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STATE OF WASHINGTON

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No. 84380-5

SUPREME COURT OF
THE STATE OF WASHINGTON

STEPHEN K. EUGSTER,
Appellant,

vs.

STATE OF WASHINGTON and WASHINGTON COURT OF
APPEALS and DIVISIONS I, II and III, thereof,
Respondents.

BRIEF OF APPELLANT

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TABLE OF CONTENTS

I. INTRODUCTION 1

II. ASSIGNMENTS OF ERROR 1

 A. Assignments of Error. 1

 B. Issue Presented. 1

III. STATEMENT OF FACTS 1

IV. SUMMARY OF ARGUMENT 8

V. ARGUMENT 9

 A. Standard of Review: Plaintiff’s Burden. 9

 B. Wash. Const. Art. I, § 19: One Person,
 One Vote Principle. 11

 C. Judges Must be Elected in Compliance
 With Law: *City of Spokane v. Rothwell*. 11

 D. Washington Constitution Article I, § 19
 or *Wells v. Edwards*? 18

 E. There Is No Need for A *Gunwall*
 Analysis: Art. I, § 19 Provides More
 Protection than *Wells v. Edwards*. 20

 F. *Gunwall* Factors: Discussion
 (Nevertheless), but with the Addition
 of a Seventh Factor. 23

 1. *Textual Language of the
 State Constitution*. 26

 2. *Differences in the Texts of
 Parallel Provisions of the
 Federal and State Constitutions*. 28

3.	<i>State Constitutional and Common Law History.</i>	29
4.	<i>Preexisting State Law.</i>	30
5.	<i>Structural Differences Between the Federal and State Constitutions.</i>	31
6.	<i>Matters of Particular State or Local Concern.</i>	32
7.	<i>Viability of the Federal Precedent.</i>	35
VI.	CONCLUSION	38
APPENDIX		

TABLE OF AUTHORITIES

Table of Cases

<i>Baker v. State</i> , 170 Vt. 194, 744 A.2d 864 (1999)	38
<i>Blankenship v. Bartlett</i> , 455PA06-2, 681 S.E.2d 759 (N.C. 8-28-2009) ..	19, 29, 37
<i>Brower v. State</i> , 137 Wn.2d 44, 68, 969 P.2d 42 (1998)	11, 22
<i>Carlisle v. Columbia Irrigation District</i> , ___ Wn. 2d ___, Footnote 1, (No. 82035-0) (Wash. 4-1-2010)	9
<i>Cent. Wash. Bank v. Mendelson-Zeller, Inc.</i> , 113 Wn.2d 346, 354, 779 P.2d 697 (1989)	10
<i>Chisom v. Roemer</i> , 501 U.S. 380 (1991)	36
<i>City of Bellevue v. Lee</i> , 166 Wn.2d 581, 585, 210 P.3d 1011 (2009)	10
<i>City of Seattle v. State</i> , 103 Wn.2d 663, 669, 694 P.2d 641 (1985)	12, 22, 23
<i>City of Spokane v. Rothwell</i> , 141 Wn. App. 680, 170 P.3d 1205 (2007) ...	17, 18, 30, 33
<i>Davis v. Microsoft Corp.</i> , 149 Wn.2d 521, 531, 70 P.3d 126 (2003)	9
<i>Edelman v. Jordan</i> , 415 U.S. 651, 671 (1974)	35
<i>Foster v. Sunnyside Valley Irrig. Dist.</i> , 102 Wn.2d 395, 405, 687 P.2d 841 (1984) ..	11, 13, 21, 22
<i>Grant Co. Fire Prot. Dist. v. Moses Lake</i> , 145 Wn.2d 702, 717, 42 P.3d 394 (2002)	22

<i>Hadley v. Junior College District</i> , 397 U.S. 50 (1970)	36
<i>Johnson v. State</i> , 2006-2024, 965 So. 2d 866 (La. App. 1 Cir. 6/8/07)	19
<i>Lucas v. Forty-Fourth Gen. Assembly</i> , 377 U.S. 713, 12 L. Ed. 2d 632, 84 S. Ct. 1459 (1964)	14
<i>Madison v. State</i> , 161 Wn.2d 85, 96, 163 P.3d 757 (2007)	21, 22, 32
<i>Mahan v. Howell</i> , 410 U.S. 315, 35 L. Ed. 2d 320, 93 S. Ct. 979 (1973)	8, 13
<i>Malang v. Dep't of Labor & Indus.</i> , 139 Wn. App. 677, 683-84, 162 P.3d 450 (2007)	9
<i>McNally v. United States</i> , 483 U.S. 350, 376-377 (1987)	38
<i>Ohler v. Tacoma General Hospital</i> , 92 Wn.2d 507, 512, 598 P.2d 1358 (1979)	10
<i>Port of Seattle v. Lexington Ins. Co.</i> , 111 Wn. App. 901, 906, 48 P.3d 334 (2002)	9
<i>Republican Party of Minnesota v. White</i> , 536 U.S. 765, 784 (2002)	37, 38
<i>Reves v. Ernst & Young</i> , 494 U.S. 56, 74 (1990)	38
<i>Reynolds v. Sims</i> , 377 U.S. 533 (1964)	32
<i>Schmidt v. Coogan</i> , 162 Wn.2d 488, 493, 173 P.3d 273 (2007)	9
<i>State v. Fry</i> , ___ Wn. 2d ___ footnote 2, Case No. 81210-1 (Wash. 1-21-2010)	21

<i>State v. Gunwall</i> , 106 Wn.2d 54, 61, 720 P.2d 808 (1986) . . .	8, 11, 20, 21, 23, 24, 26, 29-32, 35, 36
<i>State v. Vickers</i> , 148 Wn.2d 91, 59 P.3d 58 (2002)	21
<i>Story v. Anderson</i> , 93 Wn.2d 546, 553-54, 611 P.2d 764 (1980)	13
<i>Twisp Mining Co. v. Chelan Mining Co.</i> , 16 Wn.2d 264, 274 (1943)	34
<i>Wells v. Edwards</i> , 347 F. Supp. 453 (MD La. 1972), <i>summarily</i> <i>aff'd</i> , 409 U.S. 1095 (1973)	8, 18, 19, 21, 25-27, 29-32, 35-37
<i>WMCA, Inc. v. Lomenzo</i> , 377 U.S. 633, 12 L. Ed. 2d 568, 84 S. Ct. 1418 (1968)	14

Constitutional Provisions

Wash. Const. art. I, § 1	26
Wash. Const. art. I, § 12	3, 9, 10, 22, 27, 32
Wash. Const. art. I, § 19	1, 3, 8-12, 18, 20-23, 26-29, 31, 32, 35, 36, 38
Wash. Const. art. I, § 29	26
Wash. Const. art. IV, § 3	34
Wash. Const. art. 1, § 32	26
Wash. Const. art IV, §§ 3 and 5	12, 20, 23, 27, 28, 31, 33
Wash. Const. art. IV, § 5	34
Wash. Const. art. IV, § 29	33

Wash. Const. art. IV, § 30	1-3, 6
Wash. Const art. IV, § 30 (4)	33, 38
Wash. Const. art. VII, § 3	33

Statutes

RCW 2.06.040	4, 6
RCW 4.04.010	5
RCW Ch. 7.24	9
RCW 24.03.100	34
RCW 24.06.065	34

Rules and Regulations

RAP 13.1	5
----------------	---

Other Authorities

Charles H. Sheldon, <i>A Decade of Washington v. Gunwall: Is It Still All Sail And No Anchor</i> , 59 ALB. L. REV. 1743 (1995-1996)	24
Cornell W. Clayton, <i>Toward a Theory of the Washington Constitution</i> , 37 GONZ. L. REV. 54 (2001-2002)	24
Francisco Ed. Lim, <i>Determining the Reach and Content of Summary Decisions</i> , 8 REV. LITIG. 165 (1988-1989)	35
Hugh D. Spitzer, <i>New Life for the Criteria Tests in State Constitutional Jurisprudence: Gunwall is Dead - Long Live Gunwall</i> , 37 RUTGERS L.J. 1169 (2005-2006)	24

Hugh D. Spitzer, <i>Which Constitution - Eleven Years of Gunwall in Washington State</i> , 21 SEATTLE U. L. REV. 1187 (1997-1998)	24
L. Hyde, <i>Judges: Their Selection and Tenure</i> , 30 J. AM. JUD. SOC. 152 (1946-1947)	30
Q. S. SMITH, ANALYTICAL INDEX TO THE JOURNAL OF THE WASHINGTON STATE CONSTITUTIONAL CONVENTION 1889 (B. P. Rosenow ed., 1999)	30
Rem. Rev. Stat. (Sup.), § 3803-31 [P.C. § 4503-131] subsections I and III	34
Richard Briffault, <i>Symposium: The Law of Democracy: New Issues in the Law of Democracy Judicial Campaign Codes after Republican Party of Minnesota v. White</i> , 153 U. PA. L. REV. 181, 191 (2004-2005)	37

I. INTRODUCTION

Judges elected to the Washington Court of Appeals are not properly elected and apportioned as required by Wash. Const. art. I, § 19¹ and its one person, one vote principle.

II. ASSIGNMENTS OF ERROR

A. Assignments of Error.

Plaintiff assigns error to paragraphs 1 and 3 of the Order portion of the Order of Dismissal. CP 118-19.

B. Issue Presented.

The issue presented is whether Wash. Const. art. I, § 19, which specifically provides that “[a]ll Elections shall be free and equal,” applies to the election of judges to the Washington Court of Appeals² and, if so, whether the judges are elected and apportioned as required by the one person, one vote principle.

III. STATEMENT OF FACTS

The facts of this case are found in the Declaration of Stephen K. Eugster in Support of Plaintiff’s Motion for Partial Summary

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

² Wash. Const. art. IV, § 30. The parties are in agreement that there is only one Washington Court of Appeals. Defendants’ Motion to Dismiss and Cross Motion for Summary Judgment and Memorandum in Support of Defendants’ Motions. CP 96.

Judgment December 28, 2009 (Declaration). CP 70 - 89.

The facts set forth in the Declaration have not been controverted.³

Plaintiff is a citizen, taxpayer, and qualified elector of the state of Washington. CP 71. As a voter he is entitled to vote for judges of the Washington Court of Appeals, including the judges of Division I, Division II, and Division III of the Washington Court of Appeals. *Id.* But, he only gets a chance to vote for some of the judges making up Division III of the Court of Appeals, those elected from district 1 of the division. RCW 2.06.020.

Defendant state of Washington is the state of Washington. CP 71.

Defendant Washington Court of Appeals is a single Washington appellate court below the Washington Supreme Court which was created by Wash. Const. art. IV, § 30.⁴ *Id.*

Plaintiff, as a Washington lawyer, has represented numerous clients before the Washington Court of Appeals and before each of

³ The uncontroverted facts in the Eugster Declaration are the facts for purposes of the case and this appeal. *See, e.g., Parrott Mech., Inc. v. Rude*, 118 Wn. App. 859, 864, 78 P.3d 1026 (2003).

⁴ This provision provides for a "Court of Appeals" not "Courts of Appeal."

the divisions of the court, in particular, Division III. CP 73-74.

Plaintiff, as a litigant in his own right, has advanced numerous public trust, public interest, and taxpayer cases which have been appealed to Division III of Washington Court of Appeals and has argued such cases primarily before Division III, but also before Division I and Division II. CP 74.

The Washington Court of Appeals was created by amendment to the Constitution of the State of Washington. Amendment 50, 1967 Senate Joint Resolution No. 6; see 1969 p. 2975, approved November 5, 1968. Wash. Const. art. IV, § 30. CP 75.

The judges of the Court of Appeals are to be elected and are elected. Wash. Const. art. IV, § 30. Wash. Const. art. I, § 19 provides that “[a]ll Elections shall be free and equal, and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage.” Wash. Const. art. I, § 19 was in effect at the time of the creation of the Washington Court of Appeals and still is in effect. CP 74.⁵

The Court of Appeals does not sit *en banc*. Instead, the work

⁵ In addition, Wash. Const. art. I, § 12 provides “[n]o law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations.” Wash. Const. art. I, § 12 was in effect at the time of the creation of the Wash. Court of Appeals and still is in effect. CP 74 - 75.

of the court is performed by divisions of the court. And within the divisions, by panels of three judges from such division selected by the division chief judge from the judges elected to the division. RCW 2.06.040.

The panel selection process in each division, is *ad hoc*. However, certain aspects of the processes are apparent and common: The processes permit a sharing of the work. The processes have nothing to do with the fact that judges are to be elected. The processes do not address nor consider concerns for electoral apportionment; and, the processes have nothing to do with the fact that judges are to exercise their power in contexts which allow for voter connection with the work in which the judges engage. CP 78-81.⁶

The division of the Court of Appeals to which a case is appealed from a trial court is, for the most part, the court of last resort of the state of Washington for the vast number of cases appealed to the Court of Appeals; that is, a specific division of the Court of

⁶ See S. K. Eugster, *The Washington Court of Appeals: Fair and Equal Election Rights Violated, An Opportunity for Judicial Improvement* 14 (Jan. 19, 2009) and Appendix E – 2008 Reported Cases, Spokane County, Dist. 1, Div. III, Appendix F – 2008 Unreported Cases, Spokane County, Dist. 1, Div. III, Appendix G – 2007 Reported Cases, Spokane County, Dist. 1, Div. III, Appendix H – 2007 Unreported Cases, Spokane County, Dist. 1, Div. III found at http://www.steveeugster.com/pdf/-article_january_19_2009.pdf.

Appeals. CP 81.

A division panel decision is a final decision. There is no appeal of the decision (a) to a larger grouping of judges of a the division, or (b) to a grouping of judges of the Court of Appeals beyond the division; that is, to the judges of the Court of Appeals as a whole, or to a larger or new panel.

That is to say, the division to which the case must of necessity have been appealed, and the division panel itself, not the division as a whole, and not the Court of Appeals itself, is the court of last resort of the state of Washington for all cases appealed except a minor few. CP 81-82.

A party to a case decided by a division of the Court of Appeals may petition for review of the case by the Washington State Supreme Court. RAP 13.1. This is "discretionary review." CP 82. Petitions for review are not often granted by the Washington Supreme Court. *Id.*⁷

Washington is a "common law" state. The laws governing the people include case law developed by the courts as common law – law common to all, precedential law, Washington law. RCW 4.04.010. CP 82.

The Washington legislature has delegated authority to the

⁷ There seems to be a quota on the number of cases with respect to which the Supreme Court accepts review.

panels of the divisions of the Court of Appeals to limit the evolution of the common law. The legislature provided in RCW 2.06.040 that "[i]n the determination of causes all decisions of the court shall be given in writing and the grounds of the decisions shall be stated" and that "[a]ll decisions of the court having precedential value shall be published as opinions of the court. Each panel shall determine whether a decision of the court has sufficient precedential value to be published as an opinion of the court. Decisions determined not to have precedential value shall not be published." CP 82-83.

The state of Washington has a current population of about 6,558,800. (Note, statistical information used in this paragraph and below comes from or is generated from information provided by the Washington State Office of Financial Management.)

The divisions are not apportioned according to population. Rather, they were created using geographic criteria. RCW 2.06.020.

Likewise, the districts of a division are not apportioned according to population; they too have been created using geographic criteria. RCW 2.06.020.

The apportionment, if any, applies to the number of judges elected by the population of a district of a division. CP 83-84.

Population calculations based upon information from the Washington Office of Financial Management are as follows:

			Population per Judge
	Population	Judges	
Division I	2,984,700	12	248,725
Division II	2,157,200	6	359,533
Division III	1,445,700	5	289,140
Division I			
District 1	1,884,200	8	235,525
District 2	696,600	2	348,300
District 3	403,500	2	201,750
Division II			
District 1	805,400	3	268,467
District 2	717,300	2	358,650
District 3	634,500	2	317,250
Division III			
District 1	573,700	2	286,850
District 2	467,500	1	467,500
District 3	404,500	2	202,250

CP 84-86 and Appendix A.

Using the methodology of *Mahan v. Howell*, 410 U.S. 315 (1973) to analyze apportionment deviation, as approved by this court,⁸ the following statistics were generated for the case:

			Ratio		Deviation
High / Low Districts	Statewide	2008	2.4	to 1	104%
High / Low Districts	Statewide	2000	2.28	to 1	92%
High / Low Districts	Division I	2008	1.72	to 1	82%
High / Low Districts	Division III	2008	2.12	to 1	105%

CP 88 - 89. Appendix B.

IV. SUMMARY OF ARGUMENT

Plaintiff establishes beyond a reasonable doubt that Wash. Const. art. I, § 19 applies to the election of judges to the Court of Appeals. Further, it is shown the principle of one person, one vote is a part of art. I, § 19. Next, Plaintiff shows that the election of judges to the Court of Appeals violates art. I, § 19.

Plaintiff shows that art. I, § 19 is an independent state ground for decision under *Gunwall*.⁹ It is also shown that *Wells v. Edwards*¹⁰ (the case Defendants use to sustain the status quo) does not apply in Washington.

Even though art. I, § 19 is an independent state ground,

⁸ See discussion *infra* at 16 and following.

⁹ *State v. Gunwall*, 106 Wn.2d 54, 61, 720 P.2d 808 (1986).

¹⁰ 347 F. Supp. 453 (MD La. 1972), *summarily aff'd*, 409 U.S. 1095 (1973).

Plaintiff works through an analysis under the *Gunwall* factors that shows art. I, § 19 is an independent state ground providing more protection than *Wells v. Edwards*.

V. ARGUMENT

A. Standard of Review: Plaintiff's Burden.

The case comes to the court on a decision by the trial court on a motion for summary judgment.¹¹ In reviewing an order for summary judgment, the appellate court applies the same standard as the trial court.¹² All evidence is viewed in the light most favorable to the nonmoving Party.¹³ Summary judgment is proper when the evidence shows that there is no genuine issue of material fact and the moving party is entitled to the judgment as a matter of law.¹⁴ The moving party bears the initial burden to show the absence of any issue of

¹¹ The case is a declaratory judgment case pursuant to the Washington Declaratory Judgment Act, RCW Ch. 7.24. There are admitted and justiciable controversies as required by the Act.

¹² *Schmidt v. Coogan*, 162 Wn.2d 488, 493, 173 P.3d 273 (2007); *Parrott Mech., Inc. v. Rude*, 118 Wn. App. 859, 864, 78 P.3d 1026 (2003). Review is *de novo*. *Davis v. Microsoft Corp.*, 149 Wn.2d 521, 531, 70 P.3d 126 (2003).

¹³ *Carlisle v. Columbia Irrigation District*, ___ Wn. 2d ___, Footnote 1, (No. 82035-0) (Wash. 4-1-2010); *Port of Seattle v. Lexington Ins. Co.*, 111 Wn. App. 901, 906, 48 P.3d 334 (2002).

¹⁴ *Malang v. Dep't of Labor & Indus.*, 139 Wn. App. 677, 683-84, 162 P.3d 450 (2007).

material fact.¹⁵

Uncontroverted relevant facts offered in support of summary judgment are deemed established.¹⁶

The facts of the case are found in the Declaration of Stephen K. Eugster in Support of Plaintiff's Motion for Partial Summary Judgment December 28, 2009. CP 70. The facts were not controverted by the Defendants, thus they are taken to be true.¹⁷

Plaintiff must meet, head on, the presumption of constitutionality. Plaintiff has the burden of proving that the statutes pertaining to the election of judges to the Court of Appeals is unconstitutional. *See, e.g., City of Bellevue v. Lee*, 166 Wn.2d 581, 585, 210 P.3d 1011 (2009).

Plaintiff establishes beyond a reasonable doubt that the laws pertaining to the election of judges to the Washington Court of Appeals violate Wash. Const., art. I, § 19 because the election of judges is not fair and equal and does not comply with the principle of one person, one vote.

¹⁵ *Cent. Wash. Bank v. Mendelson-Zeller, Inc.*, 113 Wn.2d 346, 354, 779 P.2d 697 (1989) cited in *Rude*, 118 Wn. App. at 864.

¹⁶ *Id. See also, Ohler v. Tacoma General Hospital*, 92 Wn.2d 507, 512, 598 P.2d 1358 (1979).

¹⁷ *Rude*, 118 Wn. App. at 864.

B. Wash. Const. Art. I, § 19: One Person, One Vote Principle.

Wash. Const. art. I, § 19 provides that elections are to be “fair and equal.”

The right to vote is fundamental, and art. I, § 19 provides greater protection for a free and equal vote than does the federal constitution's one person, one vote equal protection right. *Foster v. Sunnyside Valley Irrig. Dist.*, 102 Wn.2d 395, 405, 687 P.2d 841 (1984); see also, *Brower v. State*, 137 Wn.2d 44, 68, 969 P.2d 42 (1998). In light of the foregoing, there is no need to conduct a *Gunwall* analysis to determine whether the Washington Declaration of Rights, art. I, § 19, provides greater protection than that provided under the United States Constitution and the equal protection clause of the Fourteenth Amendment. See discussion below commencing at 19.

Washington Court of Appeals judges are elected.¹⁸ Thus, the election of judges to the Washington Court of Appeals is subject to art. I, § 19. Defendants do not question this. They admit it and say “[o]f course article I, section 19 ‘applies’ to the elections of judges in Washington, including judges of the court of appeals.” Answer to

¹⁸ The *Gunwall* factors do not apply because the protection provided by art. I, § 19 is greater than any protection provided under the Federal Constitution. See discussion below at 20 and following.

Statement of Grounds for Direct Review at 2.

There is no exception in the Washington constitution which says that art. I, § 19 does not apply to election of judges to the Washington Court of Appeals.

It applies to the election of judges to the Washington Supreme Court and to the election of judges to the various Washington Superior Courts. Such elections are at large so the requirements of art. I, § 19 and the one person, one vote principle are fulfilled. Wash. Const. art IV, §§ 3 and 5.

No Washington case says that the principle of one person, one vote as found in art. I, § 19 only applies to some elections – there is no judicial election exception.

The argument which will be made by Respondents is that since there is no case which specifically says it applies to the election of judges, there is precedent for saying there is an exception regarding its application to judicial elections. This argument, quite frankly, is inconsistent with logic, common sense or reason.

If there is an election for a state position or state office, Wash. Const. art. I, § 19 must be applied to the election.

Article I, § 19 requires "that otherwise qualified voters who are significantly affected by the results of an election be given an opportunity to vote in that election." *City of Seattle v. State*, 103

Wn.2d 663, 673, 694 P.2d 641 (1985).

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

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

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

In the footnote to *Mahan v. Howell*, the *Story* court explained how the measurement process worked.

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

¹⁹ See Appendix B.

In *Story*, the court found that the Island County Washington commissioner district scheme was disproportional.

An examination of prior case law reveals that the disparity in this case greatly exceeds disparities that have been struck down as impermissibly large. In *Lucas v. Forty-Fourth Gen. Assembly*, 377 U.S. 713, 12 L. Ed. 2d 632, 84 S. Ct. 1459 (1964), the court struck down an election scheme with a ratio of 3.6 to 1 and a percentage deviation of 115.44 percent. In *WMCA, Inc. v. Lomenzo*, 377 U.S. 633, 12 L. Ed. 2d 568, 84 S. Ct. 1418 (1968), the court invalidated an election scheme with a ratio of 2.6 to 1 and percentage deviation of 88 percent.

The court went on to set forth the disparity analysis as to the Island County district scheme and concluded that the scheme was unconstitutional.

In the present case, the ratio of largest district to smallest is 6.87 to 1, and the percentage deviation is 168.62 percent. The disparity is approximately one and a half times as great as the disparity struck down in *Lucas* and double the disparity struck down in *WMCA*. Such a disparity is far too great to meet the bedrock requirement of "substantial population equality."

Any way one looks at the Court of Appeals, the facts establish that the Court of Appeals, is not in substantial compliance with the principle of one person, one vote. Statement of Facts, *supra* at 6 and following, and see Appendix B.

But there is something else which deserves close attention: Panels are often made up of judges with no electoral connection to cases on appeal. A phenomenon of the apportionment and the mal-

apportionment of districts and the ways in which the chief judges assign judges to panels is this: Judges who have no relation to the case before the court, in that the case does not come to the court or to a panel from a superior court within the district from which the judge is elected.

Let us look at the experience regarding Division III – Spokane County Cases for part of 2008. The experience of Division III with respect of cases coming to the court from the Spokane County Superior Court (in District 1) is instructive.

During the period of January 1, 2008 to October 31, 2008, Division III produced 19 published opinions.²⁰ District 1 judges were on the panels in 13 cases.²¹ The single judge from District 2 was on the panels in 15 cases. Judges from District 3 were on the panels in 15 cases.

As far as judges making up a majority of the panel (two judges), District 1 was in the majority in 4 cases. Districts 2 and 3 together were in the majority in 17 cases. Judges from District 3 alone made up the majority in 8 cases.

As far as judge combinations making up all three judges on

²⁰ Appendix C.

²¹ This number includes judges serving *pro tempore*.

case panels, District 2 and 3 accounted for 6 cases. That is to say, 6 of the cases were decided by judges having no connection to Spokane County and to District 1.

During this same period, there were 40 unreported cases which were appealed to the court from the Superior Court of Spokane County (District 1).²² District 1 judges were on the panel in 32 cases, including service by *pro tempore* judges. Without the *pro tempore* judges, judges from District 1 were on the panels in 18 cases. The single judge from District 2 was on the panels in 25 cases. Judges from District 3 were on the panels in 37 cases.

As far as judges making up a majority of the panels (two judges), District 1 was in the majority in 8 cases. Districts 2 and 3 together were in the majority in 33 cases. Judges from District 3 alone made up the majority in 19 cases.

As far as judge combinations making up all three judges on case panels, District 2 and 3 accounted for 8 cases. Thus, 8 of the cases were decided by judges having no connection to Spokane County, to District 1.

This mis-apportionment is true for other periods.

The judges are not connected to the cases or voters of the

²² Appendix D.

districts; Spokane County produces a majority of the cases for review by Division III. The people of Spokane County, the county being within District 1, participate in the election of two judges to the Court of Appeals, Division III.

Despite these facts, the judges elected in District 1 play a relatively minor role as to Spokane County cases. Consider the reported cases for the period January 1, 2008 through October 31, 2008 as shown in Appendix C.

The judges from District 2 and 3 served most of the time. These judges wrote the opinions in 13 of the 19 cases reported during the period. The judge from District 2 served on case panels for the period 15 out of the 19 cases. Judge Schultheis from District 1, the most active District 1 judge for the period, served on only 8 of the 19 panels.

C. Judges Must Be Elected in Compliance with Law: *City of Spokane v. Rothwell*.

Additional support and understanding of how the Washington courts view the election of judges is to be found in *City of Spokane v. Rothwell*, 141 Wn. App. 680, 170 P.3d 1205 (2007). There, the issue before the court was whether a judge who is not properly elected has jurisdiction to act as a judge. Division III held that a judge who was

not properly elected did not have jurisdiction to act.²³

D. Washington Constitution Article I, § 19 or *Wells v. Edwards*?

Defendants assert that the principle of one person, one vote does not apply to Washington judicial elections. In doing so, Defendants will cite *Wells v. Edwards*, 347 F. Supp. 453 (MD La. 1972), *summarily aff'd*, 409 U.S. 1095 (1973). In essence, they argue that *Wells v. Edwards* carves the one person, one vote principle of Art. I. § 19 out of the section with respect of the election of judges in Washington. This, of course, makes no sense and it is wrong.

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

²³ The case was reversed on other grounds on a petition for review to the Washington Supreme Court. *City of Spokane v. Rothwell*, 166 Wn.2d 872, 215 P.3d 162 (2009).

The case was an application of the district court's understanding of the law of one person, one vote under the equal protection clause of the of the Fourteenth Amendment at the time of the case in 1970. It held that the law, as developed to that point, limited the application of one person, one vote under the Fourteenth Amendment to the election of legislative representatives.

This case has recently been discussed in two state proceedings. The recent North Carolina Supreme Court case of *Blankenship v. Bartlett*, 455PA06-2, 681 S.E.2d 759 (N.C. 8-28-2009) is instructive. There, the North Carolina Supreme Court held that *Wells v. Edwards* did not apply to a situation where the issue was the application of a North Carolina constitution equal protection requirement to the election of North Carolina judges.

On the other hand, in *Johnson v. State*, 2006-2024, 965 So. 2d 866 (La. App. 1 Cir. 6/8/07), the Louisiana court came to a different conclusion. There, the court relied on *Wells v. Edwards*. It did so on two basic points: (a) "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" and (b) 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.”²⁴

As one can see, unlike the North Carolina court, the Louisiana court did not apply a *Gunwall* analysis or anything remotely like a *Gunwall* analysis.

E. There Is No Need for A *Gunwall* Analysis: Art. I, § 19 Provides More Protection than *Wells v. Edwards*.

The purpose of an analysis of the *Gunwall* factors is to ensure that a proper decision is made relevant to determining whether, in a given situation, the constitution of the State of Washington should be considered as extending broader rights to its citizens than does the United States Constitution. *Gunwall*, 106 Wn.2d 54.

The issue in *Gunwall* was stated as follows:

ISSUE ONE. When is it appropriate for this court to resort to independent state constitutional grounds to decide a case, rather than deferring to comparable provisions of the United States Constitution as interpreted by the United States Supreme Court?

Id. 106 Wn.2d 58.

The purpose of the *Gunwall* analysis in a particular case is to determine whether there are independent state constitutional grounds which are superior or take precedence over Federal Constitutional Fourteenth Amendment grounds. In the case at hand,

²⁴ Such an argument cannot be made in Washington. Clearly, judges are elected in compliance with Wash. Const. Art. I, § 19. Wash. Const. art. IV, §§ 3 and 5.

the issue is whether art. I, § 19 takes precedence over the *Wells v Edwards* position.

The *Gunwall* factors²⁵ do not apply because art. I, § 19 provides more protection than *Wells v. Edwards* and its position regarding one person, one vote and the election of judges.

Defendants base their case on *Wells v. Edwards* and the federal court holding there in that under the one person, one vote principle found in the equal protection clause of the Fourteenth Amendment, the principle does not apply to the election of judges.

No *Gunwall* analysis is necessary. The Supreme Court has already held that Art. I, § 19 provides greater protection than that provided by the equal protection clause of the Fourteenth Amendment. Where greater protection has been found, it is not necessary to pursue a *Gunwall* analysis.²⁶

This Court on more than one occasion has stated that art. I, § 19 provides greater and independent state rights than those provided under application of one person, one vote rulings of the Federal court.

²⁵ *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986).

²⁶ *State v. Fry*, ____ Wn. 2d ____ footnote 2, Case No. 81210-1 (Wash. 1-21-2010); *Madison v. State*, 161 Wn.2d 85, 96, 163 P.3d 757 (2007); *State v. Vickers*, 148 Wn.2d at Wn.2d 91, 108 n. 43, 148, 59 P.3d 58, (2002); and *Foster v. Irrigation District*, 102 Wn.2d 395, 404, 687 P.2d 841 (1984).

Sunnyside Valley Irrig. Dist., 102 Wn.2d 395, 687 P.2d 841 (1984). Article I, section 19 requires "that otherwise qualified voters who are significantly affected by the results of an election be given an opportunity to vote in that election." *City of Seattle v. State*, 103 Wn.2d 663, 673, 694 P.2d 641 (1985). [Emphasis added.]

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

There is no exception in the constitution which says that art. I, § 19 does not apply to election of judges to the Washington Court of Appeals. Certainly, it applies to the election of judges to the Washington Supreme Court and to the election of judges to the various Washington Superior Courts. Such elections are at large so the requirements of art. I, § 19 are fulfilled. Wash. Const. art IV, §§ 3 and 5. Judges of the Court of Appeals are elected, thus, the fair and equal provisions of art. I, § 19 must be complied with.

F. *Gunwall* Factors: Discussion (Nevertheless), but with the Addition of a Seventh Factor.

Despite the fact that it has already been established that Article I, § 19 is an independent state ground for decision in this case, Appellant will discuss the six *Gunwall* factors, and an additional seventh factor, to further shore up the point - how the fair and equal

vote provisions of art. I, § 19 supercede or prevail over the *Wells v. Edwards* judicial election exception to the one person, one vote principle.²⁸

The *Gunwall*²⁹ factors are as follows:

We deem the following six nonexclusive neutral criteria synthesized from a burgeoning body of authority,[fn10] relevant to determining whether, in a given situation, the constitution of the State of Washington should be considered as extending broader rights to its citizens than does the United States Constitution.

1. The textual language of the state constitution. The text of the state constitution may provide cogent grounds for a decision different from that which would be arrived at under the federal constitution. It may be more explicit or it may have no precise federal counterpart at all.
2. Significant differences in the texts of parallel provisions of the federal and state constitutions. Such differences may also warrant reliance on the state constitution. Even where parallel provisions of the two constitutions do not have meaningful differences, other relevant provisions of the state constitution may require that the state constitution be interpreted differently.

²⁸ For discussion of *Gunwall* and its purposes and its application see, Hugh D. Spitzer, *New Life for the Criteria Tests in State Constitutional Jurisprudence: Gunwall is Dead - Long Live Gunwall*, 37 RUTGERS L.J. 1169 (2005-2006); Hugh D. Spitzer, *Which Constitution - Eleven Years of Gunwall in Washington State*, 21 SEATTLE U. L. REV. 1187 (1997-1998); and, Charles H. Sheldon, *A Decade of Washington v. Gunwall: Is It Still All Sail And No Anchor*, 59 ALB. L. REV. 1743 (1995-1996). See also, Cornell W. Clayton, *Toward a Theory of the Washington Constitution*, 37 GONZ. L. REV. 54 (2001-2002).

²⁹ *Gunwall*, 106 Wn.2d 61-62.

3. State constitutional and common law history. This may reflect an intention to confer greater protection from the state government than the federal constitution affords from the federal government. The history of the adoption of a particular state constitutional provision may reveal an intention that will support reading the provision independently of federal law.

4. Preexisting state law. Previously established bodies of state law, including statutory law, may also bear on the granting of distinctive state constitutional rights. State law may be responsive to concerns of its citizens long before they are addressed by analogous constitutional claims. Preexisting law can thus help to define the scope of a constitutional right later established.

5. Differences in structure between the federal and state constitutions. The former is a grant of enumerated powers to the federal government, and the latter serves to limit the sovereign power which inheres directly in the people and indirectly in their elected representatives. Hence the explicit affirmation of fundamental rights in our state constitution may be seen as a guaranty of those rights rather than as a restriction on them.

6. Matters of particular state interest or local concern. Is the subject matter local in character, or does there appear to be a need for national uniformity?^[fn 11] The former may be more appropriately addressed by resorting to the state constitution.

Plaintiff believes there is another factor which should be considered and that is whether and to what extent the so-called federal position is still viable in the federal constitutional scheme. That is in this case, whether *Wells v. Edwards* is still good law or whether it would be applied in this case. Thus, the seventh factor would be stated to be something like this:

7. Viability of the Federal Precedent. How much weight should be given to the federal precedent? Is it still good law? Would it be applied again today in the context of the case at hand?

Now, the analysis of the factors:

1. Textual Language of the State Constitution.

The text of our constitution "provide[s] cogent grounds for a decision different from that which would be arrived at under" *Wells v. Edwards* position regarding one person, one vote and the election of judges. *Gunwall*, 106 Wn.2d 61. And, it is "more explicit" and has no "precise federal counterpart at all." *Id.*

The state constitution is explicit –

SECTION 19 FREEDOM OF ELECTIONS. All Elections shall be free and equal, and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage.

This section has to be read in light of Wash. Const. art. I, § 1, which pronounces that "[a]ll political power is inherent in the people".

This section has to be read in conjunction with Wash. Const. art. I, § 29 which provides:

The provisions of this Constitution are mandatory, unless by express words they are declared to be otherwise.

And, if there is any doubt about the explicit and mandatory nature of art. I, § 19, one need only extend the inquiry by reference to art. 1, § 32, which provides that "[a] frequent recurrence to

fundamental principles is essential to the security of individual right and the perpetuity of free government.”

The language of § 19 applies to “all elections.” There is no exception. Some of the elections to which the provision applies are elections for judicial office. The section was in place when the Washington Court of Appeals was created in 1969. 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 of judges at large. The requirements of Wash. Const. art. I, § 19 were fulfilled in Wash. Const. art. IV, §§ 3 and 5.³⁰

It would not be logical to say that in light of *Wells v. Edwards*, an exception could be engrafted on art. I, § 19.

There is no counterpart to § 19 in the Federal constitution, in the equal protection clause of the Fourteenth Amendment. And, it also stands apart within the context of the state constitution itself, from state constitutional language which might be said to be similar to the equal protection clause of the Fourteenth Amendment, the art. I, § 12 privileges and immunities part of the State Declaration of Rights.

³⁰ The elections for judges of the Supreme Court and the Superior Courts are at large. Thus, the elections are apportioned and thus meet the one person, one vote requirement of § 19.

This specific right is tied to other aspects of the constitution. The right to vote is fundamental, the recurrence to the right is fundamental, the right has been applied to the election of judges in Washington from the date of the passage adoption of the constitution. Wash. Const. art IV, §§ 3 and 5 (the at large Supreme Court elections and at large Superior Court elections).

2. *Differences in the Texts of Parallel Provisions of the Federal and State Constitutions.*

The “fair and equal election” provision is a specific part of § 19. It is not something engrafted onto the section. It has been interpreted to include the principle of one person, one vote. There is no similar provision in the federal constitution. For this reason alone, the federal constitution cannot be applied to trump the state constitution.

Some might say that the federal provision is like the privileges and immunities provision of the state constitution. But this still would make no difference because the Section 19 is independent of the provision. And, also because the state privileges and immunities provision is an independent state, ground in and of itself.³¹

The one person, one vote rule under the federal constitution is something which has been engrafted onto the “equal protection”

³¹ See footnote 22.

clause of the Fourteenth Amendment, which provides:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

This language says nothing about elections. The Washington language does. The terms fair and equal apply to all elections. The language of “equal protection” applies to “the laws.” There is an obvious difference of intended specificity.

A major reason why the *Wells v. Edwards* position regarding the meaning of the equal protection clause and the election of judges does not apply, should not apply, should not trump § 19, is this -- *Wells v. Edwards* is simply not good law. It will be, or should be, overruled. See the extensive discussion of this position below in the 7th factor analysis.

It should not be used in Washington just as it was not used in *Blankenship v. Bartlett, supra*, at 10.

3. State Constitutional and Common Law History.

Washington law and the history of our law evidences an intention to “confer greater protection from the state government than the federal constitution affords from the federal government.” *Gunwall*, 106 Wn.2d 61. Our history “reveal[s] an intention that . . .

support[s] reading the provision independently of federal law" (*Id.*) especially of case law developed at the federal level as in the case of *Wells v. Edwards*.

And, even more especially, independent of federal case law which is highly suspect in today's understanding of the law and in light of several other factors including importantly a clearer understanding of the role elections play in the selection of judges. See discussion below regarding the 7th factor.

The history of popular election goes back at least as far as the Revolution of 1688 against the Stuart Kings in England and the Jacksonian Revolution of the 1830's.³²

From its inception, Washington has popularly elected its judges designated in the state constitution. See *generally*, Q. S. SMITH, ANALYTICAL INDEX TO THE JOURNAL OF THE WASHINGTON STATE CONSTITUTIONAL CONVENTION 1889 (B. P. Rosenow ed., 1999).

Further, it has been held that a judge not properly elected does not have authority to hold office, to act as a judge having jurisdiction. *City of Spokane v. Rothwell*, 141 Wn. App. 680.

4. Preexisting State Law.

Under *Gunwall*, "[p]reviously established bodies of

³² L. Hyde, *Judges: Their Selection and Tenure*, 30 J. AM. JUD. Soc. 152 (1946-1947).

state law, including statutory law, may also bear on the granting of distinctive state constitutional rights. State law may be responsive to concerns of its citizens long before they are addressed by analogous constitutional claims.” *Gunwall*, 106 Wn.2d 62.

Art. I § 19 was in existence long before *Wells v. Edwards* came about -- nearly 100 years before. Its meaning was specifically tied to all elections, the terms “fair and equal” subsume, include, absorb the meaning of “one person, one vote” in terms of what was or should be “fair” and “equal” and which should be “protect[ed].”

Art. I, § 19 obviously applied to the election of judges. See Wash. Const. art. IV, §§ 3 and 5.

5. *Structural Differences Between the Federal and State Constitutions.*

Under *Gunwall*, we are to consider and have in mind the “[d]ifferences in structure between the federal and state constitutions. The former is a grant of enumerated powers to the federal government, and the latter serves to limit the sovereign power which inheres directly in the people and indirectly in their elected representatives. Hence, the explicit affirmation of fundamental rights in our state constitution may be seen as a guaranty of those rights rather than as a restriction on them.” *Gunwall*, 106 Wn.2d 62.

There are vast structural differences between the language of

art. I, § 19 and the equal protection language of the Fourteenth Amendment and the decisional language of *Wells v. Edwards*. The “fair and equal election” language is specific to art. I § 19. The one person, one vote principle was grafted onto the equal protection clause and then it was said to not include the election of judges. *Reynolds v. Sims*, 377 U.S. 533 (1964).

The language of art. I, § 19 is certainly more compelling than the dubious exemption from one person, one vote in *Wells v. Edwards*.

6. Matters of Particular State or Local Concern.

In the 6th *Gunwall* factor, we are to consider if the matter is one of “particular state interest or local concern.” We are to consider whether the matter is “local in character, or does there appear to be a need for national uniformity?” We are instructed that if the matter is local in character “may [it] be more appropriately addressed by resorting to the state constitution.” *Gunwall*, 106 Wn.2d 62.

Washington has provided that elections are to be “fair and equal.” This provision is also a protected part of the privileges and immunities rights of art. I, § 12. *Madison v. State*, 161 Wn.2d 85.

There is no need for national uniformity as to the issue of the election of judges. Indeed, the federal system does not allow for the election of judges. What meaning would such representatives have

with respect of states who elect judges, states like Washington, which from its inception allowed for, called for, the election of judges. Art. IV, §§ 3 and 5. *And see, Rothwell v. Spokane*, 141 Wn. App. 680.

Does one doubt what has been said? Look at the constitutional direction in Wash. Const art. IV, § 30 (4): “Manner of Election” provision.

The people direct their legislators to set forth the manner of election of the judges to the Court of Appeals. What could have been meant by this? One need only look at what the people have already done in the past concerning the meaning of “manner of election” legislation.

Certainly they did not seek to allow the legislature to avoid compliance with art. I, § 19.³³ Here are a few reasons why:

First, had the people wanted to give the legislature the power not have to comply with the constitution and art. I, § 19, they would have said so. They would have said something like this “[n]otwithstanding any provision of this Constitution to the contrary. . . .” *E.g.*, Wash. Const. art. IV, § 29; Wash. Const. art. VII, § 3.

Second, the language used is generic — it is similar to

³³ See, *The Washington Court of Appeals: Fair and Equal Election Rights Violated, An Opportunity for Judicial Improvement* (January 19, 2009). Appendix B.

language used in other parts of Washington law with respect of the rounding out of corporation and associational structures. Section 30 (4) says: “(4) Judges. The number, manner of election, compensation, terms of office, removal and retirement of judges of the court of appeals shall be as provided by statute.” Similar language has been used before.³⁴

Third, the manner of election effort, one might presume, is to be that which is similar generically to the manner of election of judges already found in the constitution, but with some variations consistent with the judges to be elected to the Washington Court of Appeals. That is to say, what was generally intended by the language can be found in the constitution itself. For example, with respect of the Supreme Court, Wash. Const. art. IV, § 3 provides that the “judges of the supreme court shall be elected by the qualified electors of the state at large at the general state election” [Emphasis added.]

And, with respect of the Superior Courts of Washington, Wash. Const. art. IV, § 5 provides “[t] here shall be in each of the organized counties of this state a superior court for which at least one judge shall be elected by the qualified electors of the county at the general

³⁴ See, e.g., Rem. Rev. Stat. (Sup.), § 3803-31 [P.C. § 4503-131] subsections I and III as shown in *Twisp Mining Co. v. Chelan Mining Co.*, 16 Wn.2d 264, 274 (1943); RCW 24.06.065; and, RCW 24.03.100.

state election [Emphasis added.]

7. Viability of the Federal Precedent.

It is appropriate to ask whether *Wells v. Edwards* continues as good law and whether it should apply here if it is of questionable precedence. Surely these points should be inquired into and discussed as a relevant additional *Gunwall* factor in this case.

Wells v. Edwards was only a summary affirmance case.³⁵ Summary affirmance cases do not have the value other cases have. See e.g., Justice Rehnquist's statements in *Edelman v. Jordan*, 415 U.S. 651, 671 (1974).

The strength of such cases depends on consideration of the case in light of a number of factors. Francisco Ed. Lim, *Determining the Reach and Content of Summary Decisions*, 8 REV. LITIG. 165 (1988-1989). Each of these factors will be briefly discussed.

Factual Issues – Are They Similar? The facts in *Wells v. Edwards*, 347 F. Supp. 453 (MD La. 1972) are not the same as the facts of this case. The Louisiana state constitution does not have a constitutional provision like, or similar to, Wash. Const. art. IV, § 19³⁶ – a provision specifically saying that elections are to be free and

³⁵ There was, however, a dissent to the summary affirmance. It will be discussed below at 43.

³⁶ See <http://www.legis.state.la.us/lss/tsrssearch.htm>.

equal.³⁷

Identity of Issues - The Issues Are Not the Same. The issue before the *Wells* court was not the same as here. The issue was not whether a specific statute or constitutional provision providing for “free and equal elections” in a state applied to judicial elections.

Subsequent Developments Have Had an Impact. The lower court reasoning of the court in *Wells* was based upon understandings which are no longer valid (if they ever really were). Some cases were cited but they were old cases, cases which did not take into consideration of *Hadley v. Junior College District*, 397 U.S. 50 (1970) and its progeny. And, not one case of the cases cited dealt with a state constitutional provision providing for “free and equal elections” such as that of Wash. Const. art. I, § 19.

Statutory Developments and Case Law Developments. Another reason why *Wells* is not good law is the case of *Chisom v. Roemer*, 501 U.S. 380 (1991). In this case, the court in a six to three decision held that judicial elections were covered by Section 2 of the Voting Rights Act of 1965, as amended in 1982.

The Supreme Court's thinking and analysis of judicial elections

³⁷ The discussion hereafter could well be included in the consideration of the *Gunwall* factors. It is kept separate because of the tenuous nature of the *Wells v. Edwards* summary decision in light of recent circumstances.

found in *Republican Party of Minnesota v. White*, 536 U.S. 765, 784 (2002) is also a basis for questioning the current force of *Wells v. Edwards*. See, Richard Briffault, *Symposium: The Law of Democracy: New Issues in the Law of Democracy Judicial Campaign Codes after Republican Party of Minnesota v. White*, 153 U. PA. L. REV. 181, 191 (2004-2005).

Settled Constitutional Issue? It cannot be said that the matter asserted in *Wells v. Edwards* is a settled constitutional issue. See *Blankenship v. Bartlett*, *supra*, at 10. And, the essence of the intellectual battle for reality of election of judges is found in the strongly worded dissent to the summary affirmance of *Wells v. Edwards* by Justice White, joined by Justices Douglas and Marshall. Justice White said, "once a State chooses to select officials by popular vote, each qualified voter must be treated with an equal hand and not be subjected to irrational discrimination based on his residence. *Wells v. Edwards*, 409 U.S. 1095 (1973).

In *Republican Party of Minnesota v. White*, 536 U.S. 765, 784 (2002), the court pointed out that:

Separation of the judiciary from the enterprise of "representative government" might have some truth in those countries where judges neither make law themselves nor set aside the laws enacted by the legislature. It is not a true picture of the American system. Not only do state-court judges possess the power to "make" common law, but they have the

immense power to shape the States' constitutions as well. See, e.g., *Baker v. State*, 170 Vt. 194, 744 A.2d 864 (1999). Which is precisely why the election of state judges became popular.”³⁸

The Supreme Court rejected the idea that elected members of the Minnesota judiciary are separate "from the enterprise of representative government." *Republican Party of Minnesota v. White*, 536 U.S. 784 .

VI. CONCLUSION

The court should declare that Wash. Const. art. I, § 19 and its one person, one vote principle applies to the election of judges to the Washington Court of Appeals. The court should conclude that "manner of election"³⁹ of judges to the Court of Appeals does not comply with art. I, § 19.

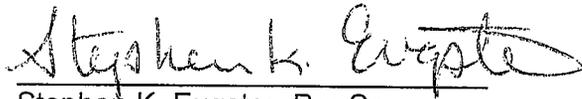
³⁸ In a footnote, 12, the court said: “

In fact, however, the judges of inferior courts often "make law," since the precedent of the highest court does not cover every situation, and not every case is reviewed. Justice Stevens has repeatedly expressed the view that a settled course of lower court opinions binds the highest court. See, e.g., *Reves v. Ernst & Young*, 494 U.S. 56, 74 (1990) (concurring opinion); *McNally v. United States*, 483 U.S. 350, 376-377 (1987) (dissenting opinion).

³⁹ Wash. Const. art. IV, § 30 (4) provides: “The number, manner of election, compensation, terms of office, removal and retirement of judges of the court of appeals shall be as provided by statute.” [Emphasis added.]

Finally, the court should provide time for the legislature to provide for a "manner of election" of judges to the Court of Appeals which complies with its decision.

Respectfully submitted this 21st day of May, 2010.


Stephen K. Eugster, Pro Se

APPENDIX A

Division I			Division I							12	
District			Dist. 1		Dist. 2		Dist. 3				
Judges Assigned to District			8		2		2				
County	Census										
	2,000	2,008	2,000		2,008		2,000		2,008		
Adams	16,428	17,800									
Asotin	20,551	21,400									
Benton	142,475	165,500									
Chelan	66,616	72,100									
Clallam	64,179	69,200									
Clark	345,238	424,200									
Columbia	4,064	4,100									
Cowlitz	92,948	99,000									
Douglas	32,603	37,000									
Ferry	7,260	7,700									
Franklin	49,347	70,200									
Garfield	2,397	2,300									
Grant	74,698	84,600									
Grays Harbor	67,194	70,900									
Island	71,558	79,300					71,558		79,300		
Jefferson	26,299	28,800									
King	1,737,046	1,884,200	1,737,046		1,884,200						
Kitsap	231,969	246,800									
Kittitas	33,362	39,400									
Klickitat	19,161	20,100									
Lewis	68,600	74,700									
Lincoln	10,184	10,400									
Mason	49,405	56,300									
Okanogan	39,564	40,100									
Pacific	20,984	21,800									
Pend Oreille	11,732	12,800									
Pierce	700,818	805,400									
San Juan	14,077	16,100					14,077		16,100		
Skagit	102,979	117,500					102,979		117,500		
Skamania	9,872	10,700									
Snohomish	606,024	696,600			606,024		696,600				
Spokane	417,939	459,000									
Stevens	40,066	43,700									
Thurston	207,355	245,300									
Wahkiakum	3,824	4,100									
Walla Walla	55,180	58,600									
Whatcom	166,826	191,000					166,826		191,000		
Whitman	40,740	43,000									
Yakima	222,581	235,900									
Divisions	3	5,894,143	6,558,800	Total Dist.	1,737,046	1,884,200	606,024	696,600	355,440	403,900	Total Dist.
		1,964,714	2,186,267	Pop. Judge	217,131	235,525	303,012	348,300	177,720	201,950	Pop. Judge
Total Districts	9	654,905	728,756								Pop. per Judge
Judges	24	245,589	273,283	Yr. 2000	1,737,046		606,024		355,440		Judges
				Yr. 2008		1,884,200		696,600		403,900	12
										2,698,510	224,876
										2,984,700	248,725

Division II				Division II							7	
District				Dist. 1		Dist. 2		Dist. 3				
Judges Assigned to District				3		2		2				
County	Census											
	2,000		2,008	2,000	2,008	2,000	2,008	2,000	2,008			
Adams	16,428		17,800									
Asotin	20,551		21,400									
Benton	142,475		165,500									
Chelan	66,616		72,100									
Clallam	64,179		69,200			64,179	69,200					
Clark	345,238		424,200					345,238	424,200			
Columbia	4,064		4,100									
Cowlitz	92,948		99,000					92,948	99,000			
Douglas	32,603		37,000									
Ferry	7,260		7,700									
Franklin	49,347		70,200									
Garfield	2,397		2,300									
Grant	74,698		84,600									
Grays Harbor	67,194		70,900			67,194	70,900					
Island	71,558		79,300									
Jefferson	26,299		28,800			26,299	28,800					
King	1,737,046		1,884,200									
Kitsap	231,969		246,800			231,969	246,800					
Kittitas	33,362		39,400									
Klickitat	19,161		20,100									
Lewis	68,600		74,700					68,600	74,700			
Lincoln	10,184		10,400									
Mason	49,405		56,300			49,405	56,300					
Okanogan	39,564		40,100									
Pacific	20,984		21,800					20,984	21,800			
Pend Oreille	11,732		12,800									
Pierce	700,818		805,400	700,818	805,400							
San Juan	14,077		16,100									
Skagit	102,979		117,500									
Skamania	9,872		10,700					9,872	10,700			
Snohomish	606,024		696,600									
Spokane	417,939		459,000									
Stevens	40,066		43,700									
Thurston	207,355		245,300			207,355	245,300					
Wahkiakum	3,824		4,100					3,824	4,100			
Walla Walla	55,180		58,600									
Whatcom	166,826		191,000									
Whitman	40,740		43,000									
Yakima	222,581		235,900									
Divisions	3	5,894,143	6,558,800	Total Dist.	700,818	805,400	646,401	717,300	541,466	634,500	Total Dist.	
		1,964,714	2,186,267	Pop. Judge	233,606	268,467	323,201	358,650	270,733	317,250	Pop. Judge	
Districts	9	654,905	728,756								Pop. per Judge	
Judges	24	245,589	273,283	Yr. 2000	700,818		646,401		541,466		Judges	7
				Yr. 2008		805,400		717,300		634,500	1,888,685	269,812
											2,157,200	308,171

Division III				Division III		5		Dist 2		Dist 3			
District				Dist. 1		Dist 1		Dist 2		Dist 3			
Judges Assigned to District				2		1		1		2			
County	Census												
	2,000	2,008		2,000	2,008	2,000	2,008	2,000	2,008	2,000	2,008		
Adams	16,428	17,800				16,428	17,800						
Asotin	20,551	21,400				20,551	21,400						
Benton	142,475	165,500				142,475	165,500						
Chelan	66,616	72,100								66,616	72,100		
Clallam	64,179	69,200											
Clark	345,238	424,200											
Columbia	4,064	4,100						4,064	4,100				
Cowlitz	92,948	99,000											
Douglas	32,603	37,000								32,603	37,000		
Ferry	7,260	7,700		7,260	7,700								
Franklin	49,347	70,200						49,347	70,200				
Garfield	2,397	2,300						2,397	2,300				
Grant	74,698	84,600						74,698	84,600				
Grays Harbor	67,194	70,900											
Island	71,558	79,300											
Jefferson	26,299	28,800											
King	1,737,046	1,884,200											
Kitsap	231,969	246,800											
Kittitas	33,362	39,400								33,362	39,400		
Klickitat	19,161	20,100								19,161	20,100		
Lewis	68,600	74,700											
Lincoln	10,184	10,400		10,184	10,400								
Mason	49,405	56,300											
Okanogan	39,564	40,100		39,564	40,100								
Pacific	20,984	21,800											
Pend Oreille	11,732	12,800		11,732	12,800								
Pierce	700,818	805,400											
San Juan	14,077	16,100											
Skagit	102,979	117,500											
Skamania	9,872	10,700											
Snohomish	606,024	696,600											
Spokane	417,939	459,000		417,939	459,000								
Stevens	40,066	43,700		40,066	43,700								
Thurston	207,355	245,300											
Wahkiakum	3,824	4,100											
Walla Walla	55,180	58,600						55,180	58,600				
Whatcom	166,826	191,000											
Whitman	40,740	43,000						40,740	43,000				
Yakima	222,581	235,900								222,581	235,900		
Divisions	3	5,894,143	6,558,800	Total Dist.	526,745	573,700	405,880	467,500	374,323	404,500	Total Dist.		
		1,964,714	2,186,267	Pop. Judge	263,373	286,850	405,880	467,500	187,162	202,250	Pop. Judge		
Districts	9	654,905	728,756								Pop. per Judge		
Judges	24	245,589	273,283	Yr. 2000	526,745		405,880		374,323		Judges	5	
				Yr. 2008		573,700		467,500		404,500			261,390
													289,140

Appendix B

Analyses of the ratios and percentage deviations wherein Plaintiff has attempted to apply the approach to population per representative methodology used in *Mahan v. Howell*, 410 U.S. 315 (1973) again using information generated from statistics provided by the Washington State Office of Financial Management.

A. Statewide – using 2008 projected statistics.

Apportionment Statewide Statistics 2008			
2008	High District	Low District	State Average Per District
	487,500	201,950	273,283
Ratio	$487,500 / 201,950 = 2.41$ to 1		
Percentage Deviation Calculation	$487,500 - 273,283 = 214,217$		
	$214,217 / 487,500 = .78$		
	$273,283 - 201,950 = 71,333$		
	$71,333 / 201,950 = .26$		
Percentage Deviation	$.78 + .26 = 1.04$ or 104%		

B. Statewide – using 2000 statistics.

Apportionment – Statewide Statistics 2000			
2000	High District	Low District	State Average Per District
	405,880	177,720	245,283
Ratio	$405,880 / 177,720 = 2.28$ to 1		
Percentage Deviation Calculation	$405,880 - 245,283 = 160,597$		
	$160,597 / 245,283 = .65$		
	$245,283 - 177,720 = 67,563$		
	$67,563 / 245,283 = .27$		

Percentage Deviation	$.65 + .27 = .92$ or 92%
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C. Division I – using 2008 statistics.

Apportionment Division I Statistics 2008			
2008	High District	Low District	State Average Per District in Division I
	348,300	201,950	248,725
Ratio	$348,300 / 201,950 = 1.72$ to 1		
Percentage Deviation Calculation	$348,300 - 248,725 = 146,598$		
	$146,598 / 248,725 = .59$		
	$248,725 - 201,950 = 46,775$		
	$46,775 / 201,950 = .23$		
Percentage Deviation	$.59 + .23 = .82$ or 82%		

D. Division III – using 2008 statistics.

Apportionment Division III Statistics 2008			
2008	High District	Low District	State Average Per District in Division III
	467,500	202,250	289,140
Ratio	$467,500 / 202,250 = 2.12$ to 1		
Percentage Deviation Calculation	$467,500 - 289,140 = 178,360$		
	$178,360 / 289,140 = .62$		
	$289,140 - 202,250 = 86,890$		
	$86,890 / 202,250 = .43$		
Percentage Deviation	$.62 + .43 = 1.05$ or 105%		

