

1 EXPEDITE
2 No hearing set
3 Hearing is set
4 Date: February 5, 2010
5 Time: 9:00 AM
6 Judge/Calendar: Judge Richard D. Hicks,
7 Motions – Summary Judgment

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/s/ Stephen K. Eugster

Stephen K. Eugster, pro se, 12/29/09

8 SUPERIOR COURT OF THE STATE OF WASHINGTON
9 IN AND FOR THE COUNTY OF THURSTON

10
11 STEPHEN K. EUGSTER,)
12)
13 Plaintiff,) No. 09-2-02873-4
14 vs.)
15 STATE OF WASHINGTON *et al.*,) BRIEF IN SUPPORT OF
16) PLAINIFF’S MOTION FOR
17 Defendants.) PARTIAL SUMMARY
18) JUDGMENT
19)

20 **I. ISSUE**

21 Whether Wash. Const. art. I, § 19¹ applies to the election of judges to the
22 Washington Court of Appeals.

23 **II. STATEMENT OF FACTS**

24
25 ¹ “All Elections shall be free and equal, and no power, civil or military, shall at
26 any time interfere to prevent the free exercise of the right of suffrage.”
27

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1 From the Declaration of Plaintiff in support of this motion the following
2 facts have been selected as appropriate to the motion:²

3 Plaintiff is a citizen, taxpayer, and qualified elector of the state of
4 Washington. As a voter he is entitled to vote for judges of the Washington Court
5 of Appeals, including the judges of Division I, Division II, and Division III of the
6 Washington Court of Appeals.

7 Defendant State of Washington is the State of Washington.

8 Defendant Washington Court of Appeals is a single Washington appellate
9 court below the Washington Supreme Court which was created by Wash. Const.
10 art. IV, § 30.³

11 Plaintiff, as a Washington lawyer, has represented numerous clients before
12 the Washington Court of Appeals and before each of the divisions of the court, in
13 particular, Division III. Plaintiff, as a litigant in his own right, has advanced
14 numerous public trust, public interest, and taxpayer cases which have been
15 appealed to Division III of Washington Court of Appeals and has argued such
16 cases primarily before Division III, but also before Division I and Division II.

17 The Washington Court of Appeals was created by amendment to the
18 Constitution of the State of Washington. Amendment 50, 1967 Senate Joint
19 Resolution No. 6; see 1969 p 2975, approved November 5, 1968. Wash. Const. art.
20 IV, § 30.

21 The judges of the Court of Appeals are to be elected and are elected. Wash.
22

23
24 ² Declaration of Stephen K. Eugster in Support of Plaintiff's Motion for Partial
25 Summary Judgment December 28, 2009.

26 ³ This provision provides for a "Court of Appeals" not "Courts of Appeal."
27

1 Const. art. I, § 19 provides that “[a]ll Elections shall be free and equal, and no
2 power, civil or military, shall at any time interfere to prevent the free exercise of
3 the right of suffrage.” Wash. Const. art. I, § 19 was in effect at the time of the
4 creation of the Washington Court of Appeals and still is in effect.

5 In addition, and related to Section 19, Wash. Const. art. I, § 12 provides
6 “[n]o law shall be passed granting to any citizen, class of citizens, or corporation
7 other than municipal, privileges or immunities which upon the same terms shall
8 not equally belong to all citizens, or corporations.” Wash. Const. art. I, § 12 was in
9 effect at the time of the creation of the Wash. Court of Appeals and still is in
10 effect.
11

12 **III. SUMMARY OF ARGUMENT**

13
14 Plaintiff asserts that the court should determine at the outset of these
15 proceedings that Wash. Const. art. I, § 19 applies to the election of judges to the
16 Washington Court of Appeals.
17

18 **IV. ANALYSIS AND ARGUMENT**

19 **A. Washington Declaratory Judgments Act.**

20 Plaintiff seeks declaratory judgment by the court with respect of the facts,
21 rights and claims asserted in the his complaint and seeks action, or actions, of the
22 court to enforce such declaratory judgment – all pursuant to Washington
23 Declaratory Judgment Act, RCW Ch. 7.24. The actions sought of the court are
24 those as proper to assure Plaintiff his rights under, and pursuant to, Wash. Const.
25 art. IV, § 30, Wash. Const. art. I, § 19, and Wash. Const. art. I, § 12. These rights
26 now are and have been, for many years, denied Plaintiff by Defendants and their
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1 predecessors in office, as the case may be, who have complied with certain
2 provisions of state of Washington statutes which violate Wash. Const. art. IV, §
3 30, Wash. Const. art. I, § 19, and Wash. Const. art. I, § 12.

4 There are controversies between the Plaintiff and the Defendants as to the
5 matters set forth herein, the constitutional correctness of the current Washington
6 Court of Appeals system, and the election of judges to the court.

7 **B. Wash. Const. Art. I, § 19, One Person, One Vote.**

8 Wash. Const. art. I, § 19 provides that elections are to be fair and equal.
9 Washington Court of Appeals judges are elected. Thus, the election of judges to
10 the Washington Court of Appeals is subject to Art. I, § 19.

11 There is no exception in the constitution which says that Art. I, § 19 does
12 not apply to election of judges to the Washington Court of Appeals. It applies to
13 the election of judges to the Washington Supreme Court and to the election of
14 judges to the various Washington Superior Courts. Such elections are at large so
15 the requirements of Art. I, § 19 are fulfilled. Wash. Const. art IV, §§ 3 and 5.

16 If there is an election for a state position or state office Wash. Const. art. I,
17 § 19 must be applied to the election. The right to vote is fundamental, and art. I, §
18 19 provides greater protection for a free and equal vote than does the federal
19 constitution's one person-one vote equal protection right. *Foster v. Sunnyside*
20 *Valley Irrig. Dist.*, 102 Wn.2d 395, 687 P.2d 841 (1984).

21 Article I, § 19 requires "that otherwise qualified voters who are significantly
22 affected by the results of an election be given an opportunity to vote in that
23 election." *City of Seattle v. State*, 103 Wn.2d 663, 673, 694 P.2d 641 (1985).

24 The right to vote in Washington is subject to fair apportionment and
25 "[w]hether the right to vote is in fact so apportioned is subject to strict judicial
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1 scrutiny.” *Foster v. Sunnyside Valley Irrig. Dist.*, 102 Wn.2d 395, 410, 687 P.2d
2 841 (1984).

3 The Washington Supreme Court has adopted an approach by which
4 apportionment is analyzed and judged. In *Story v. Anderson*, 93 Wn.2d 546, 553 -
5 54, 611 P.2d 764 (1980) the court considered the Island County district scheme for
6 the election of county commissioners. The court said:

7 In applying the one person, one vote analysis, the degree of inequality
8 of voter representation is measured by the ratio of the largest district
9 to the smallest and by the combined percentage deviation from the
10 average. *See, e.g., Mahan v. Howell*, 410 U.S. 315, 35 L.Ed.2d 320,
11 93 S.Ct. 979 (1973).¹

12 In the footnote to *Mahan v. Howell* above the *Story Court* explained how
13 the measurement process worked.

14 (fn1) The ratio figure is obtained by simply comparing the population
15 of the largest district with that of the smallest. The percentage
16 deviation figure is obtained by ascertaining first, the average size of
17 the districts. The percentage by which the largest district is
18 overpopulated and the percentage by which the smallest district is
19 under the average are computed. These two figures are added together
to yield the total deviation figure.^[4]

20 **C. *City of Spokane v. Rothwell.***

21 Additional support and understanding of how the Washington courts view
22 the election of judges is to be found in *Spokane v. Rothwell*, 141 Wn. App. 680,
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24
25 ⁴ See the plaintiff’s complaint. The complaint includes various applications of
26 the measurement process to elections of judges to the Court of Appeals and to Divisions
27 of the Court of Appeals.

1 170 P.3d 1205 (2007). There, the issue before the court was whether a judge who
2 is not properly elected has jurisdiction to act as a judge. Division III held that a
3 judge who was not properly elected did not have jurisdiction to act. The case was
4 reversed on other grounds on a petition for review to the Washington Supreme
5 Court. *City of Spokane v. Rothwell*, 166 Wn.2d 872, 215 P.3d 162 (2009).

8 **D. Wash. Const Art. IV, § 30 and the “Manner of Election” Provision.**

9 In the process of analyzing this case and determining whether it should be
10 brought, Plaintiff considered whether it could be argued that Section 30 and its
11 delegation to the legislature to deal with the “manner of election” of judges to “a
12 court of appeals” somehow excused the legislature from compliance with art. I, §
13 19.⁵ It does not. Here are a few reasons why:

14 First, had the people wanted to give the legislature power not have to
15 comply with the constitution and art. I, § 19 they would have said so. They would
16 have said something like this “[n]otwithstanding any provision of this
17 Constitution to the contrary. . . .” *E.g.*, Wash. Const. art. IV, § 29; Wash. Const.

23 ⁵ Plaintiff has written an article entitled *The Washington Court of Appeals: Fair
24 and Equal Election Rights Violated, An Opportunity for Judicial Improvement* (Revised
25 January 19, 2009). The article and the appendices to the article are to be found at
http://www.steveeugster.com/washington_court_of_appeals.htm.

1 art. VII, § 3.

2 Second, the language used is generic — it is similar to language used in
3
4 other parts of Washington law with respect of the rounding out of corporation and
5 associational structures. Section 30 (4) says “(4) Judges. The number, manner of
6 election, compensation, terms of office, removal and retirement of judges of the
7 court of appeals shall be as provided by statute.” Similar language was used in
8 Rem. Rev. Stat. (Sup.), § 3803-31 [P.C. § 4503-131] subsections I and III as
9 shown in *Twisp Mining Co. v. Chelan Mining Co.*, 16 Wn.2d 264, 274 (1943).
10
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12 Similar language is used in RCW 24.06.065. “ The designation of . . . may
13 have one or more classes of members. The designation of such class or classes, the
14 manner of election, appointment or admission to membership, and the
15 qualifications, responsibilities and rights”
16
17

18 RCW 24.03.100 provides “[d]irectors may be divided into classes and the
19 terms of office and manner of election or appointment need not be uniform. Each
20 director shall hold office for the term for which the”
21

22 Third, the manner of election effort, one might presume, is to be that which
23 is similar generically to the manner of election of judges already found in the
24 constitution, but with some variations consistent with the judges to be elected to
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1 the Washington Court of Appeals. That is to say, what was generally intended by
2 the language can be found in the constitution itself. For example with respect of
3 the Supreme Court Wash. Const. art. IV, § 3 provides in part:
4

5 The judges of the supreme court shall be elected by the qualified
6 electors of the state at large at the general state election at the times
7 and places at which state officers are elected, unless some other time
8 be provided by the legislature. The first election of judges of the
9 supreme court shall be at the election which shall be held upon the
10 adoption of this Constitution and the judges elected thereat shall be
11 classified by lot, so that two shall hold their office for the term of
12 three years, . . .

13 And, with respect of the Superior Courts of Washington Wash. Const. art.
14 IV, § 5 provides in part:

15 There shall be in each of the organized counties of this state a
16 superior court for which at least one judge shall be elected by the
17 qualified electors of the county at the general state election: Provided,
18 That until otherwise directed by the legislature one judge only shall
19 be elected for the counties of Spokane and Stevens; one judge for the
20 county of Whitman; one judge for the counties of Lincoln, Okanogan,
21 Douglas and Adams; one judge for the counties of Walla Walla and
22 Franklin; one judge for the counties of Columbia, Garfield and
23 Asotin; one judge for the counties of Kittitas, . . .

24 **E. *Wells v. Edwards.***

25 More than likely, Defendants will make the broad assertion that the
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1 principle of one person one vote does not apply to Washington judicial elections.
2 In doing so, Defendants will cite *Wells v. Edwards*, 347 F. Supp. 453 (MD La.
3 1972), *summarily aff'd*, 409 U.S. 1095 (1973).
4

5 *Wells v. Edwards* was an early 1970's Louisiana judicial election case
6 decided by a three judge United States district court panel having to with the
7 principle of one person one vote concerning judicial elections. In the case the
8 plaintiff contended that the districts from which judges were elected to the
9 Louisiana Supreme Court were out of proportion and should be properly
10 apporportioned. The district court held that "the concept of one-man, one-vote
11 apporportionment does not apply to the judicial branch of the government." 347 F.
12 Supp., at 454.
13
14
15

16 The case was an application of the district court's understanding of the law
17 of one person one vote under the due process clause of the of the Fourteenth
18 Amendment at the time of the case in 1970. It held that the law, as developed to
19 that point, limited the application of one person one vote under the Fourteenth
20 Amendment to the election of legislative representatives.
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23 *Wells v. Edwards* has no application in Washington. It does not have any
24 application to the case at hand. Our fair and equal election requirement is broader
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1 than the requirements of the 14th Amendment. *Brower v. State*, 137 Wn.2d 44, 68,
2 969 P.2d 42 (1998) (“The right to vote is fundamental, and art. I, sec. 19 provides
3 greater protection for a free and equal vote than does the federal constitution's one
4 person-one vote equal protection right.”) citing *Foster v. Sunnyside Valley Irrig.*
5 *Dist.*, 102 Wn.2d 395, 404, 687 P.2d 841 (1984). In *Foster* the court went on to
6 say “[b]ecause we find that the Washington Constitution goes further to safeguard
7 this right than does the federal constitution, we base our decision here upon the
8 Washington Constitution.” *Id.*

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12 This case does not apply to the purely Washington constitution issue
13 presented in this case. The recent North Carolina Supreme Court case of
14 *Blankenship v. Bartlett*, 455PA06-2, 681 S.E.2d 759 (N.C. 8-28-2009) is
15 instructive. There, the North Carolina Supreme Court held that *Wells v. Edwards*
16 did not apply to a situation where the issue was the application of a North Carolina
17 constitution equal protection requirement to the election of North Carolina
18 judges.⁶

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⁶ *But see, Johnson v. State*, 2006-2024, 965 So.2d 866 (La.App. 1 Cir. 6/8/07). There, the Louisiana court relied on *Wells v. Edwards* saying: “However, we have found no circumstance in which a Louisiana court has interpreted the one-person, one-vote rule more broadly than the federal jurisprudence.” The court maintained the view that the rule did not apply to the election of judges because “[j]udicial officers are not representatives of the people, and the function of the judiciary is to administer the law, not to espouse the cause of a particular constituency.”

1 **F. *Wells v. Edwards: No Longer Good Law.***

2 *Wells v. Edwards* is no longer good law. What was the decision? There
3
4 was no opinion, only a summary affirmance.⁷

5 Summary affirmance cases do not have the value other cases have. Justice
6
7 Rehnquist in *Edelman v. Jordan*, 415 U.S. 651, 671 (1974) said this about
8 summary affirmance cases:

9
10 [T]hese three summary affirmances obviously are of precedential
11 value in support of the contention that the Eleventh Amendment does
12 not bar the relief awarded by the District Court in this case. Equally
13 obviously they are not of the same precedential value as would be an
14 opinion of this Court treating the question on the merits. [Emphasis
15 added.]

16 For a discussion of this topic see Francisco Ed. Lim, *Determining the Reach*
17 *and Content of Summary Decisions*, 8 REV. LITIG. 165 (1988-1989). The strength
18 of such cases depends on consideration of the case in light of a number of factors.
19 These factors will be discussed below.

20
21 _____
22 Washington has interpreted its one person one vote rule more broadly than the equal
23 protection clause of the 14th Amendment. *Brower v. State*, 137 Wn.2d 44, 68, 969 P.2d 42
24 (1998). Furthermore, there is no exception to the application of Wash. Const. art. I, § 19 to
25 the election of judges. *See, e.g.*, Wash. Const. art. §§ 3 and 5 – Supreme court judges are
26 elected at large and county superior court judges are elected at large.

27
28 ⁷ There was, however, a dissent to the summary affirmance. It will be discussed
below at 19.

1 **1. Factual Issues – Are They Similar?**

2 The meaning of *Wells v. Edwards* can only be found in the opinion of the
3
4 lower court. So, one must look to the actual decision itself, the one found in *Wells*
5
6 *v. Edwards*, 347 F. Supp. 453 (MD La. 1972). The facts of the case are not the
7
8 same as the facts of this case.

9 The Louisiana state constitution does not have a constitutional provision
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11 like, or similar to, Wash. Const. art. IV, § 19⁸ – a provision specifically saying
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13 that elections are to be free and equal.

14 The court found that the work of judging was not subject to one person one
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16 vote because of the nature of the work of judges. But, in Washington there is no
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18 question that the fair and equal election requirements apply to the election of
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20 judges and that there is no basis for contending that the people of the state of
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22 Washington intended otherwise. There is no question that the nature of the work
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24 of judges in Washington does not require the vote of the electorate. The section
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26 was in place when the Washington Court of Appeals was created in the
27
28 constitution and it was in place when the supreme court and superior courts were
created and when the constitution as to the latter two courts provided for elections

⁸ See <http://www.legis.state.la.us/lss/tsrssearch.htm>.

1 of judges at large. The requirements of Wash. Const. art. I, § 19 were fulfilled in
2 Wash. Const. art. IV, §§ 3 and 5. The elections are at large so the elections are
3 apportioned.
4

5 **2. Identity of Issues - The Issues Are Not the Same.**

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7 The issue before the *Wells* court was not the same as the issue before the
8 court here.

9
10 The issue was whether the judicially created one person one vote rule under
11 the due process clause of the Fourteenth Amendment applied to judicial elections
12 in Louisiana. The issue was not whether a specific statute or constitutional
13 provision providing for “free and equal elections” in a state applied to judicial
14 elections. There was no consideration of a state requirement in the context of a
15 federal due process requirement.
16
17

18 **3. Subsequent Developments Have Had an Impact.**

19 The reasoning of the court in *Wells* was based upon understandings which
20 are no longer valid (if they ever really were).
21

22 The three judge panel in *Wells* looked to decisions where the concept of
23 elections of “representatives” had been discussed. At the time the notion of
24 representative was thought by some to refer to “legislative” representative.
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1 The case itself is no longer good law because it has been eclipsed by
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3 decisions of the United States Supreme Court. *See, e.g., Chisom v. Roemer*, 501
4 U.S. 380 (1991); *Republican Party of Minnesota v. White*, 536 U.S. 765, 784
5 (2002).

6
7 The three judge panel in *Wells* looked to *Hadley v. Junior College District*,
8 397 U.S. 50 (1970). “In other words, apportionment cases have always dealt with
9 elected officials who performed legislative or executive type duties, and in no case
10 has the one-man, one-vote principle been extended to the judiciary.” *Wells*.

11
12 The court went on to say “[o]n the contrary, several cases have specifically
13 held that that principle does not apply to the judiciary. *See Stokes v. Fortson*, 234
14 F. Supp. 575 (N.D.Ga. 1964); *Buchanan v. Rhodes*, 249 F. Supp. 860 (N.D. Ohio
15 1960), *appeal dismissed*, 385 U.S. 3, 87 S.Ct. 33, 7 L.Ed.2d 3; *New York State*
16 *Association of Trial Lawyers v. Rockefeller*, 267 F. Supp. 148 (S.D.N.Y. 1967);
17 and *Holshouser v. Scott*, D.C., 335 F. Supp. 928 (1971). *Id.*

18
19 From *Buchanan v. Rhodes* the trial court in *Wells* gleaned this: "Judges do
20 not represent people, they serve people." The court goes on to say: “Thus, the
21 rationale behind the one-man, one-vote principle, which evolved out of efforts to
22 preserve a truly representative form of government, is simply not relevant to the
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1 makeup of the judiciary.” *Id.*

2
3 First, there is no truth to the first statement “Judges do not represent people,
4 they serve people.” Judges represent and serve people all the time. Each decision
5 is, in one way or another, a representation of the mind of the people, of the
6 customs of the people, of the laws of the people. For example, what does one
7 think a state’s “uniform commercial code” is? It is a representation of the customs
8 and understandings of commercial transactions of the people which have evolved
9 over the years. Customs and undertakings which became a part of the common
10 law of commercial transactions. Law developed out of the minds of judges many
11 of whom were elected to the courts. That the laws to a point have been written
12 down in a code is telling only in that people have decided to put their historical
13 understandings into a code. Thus, judges represent people. The judges represent
14 the “mind of man made.”⁹

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19 Next the court says the one person one vote principle is “simply not relevant
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22 ⁹ Joseph Goldstein, *Psychoanalysis and Jurisprudence*, 77 YALE L.J. 1053
23 (1967-1968) (“Law is mind-of-man-made. There is in law, as psychoanalysis teaches
24 that there is in individual man, a rich residue which each generation preserves from the
25 past, modifies for the present, and leaves for the future.”)

1 to the makeup of the judiciary.” The court perhaps meant that people should not
2 have any role in the selection of their judges. Again, there is no logic to the
3 court’s statement. Of course people who elect judges are engaging in a process by
4 which they are making decisions as to the better of the candidates for judicial
5 office.
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8 But all of these cases, but for perhaps the last, was decided prior to *Hadley*
9 *v. Junior College District*, 397 U.S. 50 (1970). And from reading Justice White’s
10 dissent to the summary affirmance in *Wells v. Edwards*, the three judge court
11 misunderstood *Hadley*. See discussion of the dissent below at page 19.
12

13 And, again, not one case dealt with a state constitutional provision
14 providing for “free and equal elections” such as Wash. Const. art. I, § 19.
15

16 **4. Statutory Developments and Case Law Developments.**

17
18 Another reason why *Wells* is not good law is the case of *Chisom v. Roemer* ,
19 501 U.S. 380 (1991). In this case the court in a six to three decision held that
20 judicial elections where covered by Section 2 of the Voting Rights Act of 1965, as
21 amended in 1982. In *Chisom*, which concerned the election of Louisiana's state
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1 supreme court, the Court rejected the notion that the statutory term
2 "representatives" did not apply to judges. "Resting largely on legislative history
3 and standard canons of statutory construction, Justice Stevens held that
4 'representatives' referred to the 'winners of representative, popular elections,' a
5 category which self-evidently included elected judges." Kathryn Abrams,
6 *Relationships of Representation in Voting Rights Act Jurisprudence*, 71 TEX. L.
7 REV. 1409, 1420 (1992-1993).

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11 *Wells v. Edwards*, such as it is, has been so affected by the Supreme Court's
12 decision in *Chisom v. Roemer*, 501 U.S. 380 (1991) that legal scholars believe it is
13 it has been "significantly undermined." Wendy R. Weiser, *Issues Facing the*
14 *Judiciary: Regulating Judges' Political Activity after White*, 68 ALB. L. REV. 651,
15 692 (2004-2005). In this article the author says:

16
17
18 The reasoning underlying the Wells decision has been significantly
19 undermined by *Chisom v. Roemer*, in which the Court held that
20 judicial elections are covered by Section 2(b) of the Voting Rights
21 Act despite the fact that the statute referred to "representatives." 501
22 U.S. 380, 404 (1991). The Court appropriately read the term
23 "representatives" in context to refer to "the winners of representative,
24 popular elections" rather than to the function of the elected office-
25 holders. *Id.* at 399.

1 *See also Houston Lawyers' Ass'n v. Attorney Gen.*, 501 U.S. 419, 421 (1991)
2 (upholding application of section 2 of the Voting Rights Act to elections for trial
3 judges); *Clark v. Roemer*, 500 U.S. 646, 652 (1991) (reviewing application of
4 section 5 of the Voting Rights Act to judicial elections). *See also*, Andrew M.
5 Hutchison, *Note, One Person, Five Votes: An Argument for Applying the Equal*
6 *Protection Clause to Iowa's Judicial Elections*, 8 J. GENDER RACE & JUST. 211
7 (2004-2005).

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11 The Supreme Court's thinking and analysis of judicial elections found in
12 *Republican Party of Minnesota v. White*, 536 U.S. 765, 784 (2002) is also a basis
13 for questioning the current force of *Wells v. Edwards*. *See* Richard Briffault,
14 *Symposium: The Law of Democracy: New Issues in the Law of Democracy*
15 *Judicial Campaign Codes after Republican Party of Minnesota v. White*, 153 U.
16 PA. L. REV. 181, 191 (2004-2005).

17 18 19 **5. Settled Constitutional Issue?**

20
21 It cannot be said that the matter asserted in *Wells v. Edwards* is a settled
22 constitutional issue. In fact, the thoughtful cases have moved the other way –
23 have recognized there cannot be a non- application of one person one vote with
24 respect of judicial elections. *See Blankenship v. Bartlett, supra*, at page 10.

25
26 The essence of the intellectual battle for reality of election of judges is
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28

1 found in the dissent the strongly worded dissent to the summary affirmance of
2 *Wells v. Edwards* by Justice White joined by Justices Douglas and Marshall.

3
4 Justice White pointed out the unreasonableness of saying that electing judges was
5 different that electing “representatives” —

6
7 once a State chooses to select officials by popular vote, each qualified
8 voter must be treated with an equal hand and not be subjected to
9 irrational discrimination based on his residence. See *Reynold v. Sims*,
10 377 U.S. 533, 554-555, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964).
11 Nothing could be plainer from Mr. Justice Black's statement in
12 *Hadley* (397 U.S. 54-55, 90 S.Ct. 791):

13 '[W]hile the office of junior college trustee differs in
14 certain respects from those offices considered in prior
15 cases, it is exactly the same in the one crucial
16 factor—these officials are elected by popular vote.

17 'When a court is asked to decide whether a State is
18 required by the Constitution to give each qualified voter
19 the same power in an election open to all, there is no
20 discernible, valid reason why constitutional distinctions
21 should be drawn on the basis of the purpose of the
22 election. If one person's vote is given less weight through
23 unequal apportionment, his right to equal voting
24 participation is impaired just as much when he votes for
25 a school board member as when he votes for a state
26 legislator. While there are differences in the powers of
27 different officials, the crucial consideration is the right of
28 each qualified voter to participate on an equal footing in
the election process. It should be remembered that in
cases like this one we are asked by voters to insure that
they are given equal treatment, and from their
perspective the harm from unequal treatment is the same
in any election, regardless of the officials selected.'

1 The judgment of the District Court is questionable under a decade of
2 this Court's decisions. It at least warrants plenary review here.

3 The judges of the North Carolina Supreme Court in *Blankenship v. Bartlett*,
4 455PA06-2, 681 S.E.2d 759 (N.C. 8-28-2009) agreed with Justice White and
5 acknowledged the changes effected as to the concept of election of
6 "representatives" in *Chisom v. Roemer*.
7

8
9 The court reasoned "Although federal courts have articulated that the
10 "one-person, one-vote" standard is inapplicable to state judicial elections, there is
11 considerable tension in the jurisprudence, as clearly illustrated by *Chisom v.*
12 *Roemer*, 501 U.S. 380 (1991). *Id.* at 6. It went on "*Chisom* first reaffirms that the
13 one-person, one-vote constitutional standard used in legislative and executive
14 branch elections does not apply to judicial elections. *Id.* at 402 ("[W]e have held
15 the one-person, one-vote rule inapplicable to judicial elections. . . ." (citing *Wells*
16 *v. Edwards*, 409 U.S. 1095 (1973))). When the Supreme Court first held the rule
17 inapplicable, it summarily affirmed a district court decision based on the rationale
18 that "[j]udges do not represent people, they serve people." *Wells v. Edwards*, 347
19 F. Supp. 453, 455 (M.D. La. 1972) (quoting *Buchanan v. Rhodes*, 249 F. Supp.
20 860, 865 (N.D. Ohio), *appeal dismissed*, 385 U.S. 3 (1966), *judgment vacated per*
21 *curiam*, 400 F.2d 882 (6th Cir. 1968)), *aff'd mem.*, 409 U.S. 1095 (1973). Yet,
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1 even in *Chisom*, the Supreme Court observed that judges were "representatives"
2 for purposes of the Federal Voting Rights Act. 501 U.S. at 401 ("[I]t seems both
3 reasonable and realistic to characterize the winners [of judicial elections] as
4 representatives of that [judicial] district.")” *Blankenship* at 6.
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6
7 Next, the court moved to a discussion of the court’s views about the election
8 of judges in Minnesota in *Republican Party of Minnesota v. White*, 536 U.S. 765,
9 784 (2002). The court pointed out that Supreme Court rejected the idea that
10 elected members of the Minnesota judiciary are separate "from the enterprise of
11 ‘representative government.’" It went on to say “[t]hus, the Supreme Court has
12 indicated both that judges are representatives and that they do not represent
13 people.” *Id.* at 6 and 7.
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16 The court did not find as surprising “the presence of this seeming
17 contradiction.” It said:
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19 Judges are ‘often called upon to disregard, or even to defy, popular
20 sentiment,’ creating a ‘fundamental tension between the ideal
21 character of the judicial office and the real world of electoral
22 politics.’ *Chisom*, 501 U.S. at 400. That fundamental tension is
23 manifested in the dueling conclusions that judges both are and are not
24 representatives of the people. We agree with the Supreme Court that
25 this tension "cannot be resolved by crediting judges with total
26 indifference to the popular will while simultaneously requiring them
27 to run for elected office." *Id.* at 400-01.
28

1 *Id.* at 7.¹⁰

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3 The court then concluded “[r]ather than wholly ignoring that tension, this
4 Court acknowledges it by holding that our State's Equal Protection Clause requires
5 a heightened level of scrutiny of judicial election districts.” At the outset of the
6 analysis of the court, the court said:
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8 We must . . . determine whether the Equal Protection Clause of
9 Article I, Section 19 of the North Carolina Constitution requires any
10 degree of population proportionality in the districts drawn for The
11 election of superior court judges. We conclude that it does.

12 *Id.* at 4.

13 II. CONCLUSION

14 Wash. Const. art. I, § 19 provides that elections are to be fair and equal.
15
16 The Washington Supreme Court has held that fair and equal means that elections
17 are subject to fair apportionment rules of one person one vote. Washington Court
18 of Appeals judges are elected. Elections of Washington Court of Appeals judges
19 are subject to Art. I, § 19. The principles of one person one vote apply to the
20 election and election apportionment of such judges. The case of *Wells v. Edwards*
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23
24 ¹⁰ For an extensive and enlightening discussion about the election of
25 judges and the representative meaning of such elections see Kathryn
26 Abrams, *Relationships of Representation in Voting Rights Act*
Jurisprudence, 71 TEX. L. REV. 1409, 1424 ff (1992-1993).

1 is not applicable, just as it was not applicable in *Blankenship v. Bartlett, supra*.

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3 December 29, 2009.

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5 Respectfully submitted,

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7 /s/ Stephen K. Eugster

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10 Stephen K. Eugster, Pro Se

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