, that the constitution of each state is unique, and that precedents from other states are valuable for present purposes only insofar as the constitutional provisions relied on therein as authorizing or prohibiting proportional representation resemble provisions which are found in the constitution of Missouri. It must further be borne in mind that the courts of Missouri are not bound to follow the precedents existing in other states, even when based on constitutional provisions identical with the relevant provisions of the Missouri constitution, but are at liberty to construe the organic law of their own state in accordance with their own judgment as to the meaning of its provisions.

There are only four reported cases in the United States passing on the question of the validity of the Hare system under the constitutions of the respective states in which the cases arose, and

[6] Art. VIII.

there are no cases on other systems of proportional representation, properly so-called. There are, however, a few decisions involving the validity of various devices for securing minority representation, though not actually proportional representation, on elective bodies, and there are a few cases on the constitutionality of preferential voting, which is one of the features incorporated in the Hare system. Cases of all these classes will be found to have some degree of relevancy in showing in general what sort of tests have been applied by the courts in determining the question of the constitutionality of departures from the traditional system of plurality voting.

Of the four decisions passing directly on the constitutionality of the Hare system, two were against its validity and two in favor of it. The adverse decisions were rendered in the Michigan case of *Wattles ex rel. Johnson v. Upjohn*[7] and in the California case of *People ex rel. Devine v. Elkus et al.*[8] The favorable decisions were rendered in the Ohio cases of *Reutener v. City of Cleveland et al.*[9] and *Hile v. City of Cleveland.*[10] Both these Ohio decisions were rendered by the same court, at the same time, and on the same facts, the only difference being in the grounds on which the charter amendment embodying the Hare system was attacked.

Many passages could be pointed out in the decisions adverse to the constitutionality of the Hare system which are open to severe criticism as being poorly reasoned or wholly irrelevant to the decision of the legal questions involved. But it will be more to the point, in the present inquiry, to ignore these incidental matters and to give attention only to the essential grounds on which the respective decisions seem to be based, with the object of determining to what extent the same arguments are applicable under the constitutional provisions of Missouri.

For this purpose it will not be necessary or useful to state the facts in the respective cases, other than to say that in each the court passed on the constitutionality of a city charter or amendment thereto providing for the election of the city council or commissioners by the Hare system (without party lists), with no

[7] (1920) 211 Mich. 514, 179 N. W. 335.
[8] (1922) 59 Cal. App. 396, 211 Pac. 34, (hearing denied by California Supreme Court).
[9] (1923) 107 Ohio St. 117, 141 N. E. 27.
[10] (1923) 107 Ohio St. 144, 141 N. E. 35.

peculiar modifications which appeared to have any bearing on the validity of the system, except that the provision for "divided ballots"[11] which is included in the most elaborate forms of the Hare system evidently was not incorporated in the form considered in these cases.

Two provisions of the constitution of Michigan were relied on by the court in *Wattles ex rel. Johnson v. Upjohn, supra,* in holding unconstitutional the Hare system as embodied in a recently adopted charter of the city of Kalamazoo. These provisions were, first, a clause defining the qualifications of voters and stating that "in all elections" every person possessing these qualifications "shall be an elector entitled to vote," and, second, a clause reading, so far as material: "No city or village shall have power to abridge the right of elective franchise, . . ."

The latter provision, the court said, "can fairly be construed to mean in the light of established conditions and laws that the right of each elector to exercise the franchise and the relative value of his vote should be preserved as it existed under the Constitution and general laws of the State".

If it is true that a provision prohibiting a municipality from abridging the right of elective franchise means that the right of suffrage must be preserved exactly as it has theretofore existed in that community, then the court's conclusion was undoubtedly correct, for it can not be denied that any system of proportional representation does require a change in the manner and effect of the exercise of the franchise wherever the traditional plurality system of voting has theretofore prevailed. But there is no provision in the Missouri constitution expressly forbidding the legislature or municipalities "to abridge the right of elective franchise", and the Michigan case should therefore not be regarded as a precedent in Missouri, so far as that part of the decision is concerned.

However, the court expressed a further ground for its decision, based on the assumption that the clause of the Michigan constitution guaranteeing qualified electors the right to vote "in all elections" impliedly conferred the right to vote for every officer to be

[11] A provision permitting a voter to indicate more than one first choice, his vote counting as only a fraction of a vote for each candidate so indicated, and the total of all his first choice votes, being equal to a single vote.

elected. The court declared that under the Hare system the voter's right to vote for every officer was abridged inasmuch as that system permitted him to vote for only one first choice in the election of a body to which a number of men were to be elected, though the voter could indicate as many successive single choices as he pleased. In the words of the court:

> Under the Kalamazoo charter seven commissioners were to be elected at large. Each elector had the right to vote for seven candidates, by a vote not only "of equal effect with, and no more than, the vote of every other elector for every officer to be elected," but of equal potential value as to each of the seven candidates he voted for. As construed in the Maynard Case, the Constitution gave him the right to express his choice by a ballot vote for each of the seven commissioners to be elected; and having done so, he "exhausted his privilege." The Hare system limits his power to express his preference "in this manner" to but one candidate of the seven, only permitting him to express a second choice for one other, and so on by numerically dwindling and weakening choices until the elector has expressed thus "as many choices as you (he) please." As said in the Maynard Case, "it is not in the power of the legislature (nor a city adopting a charter under the home rule act) to give his preference or choice, without conflicting with these provisions of the Constitution, more than a single expression of opinion or choice"; and he has the right to express that single choice as to each of the officers to be elected in his district. While each voter can under the Hare system vote for all candidates to express sequential choices as provided, it is evident that his vote is primarily and positively effective for only one candidate.

The *Maynard* case, referred to in the foregoing quotation, was *Maynard v. Board of Canvassers*,[12] which involved the constitutionality of a statute providing for cumulative voting for members of the state legislature in those districts which were entitled to more than one representative. That is, the voter was allowed as many votes as there were representatives to be elected from the district, and he might cast them all for one candidate or distribute them among a number of candidates in any way he saw fit. This statute was held to be unconstitutional because it did away with plurality voting and gave to those voters who chose to exercise it, the right to vote more than once for a single can-

[12] (1890) 84 Mich. 228, 47 N. W. 756.

didate. The court could point to no express provision of the Michigan constitution which prohibited a voter from casting more than one vote for a candidate, but seemed to derive that prohibition by implication from the provisions of the constitution guaranteeing to all qualified electors the right to vote in all elections, and providing that all voting should be by ballot, with certain immaterial exceptions, and, in general, from the representative form of government provided for by the constitution. Some of the most significant language of the court's opinion is as follows:

> The Constitution is the outgrowth of a desire of the people for a representative form of government. The foundation of such a system of government is, and always has been, unless the people have otherwise signified by their constitution, that every elector entitled to cast his ballot stands upon a complete political equality with every other elector, and that the majority or plurality of votes for any person or measure must prevail. All free representative government rests on this, and there is no other way in which a free government may be carried on and maintained. That the majority must rule, lies at the root of the system of a republican form of government no less than it does in a democratic. When there are more than two candidates for the same office placed in nomination, it may often happen that one candidate, although he may receive more votes than any other, may not receive a majority of the votes cast. Still the principle of majority rule is preserved, for in such case more of the electors prefer such candidate than they do any other particular candidate to represent them. It is the constitutional right of every elector, in voting for any person to represent him in the Legislature, to express his will by his ballot, and such vote shall be of as much influence or weight in the result, as to any candidate voted for, as the ballot and vote of any other elector. The Constitution does not contemplate, but by implication forbids any elector to cast more than one vote for any candidate for any office. This prohibition is implied from the system of representative government provided for in that instrument. The political history of the State from 1836 to the present time shows that every elector has an equal voice in the choice of those who shall represent the people in the Legislature. It is implied in those provisions of the Constitution which require that representatives in the Legislatures shall be chosen by ballot, and by single districts. By these provisions every elector expresses his wish by ballot, and a single vote is implied. It is implied in those provisions of the Con-

stitution that declare that every male citizen of twenty-one years of age, and possessing the qualifications prescribed, shall be entitled to vote at all elections; and that all votes shall be given by ballot, except for such township officers as may be authorized by law to be otherwise chosen.

The Court quoted the following from Bouvier's Law Dictionary, under the title "Vote":

> One of the cardinal principles on the subject of elections is that the person who receives a majority or plurality of the votes is the person elected. Generally, a plurality of the votes of the electors present is sufficient, but in some states a majority of all the votes is required. Each elector has one vote.

The court also remarked that no one would contend that a law would be valid which declared that person elected who received the least number of votes, even though there was no express constitutional provision prohibiting such a law, and that this was practically what was accomplished under the law under consideration, as applied to the circumstances of the case, because, if given effect, it would have brought about the election of a candidate who was voted for by a minority of the voters.

It would appear that the court rendering this decision regarded the plurality system of counting votes as inherent in the very nature of an election, unless a change were brought about by a constitutional amendment. In a dissenting opinion it was pointed out that, if cumulative voting violated a fundamental principle of republican government, as the majority opinion indicated, then it could not be adopted even by an amendment to the state constitution, because it would be violative of the clause of the Constitution of the United States guaranteeing to every State a republican form of government. But it has never been denied, and several times has been expressely conceded, that a state may authorize cumulative voting or other more or less similar devices for securing minority representation, by an express constitutional provision.

Attention may here be called to the case of *State ex rel. v. Constantine*,[13] which was relied on as a precedent in both the *Maynard* and the *Wattles* cases, *supra*, and which seems to be the first case to lay down the proposition that a constitutional pro-

[13] (1884) 42 Ohio St. 437.

vision, setting forth the qualifications of voters, and stating that all persons having these qualifications should be entitled to vote "at all elections", should be construed as though it included the words "and for every officer". In the *Constantine* case the court held unconstitutional an act which, among other things, attempted to provide for the election of a non-partisan, or bi-partisan, board of police commissioners in certain cities, by providing that, though four members of the board were to be elected, no one voter might vote for more than two candidates. The court said:

> The constitution does not provide in detail the manner of holding elections, leaving that to legislative discretion, but it does provide that all elections shall be by ballot, and, having prescribed the qualifications of an elector, provides that each elector "shall be entitled to vote at all elections." [Citing section number.] By this article we have no doubt that each elector is entitled to vote for each officer, whose election is submitted to the electors, as well as on each question that is submitted. This implication fairly arises from the language of the constitution itself, but is made absolutely certain when viewed in the light of circumstances existing at the time of its adoption. No such thing as "minority representation" or "cumulative voting" was known in the policy of this state at the time of the adoption of this constitution in 1851. The right of each elector to vote for a candidate for each office to be filled at an election had never been doubted. No effort was made by the framers of the constitution to modify this right, and we think it was intended to continue and guarantee such right by the provision that each elector "shall be entitled to vote at all elections." Such right is denied by this statute which provides for the election of four members of the board of police commissioners, but denies to any elector the right to vote for more than two persons for such commissioners.

It may be noticed that in the *Maynard* and *Constantine* cases, *supra*, the effect of the innovations in voting rights which it was sought to introduce would be minority representation but not proportional representation. In the *Maynard* case, in the particular instance before the court, there were only two offices to be filled, and consequently the effect of the cumulative voting provision as it worked out in practice was to give the minority party equal representation with the majority. However, the fact that

proportional representation is inherently a much fairer system than the plans of minority representation involved in the *Maynard* and *Constantine* cases has never seemed to carry any particular weight with the courts, so far as may be judged from their opinions.

Before further discussing the doctrine of the foregoing cases that the right to vote at all elections means the right to vote for every officer to be elected, it will be well to refer to the second of the cases holding the Hare system unconstitutional, namely, *People ex rel. Devine v. Elkus, supra,* which was decided principally on this same ground. The constitutional provision relied on was one providing that every qualified elector should "be entitled to vote at all elections which are now or may hereafter be authorized by law." The court said in part:

> No one would contend that a law would be valid which deprived a qualified elector of the right to vote at an election. . . . The constitutional right to vote would be a barren privilege if the Legislature could limit its exercise to one office or one proposition to be voted on. The right to vote "at all elections" includes the right to vote for a candidate for every office to be filled and on every proposition submitted. The election of nine members of the city council is the election of persons to nine offices as fully as if the offices were distinct in name and in the duties to be discharged, and it is as far beyond the legislative power to limit the elector to the right of voting for one candidate therefor as it would be in the election of state or county officers.

While the *Wattles* case, *supra,* might be rejected as a precedent by Missouri courts, on the ground that it was based at least in part on a constitutional provision which has no counterpart in the Missouri constitution, the same could not be said of the *Elkus* case, because in that case the decision was based squarely upon the construction placed by such cases as those hereinabove cited on the words "shall be entitled to vote at all elections" in a constitutional provision stating the qualifications of voters. The constitution of Missouri has a provision which, so far as concerns the present question, is not materially different.[14]

[14] Art. VIII, Sec. 2: "Electors, qualifications of.—All citizens of the United States [having certain specified qualifications] . . . and no other persons, shall be entitled to vote at all elections by the people; . . . ."

That the Missouri courts would construe such a provision as impliedly prohibiting the introduction of the Hare system of voting in municipal elections does not necessarily follow from the fact that the courts of Michigan and California have done so. The doctrine of the *Wattles* and *Elkus* cases is certainly open to criticism. In the first place, it seems on the face of things to be stretching language pretty far to say that "at all elections" is equivalent to "for every officer". The constitutions of some States expressly provide that persons having the qualifications of electors shall have the right to vote in the election of all officers, and in those states a doctrine similar to that of the *Constantine* case has greater justification. The decisions which have been rendered in such States have all involved limited voting as did the *Constantine* case.[15]

Yet there is a sense in which it is not unreasonable for a court to say that a voter has the right to vote for every officer to be elected, even if the constitution does not say so in so many words. In an election in which, for example, a sheriff, a coroner and a recorder of deeds were to be chosen, if a statute purported to provide that a voter might vote for a candidate for any one of those offices, but could not vote for candidates for all three, a court would undoubtedly find some ground on which to hold the statute void, and could hardly be criticised for doing so. The true ground of criticism of the *Constantine* case, and those following it, would seem to be that the right to vote for every officer to be elected does not necessarily mean the right to vote for all the members of a body such as a city council or board of aldermen, all of whom have the same title and functions, and who act only as a group. Where voting is by districts instead of at large, the voter does not have the right to vote for all the members of a legislative body, yet his constitutional rights are not regarded as infringed.[16] The only decision which could be regarded as contrary to this proposition is *State v. Wrightson*,[17] which proceeded on the theory that the New Jersey constitution expressly made counties the units for

[15] Opinion to the House of Representatives, (1898) 21 R. I. 579, 41 Atl. 1009, (a very brief advisory opinion); McArdle v. Jersey City, (1901) 66 N. J. L. 590, 49 Atl. 1013; State ex rel. Bowden v. Bedell, (1902) 68 N. J. L. 451, 53 Atl. 198.

[16] State ex rel. Guergin v. McAllister, (1895) 88 Tex. 284, 31 S. W. 187.

[17] (1893) 56 N. J. L. 126, 28 Atl. 56.

the election of members of the general assembly, and thereby impliedly prohibited a division of the counties into smaller constituencies by the legislature.

In calling attention to the fact that members of a legislative body may constitutionally be elected by districts, as showing that it is not necessary that each elector shall vote for every member of the body, it is not intended to repeat the argument, which is sometimes made in favor of the Hare system, that proportional representation merely divides the voters into constituencies based on similarity of political opinion, rather than on arbitrary geographical divisions. There are at least two differences between the geographical constituency and the constituency under the Hare system which make it doubtful whether much reliance can be placed by the advocates of proportional representation on the supposed analogy between them. In the first place, it is the very act of voting which determines to which constituency under the Hare system a voter belongs, whereas in the case of the geographical voting district, he belongs to a constituency predetermined by extrinsic facts. The situation under the Hare system is somewhat, though not entirely, analogous in this respect to that which would exist if, under the existing system the voter might vote in any electoral district in which he chose to case his ballot, regardless of his residence. The second difference between the geographical voting district and the constituency under the Hare system is that, whereas the geographical district in which a voter resides remains fixed, at least for the duration of the election, the constituency to which a voter would be regarded as belonging under the Hare system would change every time his ballot is transferred from one candidate to another. It is not insisted that these distinctions are so vital that they completely vitiate the effect of the argument based on the analogy between the constituency under the Hare system and the geographical constituency. Still less is it intended by these remarks to express an opinion as to the relative merits of the constituency under the Hare system and the geographical constituency, on general principles. The purpose of calling attention to the differences between the two concepts is simply to make it clear that a court of law which was not already favorably disposed toward proportional representation on other grounds, could easily find reasons

other than the mere novelty of the concept of the constituency based on similarity of ideas for rejecting the argument that the Hare system is merely another form of division of the electorate into constituencies analogous to the conventional division into geographical districts. At all events the courts have rejected this analogy, in both the *Wattles* case and the *Elkus* case, *supra,* even if they have not expressed their reasons for doing so in the most lucid and convincing terms. In the *Wattles* case, the court said:

> Counsel very interestingly discuss the advantages of that theoretical method of districting constituencies by boundary lines of opinion, belief or policy, but however alluring in theory, such intangible, undefined theoretical demarkation by similar thought or views is not a legal substitute for what is in law recognized to be a voting constituency or geographically defined representative district, as the right of franchise has become established under our Constitution.

That as a matter of fact the Hare system does actually deprive the voter of the right to vote for all officers, in the sense meant by the foregoing line of decisions, while it may not be exactly self-evident, appears from reflection on the subject. Of course the voter can vote for as many persons as he pleases, but they must, under the Hare system as presented in all the cases in which its constitutionality has been pased on, be voted on in a serial order of preference, and the voter's second choice is counted only if his ballot cannot help his first choice. Under the plurality system, if the voter is entitled to vote for seven men, his vote for each one will be sure to be counted, although its effectiveness in the sense of helping to elect will depend, of course, on how many others vote the same way. Under the Hare system there is only a remote chance that the voter's seventh choice will be considered at all. The advocates of the Hare system of proportional representation may as well frankly admit that the voter's rights under that system are materially different from what they are under the plurality system, and that under the Hare system the voter does not have the right to vote for all the officers to be elected, with the same effectiveness as under the plurality system. It is of the essence of the Hare system that this must be so and the use of the term "single transferable ballot" in connection with the Hare system is a recognition of this fact. If it is unconstitutional to introduce a voting system which requires a different effect to be given

to the individual voter's ballot from that which it has under the conventional plurality system, then the Hare system is undoubtedly unconstitutional, and the only thing for the advocates of proportional representation to do is to work for an amendment to the constitution.

In view of the fact that the chief constitutional objection to the Hare system has always seemed to lie in the fact that the voter is precluded thereunder (at least as the system has been adopted in the cities where its constitutionality has been passed on by the courts) from voting for more than one first choice where a number of members of a board or body are to be elected, it may be asked whether this objection cannot be overcome by the use of a form of the Hare system which allows the voter, if he wishes, to vote for as many first choices as there are places to be filled. Preferential voting systems which allow the expression of as many first choices as there are officers to be elected, have, with the single exception of the case of *Brown v. Smallwood,*[18] been generally upheld, even when they make compulsory the voting for as many first choices as there are offices to be filled.[19]

But to give the voter the right to express as many first choices as there are officers to be elected, while it might save the constitutionality of the system, would mean the sacrifice of the principle of proportional representation, unless it were further provided either that those voters who wished to do so might vote cumulatively, more than one vote for a candidate, or that those who voted for more than one first choice should have their votes counted only as fractional votes. Every known system of proportional representation in which the voter may express as many first choices as there are places to be filled, involves either cumulative or fractional voting, both of which amount in substance to the same thing. But these devices simply reintroduce in a more direct and obvious form the very thing that is condemned in those

[18] (1915) 130 Minn. 492, 153 N. W. 953.

[19] Orpen v. Watson et al., (1915) 87 N. J. L. 69, 93 Atl. 853; Farrell v. Hicken, (1914) 125 Minn. 407, 147 N. W. 815; Adams v. Landon, (1910) 18 Idaho 483, 110 Pac. 280; and see State ex rel. Zent v. Nichols et al., (1908) 50 Wash. 508, 97 Pac. 728. It should be noted, however, that the two cases last cited involved primary and not general election laws, and it is commonly recognized that a good deal more leeway is allowed the legislative authorities in prescribing the methods whereby primaries are to be conducted than in regulating the actual election of candidates to office.

decisions which have held the Hare system unconstitutional, namely, a limitation of the voter's right to vote for as many candidates as there are officers to be elected and to have his vote for each candidate counted as equal in all respects to the vote of every other elector. It therefore appears that, if the Hare system as outlined in the *Wattles* case is unconstitutional, for the reasons stated in that case and in the *Elkus* case, the objection cannot be cured by a modification of the system without sacrificing the primary objective of the Hare system, proportional representation.

There is one ground of the decision in the *Wattles* case, *supra,* which deserves brief mention. The rules for counting votes under the Hare system in the form in which it was adopted in the Kalamazoo charter provide that, subject to the rule that as nearly as possible an equal number of ballots shall be taken from each precinct, surplus ballots which are transferred "shall be taken as they happen to come without selection." This introduces an element of chance into the determination of the result, which the court found objectionable. It must be conceded that this objection, as far as it extended, was well taken. It is no answer that, as a practical matter, the element of chance is so slight as to be negligible, due to the operation of statistical laws. It might just as well be said that it would be permissible to introduce a system whereby only ten or twenty-five or some other per cent less than all of the ballots cast at an election should be counted, "taken as they happen to come without selection", and the result of the election determined thereby. But there is a variation of the Hare system, known as the "exact method" as opposed to the "chance method", which eliminates this particular objection. As that change could be introduced into any proposal for proportional representation without otherwise affecting its efficacy except by making still more complex the process of counting ballots and also because the objection just mentioned is not the one principally relied on by the courts which have declared the Hare system unconstitutional, it may be dismissed from further consideration.

The authorities in support of the constitutionality of proportional representation will now be considered. The Ohio case of *Reutener v. City of Cleveland, supra,* upheld the validity of a charter amendment embodying the Hare system in exactly or almost exactly the same form that was declared unconstitutional

by the Michigan and California courts, and the attack upon the constitutionality of the system in the *Reutener* case was based on virtually the same line of argument as that which formed the ground for the decision in the *Elkus* case and one of the grounds for the decision in the *Wattles* case. It was contended, as in those cases, that the Hare system violated a clause of the State constitution providing that every person having certain qualifications should "be entitled to vote at all elections". The court refused to hold that this constitutional provision rendered the Hare system invalid as applied in an amendment to the charter of the City of Cleveland, although it was the Ohio court which, in the *Constantine* case, *supra,* first construed the constitutional provision in question as prohibiting a voting scheme under which the voter was not allowed to vote for as many candidates as there were offices to be filled.

Before considering the decision in the *Reutener* case in detail, it will be convenient to dispose of the other Ohio case upholding the Hare system as embodied in the Cleveland charter amendment. In *Hile v. City of Cleveland, supra,* this amendment was attacked on various constitutional grounds other than those relied on in the *Reutener* case, and other than those made the basis of the Michigan and California decisions adverse to the Hare system. The *Hile* case is interesting particularly because in it the proportional representation amendment was complained of as violating the Constitution of the United States, as well as conflicting with certain sections of the constitution and laws of Ohio. The court disposed of all the objections in rather short order. A writ of error in the *Hile* case to the Supreme Court of the United States was dismissed by that tribunal, without an opinion, on the ground that there was no substantial federal question involved.[20] It may therefore be concluded that, whatever may be said in various jurisdictions as to the validity of proportional representation under State constitutions, at all events a system like the Hare system does not violate any provision of the Constitution of the United States. As most of the grounds on which the Cleveland charter amendment was attacked in the *Hile* case were not specifically objections to the Hare system as such, but simply involved the question to what extent the people

[20] Hile v. City of Cleveland (1924) 266 U. S. 582.

of Cleveland were authorized to adopt a form of government different from that prevailing in other parts of the State, it will not be necessary for present purposes to examine the *Hile* case in detail, though some of its language with respect to the rights of Ohio chartered cities will be referred to hereinafter.

The *Reutener* case, on the other hand, dealt with the only ground of objection to proportional representation thus far considered which might be relied on under the Missouri constitution and which has carried weight with the courts of other States. The contention that the Hare system was invalid because it deprived the voter of the right to have his vote counted for as many candidates as there were officers to be selected, was criticized by the Court in the *Reutener* case in the following words:

> The court does not consider that this contention is established upon the facts. The ballot is counted every time that it is considered as adding one to or subtracting one from a group of votes. It is true that the vote may become effective in electing only one candidate, and in this sense possibly it may be "counted for only one councilman."
>
> However, plaintiff in error can hardly contend that a voting system which may at times deprive a ballot of its full effect is necessarily unconstitutional.
>
> That the effect of a vote is often nullified in our elections is axiomatic. It is a matter of common knowledge that national officials have been elected by an actual minority. John Quincy Adams, for instance, received fewer popular votes than Andrew Jackson in the election of 1824. . . . That is to say, votes of a plurality of electors are not always counted so as to be effective in national elections. It is also a matter of common knowledge, that, through the gerrymander, districts may be so defined as to be practically deprived of the effectiveness of their votes in elections, that is, a majority may be so districted as to become a minority, without power of electing its candidates.
>
> The vote of an elector, therefore, under our present form of state and national government may be shorn of its effect so far as the actual election of the elector's candidate is concerned, without invalidating the method of election.
>
> . . . . . .
>
> On the face meaning of this section the Hare System of Proportional Representation does not violate the Ohio constitution, for the elector is not prevented from voting *at any election.* He is entitled to vote at every municipal election,

> even though his vote may be effective in the election of fewer than the full number of candidates, and he has exactly the same voting power and right as every other elector.

While all of the foregoing language is encouraging to the advocates of proportional representation as showing, at least, that not all courts need be expected to take as unfavorable a view of the Hare system as the Michigan and California courts have taken, yet the *Reutener* case as a whole is not as helpful to the cause of proportional representation in Missouri as might have been hoped, because of a further ground of the decision. Although the majority opinion did criticize the *Constantine* case, saying that it "extended the plain language of the constitution far beyond the word-meaning of the provision", and that it added to the clause "shall be entitled to vote at all elections", the words "and for a candidate for each office to be filled at the election", the *Reutener* case did not expressly overrule the *Constantine* case, but, on the contrary, weakened the effect of its criticism thereof, by adding these words:

> Moreover, that case was decided before the home-rule provision of the Ohio constitution was enacted. Since then a whole new body of law has developed in regard to Ohio city government—a body of law giving to cities the widest possible latitude in the formation of their local governmental functions, limited only by provisions of the state constitution.
>
> . . . . . .
>
> To hold valid this system of voting adopted by the people of Cleveland is merely to carry out the plain meaning of the constitutional provision that municipalities shall have all powers of local self-government, and to give effect to the power which rightly takes precedence over all statutes and court decisions, the will of the people, as expressed in the organic law.

It would not be true to say that the sole ground of the decision in the *Reutener* case was that Ohio cities of the class to which Cleveland belongs have such an extraordinary degree of home-rule that the ordinary provisions of the constitution relating to the rights of voters at elections are not applicable to them to the same extent as such provisions are applicable to other cities in Ohio and as the constitutional provisions of other States are applicable to

the municipalities of those States. But there is ample reason to fear that a Missouri court might reject the *Reutener* case as a precedent in passing on any proportional representation system which might be introduced in a chartered city in Missouri, on the ground that such cities are not given by the Missouri constitution the same degree of autonomy as the City of Cleveland was held to enjoy. In a brief concurring opinion in the *Reutener* case, one member of the court took occasion to say that as to other than chartered municipalities the *Constantine* case had not been overruled and its principles still applied, and a dissenting opinion, after stating that the majority opinion did not change the interpretation of the constitution in the *Constantine* case, that "Each elector of the district is entitled to vote for a candidate for each office to be filled at the election", criticized the majority opinion on the evident assumption that the sole effective ground of that opinion was that the constitutional provision in question, as interpreted in the *Constantine* case, was inapplicable to home-rule cities under the Ohio constitution. The dissenting judge's criticism of the majority opinion, which criticism had some merit, provided his premises were correct, was that the section of the constitution conferring self-government on certain municipalities should not be construed as paramount to the section relating to the rights of voters, since it was possible to construe these two sections together so as to give effect to both.

At the time of the decision of the California case of *People ex rel. Devine v. Elkus, supra,* the Supreme Court of Ohio had not yet handed down the decision in the *Reutener* case, hereinabove referred to, but the California court which decided the *Elkus* case had before it a typewritten copy of the opinion of the Ohio Court of Appeals in the *Reutener* case, an opinion not to be found in any printed report. The conclusions of the Ohio Court of Appeals as to the constitutionality of the Hare system were the same as those later reached by the Supreme Court of Ohio, which affirmed the judgment of the Court of Appeals, but the language of the opinion of the Court of Appeals was, of course, different from that of the Supreme Court. The California court in the *Elkus* case took the view that the decision of the Court of Appeals in the *Reutener* case was based solely "on the proposition that the chartered cities of Ohio are given the right of local self-govern-

ment in the broadest sense". The California court refused to follow the Ohio decision on the ground that chartered cities in California were not endowed with such complete autonomy as the Ohio cities had. The California constitution authorized a municipality of the class under consideration to "frame a charter for its own government, consistent with and subject to this constitution"; and the special power granted by the constitution to such cities to provide in their charters the manner in which "and the method by which" their officers should be elected did not, as the court said, empower such cities to "deny electors the right to vote" or "abridge the constitutional right of qualified electors to vote".

If the validity of proportional representation as applied to the legislative bodies of Missouri cities depends on whether the status of such municipalities under the State constitution is more closely analogous to that of Cleveland or to that of the California cities, it seems most likely that the courts will decide against proportional representation. The provisions of the Ohio constitution conferring autonomy on chartered municipalities read respectively as follows:

> Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws.[21]
>
> Any municipality may frame and adopt or amend a charter for its government and may, subject to the provisions of section 3 of this article, exercise thereunder all powers of local self-government.[22]

It will be noticed that the only express limitation on the right of self-government provided for in these sections is the provision that police, sanitary and similar regulations must be "not in conflict with" general laws. Quite different are the provisions of the Missouri constitution above referred to which explicitly state that any charter adopted by chartered cities, including the City of St. Louis, shall be "in harmony with the Constitution and laws of the State." This language is even more restrictive than the clause of the California constitution above quoted, in that the Missouri charters must be in harmony with the laws as well as

[21] Art. VIII, Sec. 3.

[22] Art. VIII, Sec. 7.

the constitution of Missouri. In view of this provision a Missouri court could hardly hold, with respect to a Missouri chartered city, as the case of *Hile v. Cleveland, supra,* held with respect to chartered cities in Ohio, that if an amendment to the municipal charter conflicted with general laws relating to elections and the like, the charter provision would prevail, or that municipalities are vested with the power to do acts not authorized by the statutes of the State "so long as those acts come within the domain of local self-government". If the provision of the Missouri constitution above quoted is to be given what would seem to be the natural effect of its words, it will mean that the statutes, even if not the constitution of Missouri, will have to be amended in order to authorize the adoption of the Hare system in municipal elections. For the general election laws of this State undoubtedly establish the plurality system of elections, requiring that the candidate or candidates having the highest number of votes shall be declared elected. They also provide for the marking of ballots with a cross for each candidate to be voted for, which provision does not permit the indication of successive choices required by the Hare system. In the case of *State ex rel. Brown v. McMillan, et al.*,[23] the Supreme Court of Missouri decided that a municipal election to fill vacancies in a board of aldermen must be held subject to the general election laws of the State, such as those introducing the Australian ballot, and it would seem to follow that a general election of aldermen would be subject to the statutes which establish the plurality system of voting and direct how ballots shall be marked.

It may therefore be concluded that it would require changes in the legislation of Missouri relating to elections in order to make it possible for a chartered city to adopt the Hare system in the election of its board of aldermen or city council. Whether it would also require an amendment to the constitution depends on what view our courts would take of the interpretation of such general constitutional provisions as Article VIII, section 2, authorizing persons having the specified qualifications "to vote at all elections by the people", section 3 of the same Article, providing, among other things, that all elections by the people shall be

[23] (1891) 108 Mo. 153, 18 S. W. 784.

by ballot, and Article II, section 9, which provides that "all elections shall be free and open". None of these provisions by its express language actually demands an interpretation whereby the traditional plurality system of voting will be held sacrosanct and inviolable. But, as has been above pointed out, the courts of several other states have held that more or less similar constitutional provisions imply at least so much of the conventional system as will guarantee to every voter the right to cast for each officer to be elected a vote which will count equally in the result with every other vote cast by him and with the vote cast by every other elector.

In support of this proposition may be cited not only the *Wattles* (Michigan) and *Elkus* (California) cases involving the Hare system, but also the *Constantine* (Ohio) case on limited voting, the *Maynard* (Michigan) case on cumulative voting, and two concurring opinions, and perhaps dicta in the majority opinion, in *State of North Dakota ex rel. Shaw v. Thompson,*[24] relating to cumulative voting. In the last cited case the majority of the court held that the particular statute under consideration did not purport to authorize cumulative voting, but one judge, while agreeing with the majority that the act did not involve cumulative voting, said that if it did purport to authorize cumulative voting it was invalid. The following dictum in *State v. Wrightson,*[25] also supports the doctrine of the *Constantine* case to some extent:

> An act of the legislature providing that each qualified voter of the county should vote for only one of the members apportioned to the county, would be plainly unconstitutional.[26]

The Minnesota case of *Brown v. Smallwood,*[27] holding unconstitutional a system of preferential voting not involving minority representation, might be regarded as tending in the same general direction, although there are some important distinctions between the preferential system there involved and the Hare system.[28]

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[24] (1911) 21 N. D. 426, 131 N. W. 231.
[25] *Supra,* note 17.
[26] l. c. 202.
[27] *Supra,* note 18.
[28] Rathbone v. Wirth, (1896) 150 N. Y. 459, 45 N. E. 15, holding unconstitu-

In the foregoing enumeration no mention has been made of decisions holding limited voting invalid under constitutional provisions expressly authorizing the qualified elector to vote "in the election of all officers". Such decisions have been cited elsewhere in this discussion.

The authorities directly or indirectly in favor of the constitutionality of proportional representation include only the two Ohio cases on the Hare system, above referred to, and the Pennsylvania case of *Commonwealth ex rel. McCormick v. Reeder*,[29] upholding the constitutionality of limited voting. As has already been pointed out, the *Reutener* case is weakened as an authority applicable in Missouri by the fact that the decision rests in part on the peculiar degree of autonomy granted to chartered cities under the Ohio constitution. And the opinion in the *McCormick* case, while based partly on a refusal to read into the words of the constitution "vote at all elections", the additional words "also for every candidate of a group of candidates for the same office", was also in part based on a ground which could not be relied on in Missouri, to-wit: that the Pennsylvania constitution had long been construed in practice as not prohibiting limited voting. The constitution expressly authorized limited voting in certain cases, and was held by implication to make its adoption in other cases of the same general character discretionary with the legislature.

The case of *People ex rel. Longenecker v. Nelson et al.* [30] though containing a dictum to the effect that a provision for cumulative voting is not unconstitutional, does not really tend to support the constitutionality of the Hare system, but insofar as it has

tional a statute involving a form of limited voting, might possibly be cited as an authority adverse to the Hare system, but is distinguishable in principle. The principal grounds of the decision against limited voting, as applied in that case, were (1) that it gave the minority an equal voice with the majority, and (2) that a constitutional provision for the appointment of city, town and village officers "by such authorities thereof, as the legislature shall designate" authorized the legislature to empower the common council as a body to select a police board, but did not authorize the legislature to delegate to a part of the common council the exclusive right to vote for a part of the board, since a part of the council as distinguished from the whole body, was not a city authority. Limited voting by the general public was not involved. The statute in question was also subject to other objections having no application in the case of the Hare system.

[29] (1895) 171 Pa. St. 505, 33 Atl. 67.

[30] (1890) 133 Ill. 565, 27 N. E. 217.

any relevancy to the matter at all, recognizes the rule of the *Constantine* case in principle, though giving it a different application from that which was given it in the *Maynard* case. The cumulative voting provision was upheld because it was not compulsory for the voter to cumulate his votes, the court saying that, if the act had made the cumulation of votes compulsory it would have deprived the voter of the privilege of voting at the election of a part of the officers to be elected, and would therefore have been unconstitutional under the principle of the *Constantine* case.

As the foregoing discussion shows, the authorities on either side of the question of the constitutionality of the Hare system are very few, even if to the cases directly passing on that system are added those involving other voting systems, but turning more or less on the same questions which have been raised in the cases involving the Hare system. Each of the cases on either side of the question involved some features which would distinguish it from a case involving proportional representation which might arise under the Missouri constitution. Even if directly in point, the cases decided in other States would be in no sense binding on the courts of Missouri. The doctrine of the cases adverse to the Hare system involves considerable stretching of the language of the constitutional provisions relied on, but it has in its favor at least the fact that it has commended itself to a majority of the courts which have considered the question. For all of these reasons, the Missouri courts might decide either way on the question of the constitutionality of the Hare system, and would be able to find some support for their decision, both in precedent and on principle.

Perhaps some slight hint as to the general attitude the Missouri courts would take on this question can be derived from some of the language used by the Supreme Court of Missouri in *State ex rel. Brown v. McMillan.*[31] In discussing, in another connection, the provision of the Missouri constitution that "all elections shall be free and open," the court said:

> It is not merely the right of every elector to cast his ballot in an open place. It was designed that this vote so cast should be effective—carry its proper weight in effecting the result—as the voluntary act of a freeman.

[31] Note 23.

The court then quoted from *People v. Hoffman*:[32]

> Elections are free when the voters are subjected to no intimidation or improper influence. Elections are equal when the vote of every elector is equal, in its influence upon the result, to the vote of every other elector.

The above passages, of course, were not written by the court with anything like proportional representation in mind. They are only in the nature of straws showing in which direction the wind blows—the general trend of the judicial mind—and it must be admitted that they do not give much indication of what decision might be expected in a case involving proportional representation. It may be argued with much force that the Hare system comes much nearer than the traditional plurality system towards making the vote of every elector equal in its influence and effectiveness, but language such as that above quoted has more often been used by the courts in support of the doctrine of the *Constantine* case. However, it is to be hoped that, whenever sufficient popular sentiment shall have been awakened in favor of proportional representation to induce the State legislature to enact the statutory changes necessary to put it into effect in Missouri, the courts will see their way clear to decide in favor of the constitutionality of such legislation, there being nothing in the Missouri constitution which expressly prohibits it.

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[32] (1886) 116 Ill. 587, 5 N. E. 596, 8 N. E. 788.