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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.

REPLY OF APPELLANT

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The conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing—one person, one vote.

William O. Douglas, J., *Gray v. Sanders*, 372 U.S. 368, 381 (1963)

I. INTRODUCTION

From the beginning, the people of the State of Washington have elected and unelected the judges of the various state courts. The people who do the electing are the electors residing within the jurisdiction of the court. Thus, there has always been a connection between the voter and the judge elected and the judge who did not get re-elected.

The people of the state, at large, elect justices of the Supreme Court. Wash. Const. art. IV, § 3. Wash. Const. art. I, § 19¹ and the principle of "one person, one vote" is fulfilled.

The people of the jurisdiction of a state Superior Court elect, at large within the jurisdiction of the court, the county for example, the judge or judges of the court. With respect of each court, when a judge acts either with other judges as in the case of the Supreme

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." Hereinafter referred to from time to time as Section 19.

Court, or singly the judge so acting is apportioned to voters of the electing jurisdiction. Wash. Const. art. IV, § 5. Again, Wash. Const. art. I, § 19 and the principle of “one person, one vote” is fulfilled.

We also elect judges to the Washington Court of Appeals. At the outset, the legislature created three geographic divisions of the Court of Appeals.² The electorate of the divisions were provided with the power to select the judges of the divisions. But, the electorate did not act at large within the division.

The legislature created three districts within each division and provided that a certain number of judges would be elected by the electors of each district.³

Also, the legislature provided that each division of the court would act by panels of three judges.⁴

The legislature, in the beginning of the Court of Appeals ensured that Wash. Const. art. I, § 19 and the principle of “one person, one vote” was fulfilled. In Division One, two judges were assigned to each district. In Divisions Two and Three, one judge was assigned to each district.⁵

² RCW 2.06.020 (1969 ex.s. c 221 § 2).

³ *Id.*

⁴ RCW 2.06.040 (1969 ex.s. c 221 § 4).

⁵ See Note 2.

In Divisions Two and Three, each three judge panel was properly apportioned because one judge from each division served on each panel – had to serve on each panel.

In the case of Division One, since there were two judges from each district, the chief judge of the Division was legislatively charged with the duty of selecting the three judge panels.⁶ One can only assume the purpose for this was to ensure that each panel would have a judge from each of three districts. Thus, each panel was properly apportioned.

The Washington Court of Appeals no longer complies with Wash. Const. art. IV, § 19. The manner of election provisions of RCW Ch. 2.06 violate Section 19. The principle of one person, one vote is not being complied with and the three judge panels are not properly apportioned. Indeed the three judge panels cannot be properly apportioned.

Respondents say they agree Section 19 applies to the election of judges to the Washington Court of Appeals. However, they say the principle of one person, one vote, which is embodied in Section 19,

⁶ As far as Division One was concerned, the legislature said “Panels in the first division shall be comprised of such judges as the chief judge thereof shall from time to time direct.” RCW 2.06.060.

This language was in the original language of RCW 2.06.060. It has never been removed. It obtains today.

does not apply.⁷

Respondents seek a dramatic action by this Court, a decision which would amount to an amendment of the Washington Constitution. The amendment would be the removal of the principle of one person, one vote from Section 19 concerning the election of judges to the Washington Court of Appeals.

II. ARGUMENT

A. Outline of Appellant's Reply.

The crux of Respondents' argument is this: That the Section 19 principle of one person, one vote does not apply to the election of judges to the Washington Court of Appeals. This assertion will be addressed first.

The second topic addressed will be Respondents' extraordinary assertion that the law governing the election of judges to the Court of Appeals does not "implicate" the right of any person or group to vote and is therefore "consistent" with Section 19. Page 10, *infra*.

The third topic will be Respondents' assertion that Wash.

⁷ Of necessity, they would have the Court also say the principle does not apply to the election of judges to other constitutionally-provided courts – the Supreme Court (Wash. Const. art. IV, § 3) and the Superior Courts (Wash. Const. art. IV, § 5).

Const. art. IV, § 30 and the "manner of election" language therein allows for an abrogation or an exception of the requirements of Section 19 with respect of the election of judges to the Court of Appeals. Page 14, *infra*.

The fourth, and last topic addressed, will be the reality of what the court must decide in this case. Briefly, it will describe what might evolve from a decision in favor of Appellant's position. Page 17, *infra*.

B. Electing Judges -- What We Do in Washington -- *Wells v. Edwards* -- Its Lack of Meaning for Washington.

The essence of the Defendant's argument is this: Judges are not representatives of the people, they are not executives of governmental structures, therefore, they do not have to be elected. Or, if they are elected, the elections do not have to comply with the principle of one person, one vote.

Respondents would have the court amend the Washington State Declaration of Rights so that the one person, one vote principle of Section 19, though it applies to all elections, even the election of judges of the Supreme Court⁸ and judges of the Superior Courts,⁹

⁸ Wash. Const. art IV, § 3 (judges are elected at large in the state, thus any judicial action is one taken by a person whose position is fully apportioned).

⁹ Wash. Const. art IV, § 5 (judges are elected at large in the county or combined counties, thus any judicial action is one taken by a person whose position is fully apportioned).

does not apply to the election of judges to the Washington Court of Appeals.

1. How Judges are Elected (Selected).

Respondents like the notion in *Wells v. Edwards*, 347 F. Supp. 453 (M.D. La. 1972), *summarily affirmed*, 409 U.S. 1095 (1973), that some judges think the principle of one person, one vote does not apply to judicial elections because judges are not “representatives.”¹⁰

In Washington, no matter what one might say about the role of judges in our three-part government, judges are elected. We elect them subject to Section 19, which requires that elections be “free and equal,” which means that elections must comply with the principle of one person, one vote.

The principle of one person, one vote was not something added by amendment to Section 19. It was, and remains, a principle which is embodied the language of Section 19. *Foster v. Sunnyside Valley Irrig. Dist.*, 102 Wn.2d 395, 687 P.2d 841 (1984).

As far as the people of Washington are concerned, we elect judges just as we elect others – we do not make distinctions between “representatives” and judges. The people elect those of the Washington State Bar Association they deem qualified to hold judicial

¹⁰ It might be contended that *Wells v. Edwards* is a clear case of judge-made law.

position.

Wells v. Edwards is based upon the notion that elections apply only to the selection of representatives who legislate and some others who perform administrative actions. This notion cannot be applied in Washington because we elect judges in Washington. By constitutional consent, we elect Supreme Court Judges, Superior Court judges and judges of the Court of Appeals. Wash. Const. art. IV, §§ 3, 5 and 30.

The idea that elections, and the principle of one person, one vote does not apply to the election of judges because they do not "represent" people but somehow represent some higher calling is more protected or special calling is illogical. Election means selection, choice between alternative persons. We elect, select, one person over another. We elect not because of what a person is going to do, but because the power of choice has been put in the hands of the electorate. The electorate is accorded the wisdom and the power to make selection. It is not a question of what the person selected is to do, it is a question of who has been given, or who has, the power to select. Section 19.

Now, if the people have the power to select, then that power has to be allowed to be used in compliance with the specific constitutional provisions which direct how the power is to be used.

Section 19 tells us how the power is to be used, can be used, and who participates in the exercise of the power.

The people know what they are doing when they use the power to elect judges. They know they are selecting certain members of the Washington State Bar Association who they deem to be most qualified to be judges of the courts to which judges are to be elected. They use the power of their vote to choose the persons best suited by their lights to perform the judicial function. They do not choose people who are going to legislate, they choose people who are going to decide well, people who are going to be good, and proper judges.

They choose people who have the qualities a judge should have. They are the check on who is or is not a good judge.

Let us look at this point a bit longer, this idea of the electorate being the check on who is or is not a good judge. First of all, the check is performed by the electorate which has contact with the work of the judge, not only with the work to be performed, but the work which has been performed.

There is a nexus between the electorate and the judge. Judges who perform the work of the Superior Court in King County are elected by the people of King County. They are not elected by the people of Spokane County. The nexus is there because the work of selection cannot be work which is done in a vacuum or has real

meaning to the person using the power of the vote.

The check on who is or is not a person who is to act as a judge is not performed by any other person or any institution within in the Washington system of government.

In sum, the electorate selects who is going to run for judicial position, who is going to be elected to judicial position, and who is going to stay in office if he or she decides to run again – that is to be selected to run again and to be elected if she or he does run.

No one other than the electorate provides this election, selection function. And, the function is protected by Section 19, it has to be free and equal and the free exercise of this right of suffrage cannot be interfered with or prevented. Section 19.

Respondents assert that the full application of Section 19 does not apply to the election of the persons to serve constitutionally-established judicial offices. Obviously, it does and it must.

2. *Wells v. Edwards* Has No Application in Washington: It Is No Longer Good Law (If it Ever Was).

Wells v. Edwards is no longer good law. How can it be? The notion that judges are not “representatives” and thus we as a people do not “elect” them is no longer law. It was an illusion then, and is now clearly understood to be an illusion.

In *Chisom v. Roemer*, 501 U.S. 380, 401 (1991), the Supreme

Court observed that judges were "representatives" for purposes of the Federal Voting Rights Act. ("[I]t seems both reasonable and realistic to characterize the winners [of judicial elections] as representatives of that [judicial] district.").

In *Republican Party of Minnesota v. White*, 536 U.S. 765, 784 (2002), the Supreme Court rejected the idea that elected members of the Minnesota judiciary are separate "from the enterprise of representative government." Writing for the majority, Associate Justice Scalia said:

[The] complete 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.

Id. at 784 (footnote omitted).

C. "Consistent With Article I, Section 19, The Laws Governing Election of Court of Appeals Judges Do Not Implicate the Right of Any Citizen Or Group to Vote."¹¹

This title statement does not make sense. Think of it, if a law providing for the manner of election of judges to the Court of Appeals

¹¹ Brief of Respondent at 4.

does not "implicate" the right of any citizen to vote, how can the law be consistent with Section 19 which requires that elections be free and equal?

Respondents say "[e]very Washington citizen is entitled to participate in the election of one or more judges to the Court of Appeals. RCW 2.06.020. There is no category of voter excluded from participation in such elections. The statutes providing for the election of Court of Appeals judges do not implicate the right of any citizen or group of citizens to vote, and are consistent with article I, section 19." Brief of Respondents at 6.

Respondents assert that Section 19 only protects a broad right of group suffrage. This is not the law. Section 19 provides for one person, one vote. The concomitant right of suffrage shores up this right.¹²

Here is what Chief Justice Earl Warren said about suffrage in *Reynolds v. Sims*, 377 U.S. 533, 555 (1964):

The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government. And the right of suffrage

¹² Let us remind ourselves as to the language of Section 19 – "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." [Emphasis added.] Suffrage refers to the vote, which must be free and equal.

can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.^{29.}
[Emphasis added.]

Footnote 29: As stated by Mr. Justice Douglas, dissenting, in *South v. Peters*, 339 U. S. 276, 279:

"There is more to the right to vote than the right to mark a piece of paper and drop it in a box or the right to pull a lever in a voting booth. The right to vote includes the right to have the ballot counted. . . . It also includes the right to have the vote counted at full value without dilution or discount. . . . That federally protected right suffers substantial dilution . . . [where a] favored group has full voting strength . . . [and] [t]he groups not in favor have their votes discounted."

Suffrage does not exist unless it is equal suffrage.

Respondents seem to be contending that "suffrage" is different from voting which is "free and equal." Let us look at the history of Section 19. What we will see is that suffrage referred to and further animated the term "free and equal."

In *Foster v. Sunnyside Valley Irrigation Dist*, 102 Wn.2d 395, 405, 687 P.2d 841 (1984), Justice Utter, writing for the court discussed the history of Section 19. He said:

The meaning of the guaranty to "free and equal" elections can be ascertained, in some measure, by looking to the records of the constitutional convention, and the few cases which have discussed Const. art. 1, § 19. The guaranty that "all Elections shall be free and equal" was adopted from the Oregon Constitution,

which was, in turn, adopted from the Indiana Constitution. JOURNAL OF THE WASHINGTON STATE CONSTITUTIONAL CONVENTION, 1889, at 508 n. 31 (B. Rosenow ed. 1962). The framers of the Washington Constitution added to this phrase the additional guaranty that "no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage."

He further said,

At the convention, there were two motions to replace the word "equal" with an alternative word. Mr. Dyer moved to substitute "open" for "equal." Mr. Reed moved to substitute "impartial" for "equal." Mr. Lindsley moved to strike the entire section. Each of these motions failed. At least one delegate, Mr. Moore, believed that "equal" meant the same thing as "free." JOURNAL, *supra* at 508.

Id.

From this it is abundantly clear that no one can contend that "suffrage" does away with the right of voting to be "free and equal."¹³

But even if Section 19 just protects suffrage of groups, the present method of election of judges to the Court of Appeals violates that right. Appellant, as a resident of Spokane County and his fellow Spokane County residents do not and cannot vote for judges of the Divisions One and Two of the Court of Appeals. Furthermore, they cannot vote for judges elected from districts 2 and 3 of Division Three

¹³ See the quote from Associate Justice Douglas at page 1, *supra* where he points out that "political equality" means one person, one vote. Certainly it does not mean a power of vote by some with a lesser power of vote by others.

of the Court of Appeals. As a result of the latter, judges serving as the court in the three judge panels are not elected by Appellant and his fellow residents of Spokane.¹⁴

Respondents would have this Court change the inherent purpose and function of the Section 19. This would be a corruption of our constitution.

D. "The Constitution Specifically Allows the Legislature to Determine by Statute How Court of Appeals Judges Are Elected."¹⁵

The state constitution expressly states that "[t]he number, manner of election, compensation, terms of office, removal and retirement of judges of the Court of Appeals shall be as provided by statute." Const. art. IV, § 30(4).

Respondents say "[a]t the very minimum, this language grants to the legislature broad discretion in determining how the judges of the Court of Appeals will be elected. It is at least arguable that this

¹⁴ See the discussion of this topic and the statistics with respect thereto in the Brief of Appellant 15 - 17 and the appendices related thereto.

The information reported and the appendices consist of information which is a part of the record in this case. Also, it is material which this Court can take judicial notice of. The information is a public record, a very public record in that the cases reported and which are the sources for the information are published and can be found conveniently and at no charge from numerous sources.

¹⁵ Brief of Respondents at 6.

explicit language precludes challenges to the manner of election of Court of Appeals judges based on provisions such as article I, Section 19, which is both more general and earlier in its enactment than article IV, section 30.” Brief of Respondents at 6.

In matters of constitutional construction, a constitutional provision should receive a consistent and uniform interpretation. Even though the circumstances may have changed to make a different rule seem more desirable, the constitution should not be taken to mean one thing at one time and another at another time. *State ex rel. Lemon v. Langlie*, 45 Wn.2d 82, 273 P.2d 464 (1954).

In the process of analyzing this case and determining whether it should be brought, Appellant considered whether it could be argued that Wash. Const. art. IV, § 30 and its delegation to the legislature to deal with the “manner of election” of judges to “a Court of Appeals” somehow excused the legislature from compliance with Section 19.¹⁶

It does not. Here are a few reasons why: First, had the people wanted to give the legislature power not have to comply with the constitution and art. I, § 19, they would have said so. They would

¹⁶ Appellant has written an article entitled *The Washington Court of Appeals: Fair and Equal Election Rights Violated, An Opportunity for Judicial Improvement* (Revised 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.

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 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 was used in 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).

Similar language is used in RCW 24.06.065. “The designation of . . . may have one or more classes of members. The designation of such class or classes, the manner of election, appointment or admission to membership, and the qualifications, responsibilities and rights”

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

which the”¹⁷

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 :

The judges of the supreme court shall be elected by the qualified electors of the state at large at the general state election at the times and places at which state officers are elected, unless some other time be provided by the legislature

With respect of the Superior Courts of Washington Wash. Const. art. IV, § 5 provides :

There 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 state election

E. The Future of A Decision that Section 19 Applies to the Election of Judges to the Court of Appeals.

Respondents say “[a]ppellant has not properly raised any

¹⁷ In no situation can it be found that the “manner of election” provision of a statute changed or has been said to change in any way, the persons who are entitled to vote under the manner of election. The manner of election merely refers to the way in which the electors are to vote, not that their vote can be taken away or diminished.

challenge to the establishment of separate divisions in the Court of Appeals, or to the manner in which cases are assigned to panels.”
Brief of Respondents at 14.

There is only a single, simple issue before the court. It is whether Section 19 and its principle of one person, one vote applies to the election of judges to the Washington Court of Appeals.

If the court agrees with Respondents, the case is over.

If the court agrees with Appellant, then the court will take certain action to bring the decision into effect – that is, to have the decision apply to the election of judges to the Court of Appeals.

If the court agrees that the present system violates Section 19, it would have to agree that district elections of judges to divisions of the Court of Appeals and the attendant three judge panels are unconstitutional.

If the court is to act, and the court is to be elected, and the court actors, the judges, must be apportioned as they act – then present system, manner of election, violates Section 19.

First, the court could return the case to the trial court.

Second, the court could rule the provisions of RCW 2.06.020 unconstitutional and give the legislature some time to correct the problem.

Third, the court could give some understanding of how the

“manner of election” of judges to the Court of Appeals would be constitutional so as to suggest the parameters of legislation which would be acceptable to the court. In this regard, the court might have something to say as to how judges are nominated and elected.

III. CONCLUSION

In conclusion let us leave the language of the law and speak of the reality of what we do and understand in the state of Washington regarding the election of judges to our state courts.

Let us start with why we have elections for public officials. Elections give the general population of qualified voters the right and opportunity to express themselves as to who should serve in government offices and what should be the guiding principals of government and the office holders.

Next let us consider why we need elections. Elections allow the original seating of an individual and a way to remove the official. Elections are the way we keep elected officials in line in executing the duties and responsibilities delegated to them.

As we say, we are all equal in the voting option – One person, one vote. All votes have equal weight. The elected actors must be properly apportioned.

Well now that we have the voter and the layman understanding of the rules of why we have elections, let us ask the question – “Is

there any valid reason why judges should not be held to the same election standards as other public officers?"

Why would we cut the judges more slack than any other elected officer? Why would we say that judges have a status that excuses them from the will of the voters? Are judges due this elitist status? Ask this question to the person on the street and you will hear a loud and uniform, "no."

So with all that having been said, let us take a look at the issue in this case, the election (and un-election) of judges to the Court of Appeals. We want and need a rule of law for the election of judges where the judge receives our vote or feels the sting of not receiving it. To do this, we have to have a Court of Appeals division organization so we vote on the judges that hear our cases. This is the necessary connection. The divisions have to be set up so that the judges elected and the judges who act for the court (the judges on the panels) are balanced and apportioned to comply with the one person, one vote principle.

We offer no quarrel about the delegation by the legislature of the structuring and methods of the court of appeals . . . this delegation however cannot be read as a license to ignore the one person, one vote standard and the need to ensure that judges are properly apportioned.

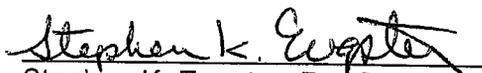
Let us be frank, let us talk with the bark on. Why would we want to limit, in any way, the right to a full expression of the voting right? Are judges ready to tell the voter that judges in elections have a preferred status? That as to them the rules of fair and equal election do not apply? That the rules of one person, one vote do not apply? That their offices and their work escape the rules of apportionment, rules which ensure that all who are entitled to vote get the benefit of their vote?

Do judges really want to express this preferred status for their own benefit?

If this is true for the Court of Appeals, it must be true for the other courts in the State of Washington.

Section 19, and the one person, one vote principle embodied therein, applies to the election of judges to the Court of Appeals. It applies to the Courts of Appeals – **the divisions** and to the panels of the Courts of Appeal.

Respectfully submitted this ⁺20 day of July 2010.


Stephen K. Eugster, Pro Se

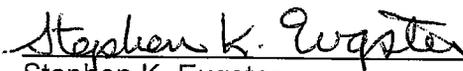
CERTIFICATE OF SERVICE

I certify, under penalty of perjury under the laws of the state of Washington, that on this date I have caused a true and correct copy of Reply of Appellant to be served on the following via e-mail and First Class United States Mail, postage prepaid as follows:

James K. Pharris
Anne E. Egeler
Deputy Solicitors General
PO Box 40100
Olympia, WA 98504-0100

James Pharris – jamesp@atg.wa.gov
Anne E. Egeler – annee1@atg.wa.gov

Signed at Spokane, Washington on July 20, 2010.



Stephen K. Eugster