Judges are (not?) Politicians: *Williams-Yulee v. The Florida Bar* and the Constitutional Law of Redistricting of Judicial Election Districts

Alec Webley*

Abstract: *In* Williams-Yulee v. The Florida Bar*, the Supreme Court unexpectedly chose to treat judicial elections differently from other elections be-cause, as Chief Justice Roberts pithily put it, "judges are not politicians". This represents a retreat not merely from a line of decisions applying the constitutional law of democracy to elected judges wholesale but from a larger jurisprudential project, nearly four decades in the making, that viewed the application of the law of democracy to the elected judiciary as an all-or-nothing proposition. For the first time, context matters when applying constitutional law to judicial elections. I explore the implications of the* Williams-Yulee *decision in a novel context: the constitutional and federal law applicable to the electoral districts of elected judges. Since the 1970s, federal judges have categorically excluded the state judge districting process from both the "one person one vote" requirement and, despite ex-press Supreme Court instruction to the contrary, much of what remains of the Voting Rights Act. They have done so for sensible reasons: state judicial districts rely on different principles than those applicable to legislative districts. But the all-or-nothing model has left judicial districting systems dangerously exposed to untoward manipulation.* Williams-Yulee *provides, I argue, the foundations of a new context-specific doctrine that applies the law of democracy to the specific features and characteristics of judicial districting. Doing so would advance the shared project*

* Law Clerk, Covington & Burling LLP. The views contained herein are not necessarily those of Covington & Burling or its clients. Thanks to the Brennan Center for Justice, in particular Alicia Bannon, for whom a significant part of the research under-girding this paper was performed and for their kind permission to publish it in this form. Thanks also to Sam Issacharoff and two anonymous reviewers for very helpful comments on a previous draft of this paper, as well as the editors of the *N.Y.U. Journal of Legislation and Public Policy*, in particular Joshua McCollum and R.T. Winston Berkman, for their incisive editing. Finally, my continued gratitude extends to Jeffrey Green, Rogers Smith, Eileen Doherty-Sil, and Anne Norton. Mistakes are mine. E-mail profesional: awebley@cov.com.

of the courts and the bar of preserving separation of powers and the public perception of judicial integrity.

Rezumat: *În hotărârea* Williams-Yulee v. The Florida Bar *(Baroul din Florida), Curtea Supremă a decis, în mod surprinzător, să trateze în mod distinct alegerile judiciare de celelalte alegeri pentru că, astfel cum judecătorul din cadrul Curții Supreme Roberts s-a exprimat scurt și convingător, "judecătorii nu sunt politicieni". Acest fapt reprezintă o revenire nu doar asupra unei serii de decizii care aplică integral legea constituțională a alegerii democratice judecătorilor aleși, dar și asupra unui mai mare proiect jurisprudențial în desfășurare de aproape patru decenii, care a abordat aplicarea legii alegerii democratice aleșilor judiciari ca o propunere de tip totul--sau-nimic.*

Pentru prima dată, contextul este important în ceea ce privește aplicarea legii constituționale alegerilor judiciare. În această lucrare, analizez implicațiile deciziei Williams-Yulee *într-un nou context: legile constituționale și federale aplicabile circumscripțiilor electorale în care judecătorii sunt aleși. Începând cu anii 1970, judecătorii federali au exclus categoric procesul statal de alegere a judecătorilor, atât de la regula o persoană un vot, cât și de la, în ciuda instrucțiunilor exprese ale Curții supreme în sens contrar, de la ceea ce a rămas din Legea dreptului de vot. Judecătorii federali au procedat astfel din cauza unor motive sensibile: circumscripțiile electorale judiciare statale se bazează pe principii diferite de cele aplicabile circumscripțiile electorale legislative.*

Dar modelul totul-sau-nimic a expus, în mod periculos, sistemul circumscripțiilor judiciare unei manipulării anormale. Decizia Williams-Yulee *oferă, în opinia mea, fundamentele unei noi doctrine a adaptării la contextul specific, doctrină care aplică legea votului democratic la trăsăturile specifice și la caracteristicile circumscripțiilor electorale judiciare. Procedând astfel, s-ar dezvolta proiectul comun al instanțelor și baroului de menținere a separației puterilor și a percepției publice asupra integrității judiciare.*

Keywords: *democracy, constitutional law, judicial integrity, judicial elections*

Introduction

What may be true of happy families, L. Tolstoy ("All happy families are alike"), or of roses, G. Stein ("Rose is a rose is a rose is a rose"), does not hold true in elections of every kind. States should not be put to the polar choices of either equating judicial elections to political elections, or else abandoning public participation in the selection of judges altogether. Instead, States should have leeway to "balance the constitutional interests in judicial integrity and free expression within the unique setting of an elected judiciary."

Williams-Yulee v. The Florida Bar (Ginsburg, J., concurring)[86]

State judicial elections,[87] once quite sleepy affairs, are becoming nasty,

[86] Williams-Yulee v. Fla. Bar, 135 S. Ct. 1656, 1675 (2015) (citations omitted).

[87] In thirty-eight states, at least some appellate or supreme court state judges are directly elected. *See generally Methods of Judicial Selection*, NAT'L CTR. FOR ST. CTS., http://www.judicialselection.us/judicial_selection/methods/selection_of_judges.cfm (last visited Oct. 17, 2016) (describing the method of judicial selection at all levels for all fifty states).

brutish, and long.[88] TV ad spending has trebled in the past ten years.[89] With rising spending, vitriolic election advertisements have come to dominate the field, just as they have in elections for other government offices.[90]

This trend seems to have played a role in the U.S. Supreme Court's unexpected decision in the 2014 term to validate the Florida Bar's ban on the direct solicitation of campaign donations by judicial candidates.[91] Yet the Court could not bring itself to give judges a free pass. Instead, by applying a weakened version of strict scrutiny[92] to the challenged regulations but upholding them nonetheless, the Court initiated an entirely new departure for its troubled jurisprudence concerning judicial elections. When Chief Justice Roberts declared for the Court that "judges are not politicians, even if they come to the bench by the way of the ballot,"[93] he was in a sense articulating a new, liminal state into which judges would be placed – as elected officials subject to the constitutional law of democracy only in accordance with the peculiar nature of their office, one distinct from any other elected office.

Such subtlety had not been a feature of the Court's work in the area of judicial elections. In this paper, I argue the Court was right to move to such an intermediary position as regards judicial elections. Doing so gives the American constitutional order a chance to reconcile what to other democracies seems irreconcilable: the selection of ostensibly neutral judges by partisan elections.

I begin with the premise that – absent surprising developments in the Court's jurisprudence – such elections will continue to be a major part of the state judicial scene in large part because the public, who must usually approve changes to state constitutions,[94] simply won't vote to abolish judicial elections wholesale,[95] except under unusual circumstances.[96] Taking the reality of judicial elections as a given, the Court has been faced with the challenge of imagining a constitutional law for judicial elections that can properly reconcile the role of judges as public representatives of a sort with their function as what Alec

[88] *See generally States: The Judicial Battleground*, JUSTICE AT STAKE, http://www.justiceatstake.org/issues/state_court_issues/index.cfm (last visited Nov. 10, 2016) ("Since 2000, elected Supreme Courts have been Ground Zero of an unprecedented money war, in which competing groups have spent tens of millions on negative ads, in an attempt to pack courts with judges friendly to their agendas.")

[89] ALICIA BANNON & LIANNA REAGAN, BRENNAN CTR. FOR JUSTICE, THE NEW POLITICS OF JUDICIAL ELECTIONS 2011–12 20 (2013), http://www.brennancenter.org/publication/new-politics-judicial-elections-2011-12 (noting that the 2010–11 cycle saw $33.7 million in TV spending on judicial elections while 2001–02 saw only $9 million).

[90] *Id.* The report discusses in considerable depth the vitriolic ads on show in the 2011–12 cycle. Spending and negative advertising are strongly correlated, though the precise dynamics of a causal relationship have not yet been rigorously established. *See* T.W. Farnam, *Study: Negative Campaign Ads Much More Frequent, Vicious than in Primaries Past*, WASH. POST (Feb. 20, 2012), http://www.washingtonpost.com/politics/study-negative-campaign-ads-much-more-frequent-vicious-than-in-primaries-past/2012/02/14/gIQAR7ifPR_story.html (proposing some explanations for a causal relation between campaign spending and negative advertising).

[91] In particular, see *Williams-Yulee*, 135 S. Ct. at 1674 (Ginsberg, J., concurring), which cites many of the above sources.

[92] *Id.* at 1665 (majority opinion).

[93] *Id.* at 1662.

[94] Only Delaware does not require popular approval of state constitutional amendments. *See* Jennie Drage Bowser, *Constitutions: Amend with Care*, NAT'L CONF. OF ST. LEGISLATURES MAG. (Sept. 1, 2015), http://www.ncsl.org/research/elections-and-campaigns/constitution-amend-with-care.aspx.

[95] *See generally* Seth Anderson, *Examining the Decline in Support for Merit Se-lection in the States*, 67 ALB. L. REV. 793 (2004) (examining voters' pronounced reluctance to eliminate judicial elections).

[96] *Id.*

Stone Sweet calls "triadic dispute resolvers."[97]

Prior to *Williams-Yulee*, the Court's response to this challenge had been an exercise in binary inclusion and exclusion, akin to its treatment of incorporation of the Bill of Rights.[98] In essence, the Court moved doctrine-by-doctrine, deciding whether to apply particular doctrines to the judiciary. Thus, at least until *Williams-Yulee*, judicial elections were subject to the Court's free speech jurisprudence in exactly the same way legislative officers were.[99] By contrast, judges were simply excused, in a little-noticed development, from the rules regarding the drawing of election districts.[100]

Judicial districting is an especially good place from which to view the consequences of what I'll call the "binary approach." It began with the Court excluding judges from the rule that districts must have the same number of people (the "equipopulation rule") in *Wells v. Edwards*.[101] Then, the Court some decades later held that judicial districts *would* be subject to the entirety of the Voting Rights Act (VRA).[102] Yet the "right" position from the perspective of vindicating the underlying purposes of the Court's jurisprudence seems to sit somewhere between these stark all-or-nothing positions. Thus, the lower courts have gently steered both the racial redistricting and equal-population districting to a much more liminal space, one attentive to the unique problems presented by judicial elections.

Whatever one thinks of the merits of judicial elections, then, we are stuck with them. This being the case, courts should turn their attention to judicial districting and similar mechanisms of judicial elections, imposing the same protections to which we have become accustomed for all other elected bodies, so we can make the best of the hand we're dealt.

By analyzing judicial districting, which is a severely under-analyzed area of elections jurisprudence, we can understand *Williams-Yuelee* in a new light: not simply as a campaign finance decision but rather as the Court's first acknowledgement of the reality of judicial elections and the complex, nuanced jurisprudence those elections demand.[103] In a way, the justices are turning to the insight they and all law students gained at the end of their Constitutional Law class: judges both are and are not politicians, and election law should treat them accordingly.

---

[97] Alec Stone Sweet, *Judicialization and the Construction of Governance*, 32 COMP. POL. STUD. 147, 149 (1999).

[98] *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW PRINCIPLES AND POLICIES 524–31 (5th ed., 2015) (outlining the development of "selective total incorporation").

[99] *See* Republican Party of Minn. v. White, 536 U.S. 765, 781 (2002) (holding restrictions on judicial candidates' speech is subject to strict scrutiny).

[100] *See* Wells v. Edwards, 409 U.S. 1095 (1972).

[101] *Id.*

[102] Voting Rights Act of 1965, 42 U.S.C. § 1973c (2006). Those cases are *Chisom* v. *Roemer*, 501 U.S. 380, 389 (1991) (holding Section 2 applies to multi-member courts) and *Houston Lawyers' Ass'n v. Attorney General of Texas*, 501 U.S. 419, 427 (1991) (holding Section 2 applies to trial courts).

[103] I approach *Williams-Yulee* from the perspective of districting, rather than campaign finance, for a few reasons. First, "campaign finance" has become such a loaded and complex subject that it seems to me to obscure, rather than illuminate, the specifically *judicial* dimension of *Williams-Yulee*. After all, the broad contours of the arguments for campaign finance in both the legislative and judicial spaces are very similar: both implicate the same desultory "free speech v. corruption" debate that has turned the academic

The paper proceeds as follows. Part I attempts to survey the varieties of judicial districting schemes that exist in the states. Unsurprisingly, these schemes are extremely heterogeneous, especially at the most local level. At the state supreme court level, only seven states have districting schemes, and of that number only a few seem to violate equipopulation norms egregiously. It is these few states that best illustrate the promise and the danger of judicial districting reform.

Part II considers the one-person-one-vote rule (hereafter the "equipopulation" rule) as applied to judicial districting. This rule is our first illustration of the "binary" nature of the court's democracy jurisprudence – elected entities are either subject to a fairly strict equipopulation norm, or they are wholly exempt from it. A fairly in-depth analysis of *Wells v. Edwards*[104] follows this discussion. In *Wells*, the Supreme Court exempted judicial districts from equipopulation but did so without discussion or analysis. The Court's silence, I argue, is instructive – the decision was indefensible in principle, but the Court's only hope of maintaining a sensible jurisprudence in practice once one accepted the binary nature of its election jurisprudence. I conclude the part by examining the underlying rationales for this exemption and their empirical basis, and the specific places where this total exemption has generated the most egregious outcomes.

Part III turns to the VRA, and in particular, Section 2 of the Act.[105] I show that despite express instructions to the

debate on campaign finance into a quagmire. *See* Samuel Issacharoff, *Market Intermediaries in the Post-Buckley World*, 89 N.Y.U. L. REV. ONLINE 105, 105 (2014) ("For all the cacophony of the opinions, the questionable reasoning, and the frailty of the fundamental divide between contributions and expenditures, the world Buckley created still provides the blueprint for campaign finance law today."). The only difference is that the equities of the debate are weighed slightly differently. *See* Caperton v. A.T. Massey Coal Co., 556 U.S. 868 (2009) (finding the appearance of corruption looms larger in the judicial context). Districting, by contrast, allows for the drawing of much cleaner lines between legislatures and judiciaries. It reveals, unencumbered by campaign finance specifics, the dilemma elected judges routinely present to the Court. Unlike legislative districts, local judicial districts must be drawn with sensitivity to caseload and prosaic administrative concerns. One size, and thus one-person-one-vote, will not necessarily fit all. And so the invitation to disapply one-person-one-vote was compelling at the time the Court turned to consider it. Yet there are many cases where, as we shall see, one-person-one-vote *ought* to apply to judicial districts, in particular to protect the separation of powers. An on-off doctrine simply won't do.

Second, there is a growing feeling the campaign finance debate in academia has foundered in an interminable debate on fundamentally irreconcilable positions on the nature of free speech. In this context, we should grasp any invitations we can to break out of the reductive paradigms of "*Citizens United* Bad" and "Free Speech Good!" In this paper, I propose seeing *Williams-Yulee* as a signal that the Court is coming to change how it thinks about the law of democracy – namely, that it is tuning its doc-trines to be more attentive to the specific institutions to which the law of democracy will apply. This is a promising beginning, and districting further suggests a viable next step for this jurisprudential strategy.

Third, there has not been a comprehensive survey of the constitutional and federal statutory law of judicial election district-drawing since the 1980s. The time is ripe for a review, especially as it appears that issues in judicial elections – whether campaign finance rules, as in *Williams-Yulee*, or ethics rules, as in the landmark *Caperton* case – have recaptured the Court's attention.

[104] Wells v. Edwards, 409 U.S. 1095 (1973).

[105] Voting Rights Act of 1965, Pub. L. No. 89-110, § 2 (codified as amended at 42 U.S.C. § 1973 (2006)). Section 2 provides that "No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color." *Id.* It is distinct from Section 5 of the Voting Rights Act, which requires a number of juris-dictions, mostly in the South, to "preclear" any election changes with the U.S. Department of Justice or the U.S. District Court for the District of Columbia. Section 5 has been rendered largely inoperative by *Shelby Cty., Ala. v. Holder*, 133 S. Ct. 2612 (2013).

contrary (in the paired cases of *Chisom v. Roemer*[106] and *Houston Lawyers' Ass'n v. Attorney General of Texas*),[107] Section 2 actions against judicial districts have been almost uniformly unsuccessful – even accounting for the challenge plaintiffs always face in establishing a colorable claim under the VRA. As the Eleventh Circuit noted,[108] the same prudential considerations that weighed in favor of exempting judges from equipopulation have led to simple disapplication of the VRA to judicial districts. *Williams-Yulee*, I argue, opens the door for lower courts to craft judiciary-specific remedies to Section 2 violations derived from judicial districting.

Part IV considers attacks against judicial districts under state and federal law unrelated to equipopulation or the VRA – in particular, challenges to judicial district-drawing on the grounds of constitution-ally impermissible partisan gerrymandering. Like most challenges to partisan gerrymandering, challenges to gerrymandered judicial districts have been almost uniformly unsuccessful. But, at the risk of overstating matters, judicial districting challenges have been the *least unsuccessful* of the lot. Considering those few victories, resting much like *Williams-Yuelee* on a sophisticated understanding of those things that make elected judiciaries special, helps flesh out the more nuanced democracy jurisprudence in *Williams-Yuelee*.

Finally, in Part V, I turn to three proposals for reform. First, I argue that in the wake of *Williams-Yulee*, there remain no legal or administrative obstacles to implementing an equipopulation rule for state supreme courts divided by district. Second, I suggest a small modification to VRA districting jurisprudence: permitting, and indeed endorsing, alternative voting mechanisms as a permissible remedy to racially-biased judicial district lines when subdistricting is foreclosed by the special considerations of judicial elections. I show that this doctrinal move is a modest yet effective correction to the particular pathologies of judicial districts and racial discrimination claims. Third, I close with best practice observations from the states them-selves, since as with all matters of state law the surest and most effective remedy is best realized at state level – if state governments can be appropriately persuaded.

I. The Present State of Judicial Districting

State judicial districts were introduced during the populist wave of the 1840s that created the judicial election. Electing judges by district was intended to further free judges from the influence of state-wide elected officials and make them more accountable to local publics.[109] At both the federal[110] and state level, judicial districts are almost always defined in terms of state counties,[111] as were almost all legislative districts until the Supreme Court intervened. For this rea-son, few judicial district maps – with the possible exception of Louisiana –

[106] Chisom v. Roemer, 501 U.S. 380 (1991).

[107] Hous. Lawyers' Ass'n v. Att'y Gen. of Tex., 501 U.S. 419 (1991).

[108] Davis v. Chiles, 139 F.3d 1414, 1423–24 (11th Cir. 1998).

[109] *See* Jed Handelsman Shugerman, *Economic Crisis and the Rise of Judicial Elections and Judicial Review*, 123 HARV. L. REV. 1061, 1138 (2010). It was also the case, of course, that the country was far more sparsely populated in the 1830s, making non-districted elections impractical in more rural states.

[110] 28 U.S.C. §§ 81–131 (West).

[111] Louisiana and Nebraska are the two prominent exceptions to this rule at least as regards supreme courts; while the predominant apportionment scheme even in these states tracks counties, litigation in the case of Louisiana and a state equipopulation rule in Nebraska has led to line-drawing on the basis of precincts. *See* LA. REV. STAT. ANN. § 13:101(1999) (describing districts); NEB. REV. STAT. § 24-201.02(2) (2011) (citing maps attached by reference to 2011 Nebraska Laws L.B. 699).

resemble the "contribution[s] to modern art" found in legislative maps.[112]

A. State Supreme Courts

Of the thirty-eight states that popularly elect or retain their supreme court justices, only Illinois, Kentucky, Oklahoma, Mississippi, Louisiana, and Nebraska elect or retain state supreme court justices from particular districts within the state rather than state-wide.[113] Maryland and South Dakota are special cases: their justices are *appointed* from a particular district[114] but subject to retention elections on a *state-wide* basis. The table below summarizes the basic features of these districted state supreme courts.

	Js	Js per district	Basic of District	J Selection Method
Kentucky	7	1	County	Non-partisan election
Louisiana	7	1	Special J Districts	Partisan election
Maryland	7	1	County	Missouri Plan
Oklahoma	9	1	County	Missouri Plan
S. Dakota	5	1	County	Missouri Plan
Mississippi	3	3	County	Non-partisan election
Nebraska	1 (+ CJ elected 6 statewide)		Special J Districts	Missouri Plan
Illinois	7	3 from Cook County + 1x4 other districts	County	Partisan election

B.State Lower Courts

The picture is much more varied below the supreme court level. While division of judicial districts on a county basis with infrequent and sporadic adjustment is the norm, states have widely varying rules for local judicial districting.[115] The largest states are a representative sampling of judicial redistricting practices:

Florida's legislature is constitutionally obliged to follow county lines in redistricting appellate and trial court districts.[116] However, appellate redistricting has not occurred since 1979,[117] while trial court redistricting has

[112] Frederick K. Lowell & Teresa A. Craigie, *California's Reapportionment Struggle: A Classic Clash Between Law and Politics*, 2 J.L. & POL. 245, 246 (1985) (attributing this phrase to Rep. Phil Burton of California while describing his legislative districting scheme designed to safeguard Democratic incumbents). Louisiana, as we will see, has a torrid history of judicial districting leading to odd, court-mandated results.

[113] *See generally* NAT'L CTR. FOR ST. CTS., *supra* note 2 (describing the district number, district basis, and method of judicial selection for all fifty states).

[114] This is presumably to represent that district's interests in the collective deliberations of the state apex court.

[115] *See generally* NAT'L CTR. FOR ST. CTS., *supra* note 2 (describing the district number, district basis, and method of judicial selection for all fifty states).

[116] *See* FLA. CONST. art. V, § 1.

[117] *See* Fla. Stat. Ann. §§ 35.02–35.043 (West 2016) (defining the appellate districts).

been sporadic (most recently in 1994, 2008, and 2014)[118] but, it appears, non-partisan.[119]

California's constitution empowers the legislature to draw appellate court districts without any restrictions,[120] but the appellate districting statute simply groups counties,[121] while the constitution guarantees one superior (trial) court district in each county.[122] County boundary changes require county government consent;[123] such consent is also needed for a trial judge to serve two counties.[124]

Texas apportions both its intermediate Courts of Appeal and the trial district courts by law without constitutional guidance but aligns all appellate court districts with county boundaries[125] and has not changed appellate districts since 2005.[126] At the district level, a Judicial Districts Board, comprised mostly of judges,[127] redistricts local courts if the legislature fails to do so within three years of the census.[128] The legislature has declared its policy is to ensure that inter-district "judicial burdens… are as nearly equal as possible,"[129] and adjusted districts in 2011.[130]

Illinois partially constitutionalizes its Supreme Court districts, incorporating a modified equipopulation rule.[131] It empowers the Supreme Court to determine appellate district boundaries and judges per appellate district by rule[132] but gives the legislature the power to define trial court districts outside of Cook County.[133] The legislature has de-fined local courts entirely in county terms.[134] The legislature has recently reapportioned the circuits,[135] though it is unclear whether population changes motivated the reapportionment.

C.Why Judicial Districting Matters: Present and Future

As the above discussion hopefully makes clear, one of the rea-sons state supreme court judicial districts lack the robust federal statutory and constitutional rules applicable to legislative districts is that there has been little occasion to demand them. States with districted supreme courts are home to only twelve

[118] *See* Committee Substitute for Senate Bill No. 1950, ch. 94-137, §§ 1–2, 1994 Fla. Laws 864; Committee Substitute for Senate Bill No. 1678, ch. 2008-4, § 8, 2008 Fla. Laws 323, 325–26; Committee Substitute for Senate Bill No. 828, ch. 2014-182, § 7, 2014 Fla. Laws 2423, 2024–25.

[119] *See* FLA. STAT. ANN. § 26.021 (West 2016). I derive my assertion that reapportionment was nonpartisan from the unanimous vote for the last reapportionment. *CS/ SB 828 – Court System*, FLA. HOUSE OF REPRESENTATIVES, http://www.myfloridahouse.gov/Sections/Bills/billsdetail.aspx?BillId=51916 (last visited Nov. 10, 2016).

[120] *See* CAL. CONST. art. VI, § 3.

[121] *See* CAL. GOV'T CODE § 69100 (West 1981).

[122] *See* CAL. CONST. art. VI, § 4.

[123] In fact, consolidation and formation of a county require a local referendum, while county abolition requires a two-thirds majority in such a referendum. Mere boundary changes require only county governing body consent. *See* CAL. CONST. art. XI, § 1.

[124] *See* CAL. CONST. art. VI, § 4.

[125] *See* TEX. GOV'T CODE ANN. § 22.201 (West 2005).

[126] *See* H.B. No. 1077, ch. 542, § 1, 2005 Tex. Gen. Laws 1466, 1466–67.

[127] These include the Chief Justice of Texas, the presiding judge of the Texas Court of Criminal Appeals, the presiding judge of each of the administrative judicial districts of the state, and the president of the Texas Judicial Council. TEX. CONST. art. V, 7a.

[128] TEX. CONST. art. V, § 7a.

[129] TEX. GOV'T CODE ANN. § 24.941 (West 1987).

[130] H.B. No. 3796, ch. 852, 2011 Tex. Gen. Laws 852.

[131] ILL. CONST. art. VI, § 2. For a discussion of the Illinois Supreme Court districts, see *supra* Part II.C.2.

[132] ILL. CONST. art. VI, § 5.

[133] ILL. CONST. art. VI, § 7.

[134] 705 ILL. COMP. STAT. 35/1 (West 2014).

[135] Senate Bill No. 0063, Pub. L. No. 97-0585, 2011 Ill. Laws 11027.

percent of the U.S. population,[136] and several have state constitutional law that prevents some kinds of especially egregious political or racial manipulation of districts (by requiring equipopulation, supermajority votes for districting decisions, or judicial participation in redistricting, and so on).[137]

Nonetheless, there are two reasons to be worried about state judiciary's exemptions from the law of democracy, notwithstanding the limited scope of judicial districting at the state supreme court level. First, of course, inequitable districting can have a disproportionate impact on vulnerable groups, whether defined by race, geography, or other salient characteristics. In this regard, any use of districts has the potential to raise the concern of minority exclusion present throughout the voting rights case law.[138]

Second, and perhaps more importantly, dangerous districting practices can spread. The almost total absence of constitutional safe-guards on the drawing of judicial districts gives unscrupulous states the opportunity to create "flight[s] of cartographic fancy"[139] that ensure control of their state's judicial system passes into the hands of a small clique of state legislators.[140]

All of this may not have mattered much in even the recent past, when judicial elections were low-visibility and lacked a terribly polarized partisan dimension.[141] But that era is over; judicial elections have become a focus of partisan strife.[142] It is in the nature of partisans to exploit deficient electoral mechanisms.[143] Such exploitation would not merely make judicial races more salient and heated. Many of the most critical election

[136] Calculated on the basis of 2013 population estimates provided by the U.S. Bureau of the Census (on file with author). U.S. BUREAU OF THE CENSUS, *National, State, and Puerto Rico Commonwealth Totals Datasets: Population, Population Change, and Estimated Components of Population Change: April 1, 2010 to July 1, 2013*, https://www.census.gov/popest/data/national/totals/2013/NST-EST2013-alldata.html (last visited Oct. 15, 2014).

[137] *See supra* Part II.D.

[138] *See generally* Lani Guinier, *Symposium: Regulating the Electoral Process: Groups, Representation, and Race-Conscious Districting: A Case of the Emperor's Clothes*, 71 TEX. L. REV. 1589 (1993) (drawing from legal challenges and political science to argue that "districting itself is the problem").

[139] Karcher v. Dagget, 462 U.S. 725, 762 (1983) (Stevens, J., concurring).

[140] In those states without independent commissions, control of redistricting is it-self usually vested in a very small group of legislators. *See generally Redistricting by State*, ROSE INST., http://roseinstitute.org/redistricting/redistricting-by-state/ (last vis-ited Nov. 10, 2015) (surveying the redistricting process in each state). Of course, a true "rotten borough" where the district contains only a few voters nonetheless selecting a state supreme court justice – an arrangement entirely permissible under the pre-sent Constitutional doctrine – could accomplish this result formally.

[141] *See, e.g.*, Paul J. De Muniz, *Politicizing State Judicial Elections: A Threat to Judicial Independence*, 38 WILLIAMETTE L. REV. 367 (2002) (describing the gradual politicization of judicial elections in Oregon).

[142] *See* Roy Schotland, *To the Endangered Species List, Add Nonpartisan Judicial Elections*, 39 WILLIAMETTE L. REV. 1397 (2003) (offering an historical overview of the politicization process); BANNON & REAGAN, *supra* note 4 (documenting this process).

[143] To cite just one example, consider the rapid spread of voter identification laws after their endorsement by the American Legislative Exchange Council (ALEC). *See* Samuel Issacharoff, *Ballot Bedlam*, 64 DUKE L.J. 1364 (2015) (describing this phenomenon); *see also* Keith Bentele & Erin O'Brien, *Jim Crow 2.0? Why States Consider and Adopt Restrictive Voter Access Policies*, 11 PERSP. ON POL. 1088, 1098 (2013) (offering an empirical analysis of rationales for the adoption of voter ID laws); *cf.* Burt Neuborne, *Felix Frankfurter's Revenge: An Accidental Democracy Built by Judges*, 35 N.Y.U. REV. L. & SOC. CHANGE 602, 631 (2011) ("An unintended by-product of the reapportionment cases was the full-scale redrawing of all legislative lines every ten years to keep pace with the decennial census. Politicians lost no time in exploiting such an opportunity for self-protection and partisan advantage.").

challenges begin in state court.[144] Without any equipopulation rule or functioning racial discrimination rule, a legislature could district a state supreme court to be under the permanent control of one party or even one powerful state legislator – until, of course, the next redistricting.

Pressure to do so will likely increase as judicial elections become more expensive.[145] The spread of regular, publicized, and partisan judicial redistricting at a local level could well inspire efforts to extend partisan control via districts to more state supreme courts beyond the existing seven.[146] While partisan gerrymandering is distressingly com-mon in legislative politics,[147] there remains an underexplored history of racial gerrymanders of judicial districts.[148] And, as state legislatures and judiciaries are increasingly drawn into ugly conflict,[149] the realization by state legislatures that they can control the complexion of their judiciaries *absolutely* – creating judicial districts that resemble Old Sarum where a judgeship is quite literally and legally in the control of a single person or family[150] – surely will not bode well for the independence of state judiciaries. Popular accountability would decline too; judges in non-equipopulous or racially polarized districts will likely never eat that "hearty helping of humble pie" they can be served "from a severe reduction of their great remove from the (ugh!) People."[151]

[144] *See* Andrew Blotky & Billy Corriher, *State and Federal Courts: The Last Stand in Voting Rights*, CTR. FOR AM. PROGRESS (June 25, 2013), http://www.american-progress.org/issues/civil-liberties/report/2013/06/25/67905/state-and-federal-courts-the-last-stand-in-voting-rights/ ("[I]n many of the states where legislators are working hardest to restrict the right to vote, the state Republican Parties have also spent mil-lions of dollars to make sure conservative judges control their high courts. Many of these states are considered 'swing states' in federal elections but have legislatures that are firmly controlled by Republican legislators. The state Republican Parties have spent heavily on judicial races in these states to ensure that the judiciary does not stand in the way of advancing their agenda.").

[145] Eliminating the possibility of real contestation for a supreme court's majority would doubtless save a considerable amount of party (and party supporters') money, which might be more usefully redirected. *See* BANNON & REAGAN, *supra* note 4 (dis-cussing the role of party spending in judicial elections); *cf.* Williams-Yulee v. Fla. Bar, 135 S. Ct. 1656, 1675 (2015) (Ginsburg, J., concurring) (describing the increasing role of spending and partisanship in judicial elections).

[146] *See generally* Richard Engstrom, *The Supreme Court and Equipopulous Gerrymandering: A Remaining Obstacle in the Quest for Fair and Effective Representation*, 1976 ARIZ. ST. L.J. 277, 278–79 (1976) (describing the political pressures leading to a universal adoption of partisan gerrymandering with little capacity on the part of the federal courts to stop it); Samuel Issacharoff, *Judging Politics: The Elusive Quest for Judicial Review of Political Fairness*, 71 TEX. L. REV. 1643, 1695–1702 (1992) (describing the same); Richard H. Pildes & Richard G. Niemi, *Expressive Harms, "Bizarre Districts," and the VRA: Evaluating Elections District Appearances After* Shaw v. Reno, 92 MICH. L. REV. 483 (1993) (describing the same).

[147] *See, e.g.*, Robert Draper, *The League of Dangerous Mapmakers*, THE ATLANTIC (Sept. 19, 2012, 8:56 PM), http://www.theatlantic.com/magazine/archive/2012/10/the-league-of/309084/ (providing an accessible summary of the history of legislative gerrymandering).

[148] *See* Alwyn Barr, *The Impact of Race in Shaping Judicial Districts, 1876–1907*, 108 SW. HIST. Q. 423 (2005) (documenting a fraught period in judicial district-drawing).

[149] *See generally Court Bashing*, GAVEL GRAB, http://gavelgrab.org/?cat=12 (last visited Nov. 10, 2016) (listing a lengthy series of instances of threats against the judiciary by state politicians).

[150] Old Sarum was a deserted English village that, owing to the absence of either an equipopulation requirement or regular census, elected two Members of Parliament. This occurred despite having no residents from around the 1400s until the constituency was abolished by the Great Reform Act of 1832. It was the quintessential "rotten borough," in part because it has such a wonderful name. *See* Stephen Farrell, *Old Sarum*, HIST. OF PARLIAMENT, http://www.historyofparliamentonline.org/volume/1820-1832/constituencies/old-sarum (last visited Nov. 10, 2016).

[151] Williams-Yulee v. Fla. Bar, 135 S. Ct. 1656, 1682 (2015) (Scalia, J., dissenting).

Racially segregated and non-equipopulous judicial districting can do still more damage to public policy than the democratic and partisan harms that come immediately to mind. A judicial district often carries with it the personal jurisdiction and venue rules of a local court.[152] The famous Chicago "earmuff" district[153] bridged two geographic areas with a thin strip (thus creating an "earmuff" shape) that was, in point of fact, the highway median. On a nationwide scale, this is an accident waiting to happen.

Given the prudential considerations about the role of the judge underlying the drawing of judicial districts and the relaxation of First Amendment strictures on judicial campaign finance,[154] it is reasonable to argue for *some* constitutional limits on state discretion to manipulate judicial district lines. After all, "public perception of judicial integrity is a state interest of the highest order."[155] It is difficult to argue that judicial legitimacy is *enhanced* under a democratic system in which judges themselves – or their allies in the legislature – can choose their voters. However bad constitutionally- regulated district lines may be, they are unlikely to be worse than lines drawn by politicians unconstrained by any rules at all.

II. Equipopulation in Judicial Districts

A. Overview of U.S. Supreme Court Equipopulation Jurisprudence

Having found legislative malapportionment justiciable under the Fourteenth Amendment in *Baker v. Carr*,[156] the Supreme Court held in *Reynolds v. Sims* that state legislatures, as the "fountainhead of representative government," were a method of "self-government" which the constitution required to be organized such that "each citizen have an equally effective voice in the election of [state legislators]."[157]

This led the Court to conclude that the "overriding objective [in apportionment] must be substantial equality of population among the various districts" subject only to "divergences ... based on legitimate considerations incident to the effectuation of a rational state policy."[158]

A companion case, *Wesburry v. Sanders*[159] interpreted Article 1, Section 2 of the U.S. Constitution[160] to apply a similar equipopulation rule to House of Representatives districts. While *Reynolds* contemplated exceptions to equipopulation on the basis of "rational state policy," the Court has come to hold that the strictness of the equipopulation

[152] *See*, *e.g.*, ALA. CONST. art. VI, § 143 (holding district court personal jurisdiction is limited to a defined district). *See generally* Thomson Reuters, *Depositions and Interrogatories*, *in* 50 STATE STATUTORY SURVEYS: CIVIL LAWS: CIVIL PROCEDURE (2016), *available at* Westlaw 0020 SURVEYS 10 (presenting fifty-state survey of personal jurisdiction laws within states). *But see* 1 Nichols Ill. Civ. Prac. § 6:31 (noting circuit courts in Illinois can hear any matter anywhere in the state and personal jurisdiction fairness issues are handled by *forum non conveniens* doctrine).

[153] This is a map for the Illinois Fourth Congressional District generated in the 2011 round of Illinois Congressional redistricting. *2011 Adopted Maps*, IL. REDIS-TRICTING COMMISSION (Jul. 7, 2014), http://www.ilhousedems.com/redistricting/?page_id=554.

[154] Williams-Yulee v. Fla. Bar, 135 S. Ct. 1656 (2015) (discussing the various arguments for relaxing or strengthening judicial campaign laws).

[155] *Id.* at 1666 (quotations omitted).

[156] 369 U.S. 186 (1962) (finding that redistricting issues present justiciable questions).

[157] 377 U.S. 533, 564–66 (1964).

[158] *Id.* at 579.

[159] 376 U.S. 1 (1964).

[160] Providing that "the House of Representatives shall be composed of Members chosen every second Year *by the people of the several States*" U.S. CONST. art. I, § 2, cl. 1 (emphasis added).

requirement depends almost entirely on the *type* of body to be elected.[161] Accordingly, there are essentially three tiers of bodies subject to equipopulation:

1.Congressional districts, which are permitted almost no deviation from equipopulation;[162]

2.State legislatures and bodies performing "general governmental functions," which may be slightly malapportioned, usually with less than ten percent population deviation from the ideal,[163] if the malapportionment is justified by a "rational state policy;" and,

3.Unelected bodies,[164] or bodies not performing "general govern-mental functions," which need not have equipopulous districts at all.

The "rational state policy test" the Court uses to determine the unconstitutionality of malapportionment is slippery; it has come to be used as a proxy to attack especially egregious partisan gerrymandering.[165] The Court has approved malapportioned districts with disparities of 16.4%, while noting this deviation "approaches tolerable limits," solely on a showing that the deviation allowed districts to be somewhat contiguous with county boundaries and without any strong evidence that the deviation came from improper motives.[166] Contrariwise, districting plans with less than a ten percent deviation from the ideal have been thrown out for being "blatantly partisan and discriminatory."[167] There are also procedural wrinkles: the Court accepted a high-deviation plan when the harm demonstrated applied only to one district rather than to the whole scheme.[168] This point is significant, as we shall see, when considering single-judge districts.

Setting aside these fine distinctions once equipopulation is applied, however, the equipopulation requirement is emphatically an "on/off" doctrine. A body is elected or it is not.[169] If it is elected, and it performs "general governmental functions," it is subject to the

[161] There is some complexity implicit in how deviations from equality are calculated. *See, e.g.*, Burns v. Richardson, 384 U.S. 73 (1966) (discussing the constitutional implications of calculation schemes while upholding a districting plan based on registered voters rather than residents). The same is true regarding precisely who is counted in the population. *See, e.g.*, *Borough of Bethel Park v. Stans*, 449 F.2d 575 (3d Cir. 1971) (considering a dispute over whether to count prisoners, for apportionment purposes, at their prison residence or former residence).

[162] *See* Karcher v. Daggett, 462 U.S. 725 (1983) (rejecting a Congressional apportionment plan with a deviation of 0.6984% from the ideal because another viable plan was presented with a deviation of 0.4514% from the ideal); Kirkpatrick v. Preisler, 394 U.S. 526 (1969) (despite "a State's preference for pleasingly shaped [Congressional] districts" districts up to 3.13% above and 2.84% below the ideal mathematical distribution of population per district were too malapportioned).

[163] Deviations of less than ten percent have "long been held presumptively valid." SAMUEL ISSACHAROFF ET AL., THE LAW OF DEMOCRACY 157 (4th ed., 2012). *But see* Cox v. Larios, 542 U.S. 947, 949–50 (2004) (Stevens, J., concurring) (citations omit-ted) (using the equipopulation rule to ferret out impermissible redistricting motives: "appellant invites us to weaken the one-person, one-vote standard by creating a safe harbor for population deviations of less than ten percent, within which districting decisions could be made for any reason whatsoever. The Court properly rejects that invitation").

[164] *See* Sailors v. Bd. of Educ. of Kent Cty., 387 U.S. 105 (1967) (clarifying that the equipopulation principle was linked to the use of *elections*, not appointed bodies divided by district).

[165] *See* ISSACHAROFF ET AL., *supra* note 78, at 182–83 ("Paradoxically, strict adherence to the equipopulation principle has reemerged as a potential constraint of gerrymandering.").

[166] Mahan v. Howell, 410 U.S. 315, 329 (1973).

[167] *See, e.g.*, Cox v. Larios, 542 U.S. 947 (2004).

[168] *See* Brown v. Thomson, 462 U.S. 835 (1983).

[169] A non-elected body is essentially exempt from equipopulation. For example, a rule that appointees to a board or a court include an equal number of residents of unequally populated counties would be constitutional. *See* Sailors v. Bd. of Educ., 387 U.S. 105 (1967).

equipopulation rule. If it isn't elected, or it does not perform those functions, it isn't subject to the equipopulation rule.[170]

This binary approach leads to odd results. Water control, reclamation, and irrigation districts;[171] a ditch association;[172] and business improvement districts[173] have been held to be single-purpose bodies that could establish malapportioned districts or restrict the franchise to a particular subset of the population.[174] But a county commissioner's court,[175] the governing board of a community college system,[176] a local school council,[177] a sanitation district,[178] and a water pollution abatement and public transport body[179] were each held to require equipopulous districting as a "general governmental body" despite appearing just as single-purpose as the entities exempted from equipopulation.[180]

The single-purpose bodies exempt from equipopulation seem to be distinguished by one of two factors: either the body does not have a significant effect on the whole body politic or the persons given dis-proportionate voting power are individuals who both contribute dis-proportionately to the entity and are disproportionately harmed by the entity's decisions.[181]

[170] *See* Avery v. Midland Cty., 390 U.S. 474, 484–85 (1968) ("We hold today only that the Constitution permits no substantial variation from equal population in draw-ing districts for units of local government having general governmental powers over the entire geographic area served by the body."); *see also* Hadley v. Junior Coll. Dist., 397 U.S. 50, 56 (1970) ("[A]s a general rule, whenever a state or local government decides to select persons by popular election *to perform governmental functions*, the Equal Protection Clause of the Fourteenth Amendment requires [equipopulation].") (emphasis added).

[171] *See* Ball v. James, 451 U.S. 355 (1981) (holding Arizona water reclamation district which apportioned voting power on the basis of land ownership is permissible because district performed a specialized function with a particular effect on landowners); Hancock v. Bisnar, 132 P.3d 283 (2006) (irrigation and power district); Not About Water Comm. v. Bd. of Supervisors, 116 Cal. Rptr. 2d 526 (Cal. Ct. App. 2002) (water utility district); Stelzel v. South Indian River Water Control Dist., 486 So. 2d 65 (Fla. Dist. Ct. App. 1986) (water control district); Foster v. Sunnyside Val-ley Irrigation Dist., 687 P.2d 841 (Wash. 1984) (irrigation district).

[172] *See* Wilson v. Denver, 125 N.M. 308 (1998).

[173] Kessler v. Grand Cent. Dist. Mgmt Ass'n, 158 F.3d 92 (2d Cir. 1998).

[174] There is a distinction in the districting jurisprudence between a "special purpose body" which can establish malapportioned districts in which all electors in that district can vote and a "special purpose district" in which the franchise is restricted, usually to landowners with special interests in the matters controlled by the elected body. *See, e.g.*, Lane v. Town of Oyster Bay, 603 N.Y.S.2d 53 (App. Div. 1993) (holding state can limit vote on extension of sanitation collection district to freeholders). In the judicial election context, there are no cases I could find in which a body found to be "judicial" was elected by anything other than "universal" suffrage. This is due, I suspect, to entrenched universal enfranchisement rules established in almost all state constitutions. *See generally* Joshua Douglas, *The Right to Vote Under State Constitutions*, 67 VAND. L. REV. 89 (2014) (collecting cases). Accordingly, it is presently the case that judicial districts fall uniformly into the "special purpose body" exception to equipopulation and not the "special purpose district" exception.

[175] Avery v. Midland Cty., 390 U.S. 474 (1968).

[176] Hadley v. Junior Coll. Dist., 397 U.S. 50 (1970).

[177] *Contrast* Pittman v. Chi. Bd. of Educ., 64 F.3d 1098 (7th Cir. 1995), *cert. denied* 517 U.S. 1243 (1996) (holding that local school boards were so specialized and local as to not exercise "general governmental functions") *with* Fumarolo v. Chi. Bd. Of Educ., 566 N.E.2d 1283 (Ill. 1990) (finding that the Chicago local school boards in fact exercised a "general governmental function" that "affected the whole community").

[178] Lower Valley Water & Sanitation Dist. v. Pub. Serv. Co. of N.M., 632 P.2d 1170 (N.M. 1981).

[179] Cunningham v. Municipality of Metro. Seattle, 751 F.Supp. 885 (W.D. Wash. 1990).

[180] The Supreme Court has seldom stepped into this field, and so some of the variation might be attributable to the idiosyncrasies of particular state courts.

[181] *See, e.g.*, Ball v. James, 451 U.S. 355 (1981) (concerning matter in which the preferred voters – essentially farmers – had a major stake in the actions of the water reclamation district).

But, as can be seen above, this jurisprudence has descended into incoherence: it is very hard to see how a sanitation district is a general governmental body but a water treatment district is not. The incoherence is deeper still when we consider what ought to be the ultimate "general governance body" – a court of general jurisdiction.

B. Wells v. Edwards: Judicial Districts Need Not Be Equipopulous

Although exceptions to equipopulation are normally confined to the narrow 'governmental functions' exception, the United States Supreme Court has held, essentially without explanation, that judicial districts are categorically exempt from equipopulation.

The first articulation of this holding was *Wells v. Edwards*, a 1973 summary affirmance, without opinion, of a Louisiana three-judge district court's challenge to the malapportionment of Louisiana Supreme Court districts.[182] While *Wells* is a summary affirmance made before 1988, which limits its precedential value[183] and does not commit the Court to the reasoning of the opinion below,[184] the Court reiterated the holding that equipopulation is inapplicable to judicial districts in a subsequent case, *Chisom v. Roemer*, which is discussed in more detail in Part III, below.[185]

The *Wells* case arose from a challenge to the districting scheme for Louisiana Supreme Court Justices.[186] The Louisiana court was comprised of seven justices: two elected at-large from the New Orleans area and one each from five other districts covering the rest of the state. The districts were defined in terms of counties ("parishes"). Over time, the districts developed gross population disparities; on an equipopulous basis, New Orleans was entitled to far more justices than its constitutionally-mandated two.[187] Ms. Wells was a resident of New Orleans and challenged this under-allocation. While conceding these disparities, the three-judge panel dismissed her claim on the grounds that the judiciary *as a whole* was exempt from the *Baker* and *Reynolds* equipopulation doctrine.

The Louisiana panel primarily drew on the "general governmental functions" exception established in *Hadley*. But where *Hadley* and its progeny concerned whether the governmental function was sufficiently "general," the *Wells* panel parsed the words "governmental function" themselves:

---

[182] 409 U.S. 1095 (1973).

[183] Before 1988, the Supreme Court had mandatory appellate jurisdiction over decisions rendered by three-judge courts and was therefore accustomed to disposing of these cases with relative brevity. *See* 16B CHARLES ALAN WRIGHT & ARTHUR MILLER, FEDERAL PRACTICE AND PROCEDURE § 4003 (3d ed. 2012) (holding summary affirmance made prior to the 1988 abolition of mandatory appeals jurisdiction is binding precedent only as regards "the precise issues presented and necessarily decided").

[184] *See generally* Mandel v. Bradley, 432 U.S. 173, 176 (1977) (*per curiam*) (ex-plaining that when the Court issues a summary affirmance, it "affirm[s] the judgment but not necessarily the reasoning by which it was reached" (quoting *Fusari v. Stein-berg*, 419 U.S. 379, 391 (1975) (Burger, C.J., concurring))).

[185] 501 U.S. 380, 402 (1991) ("[W]e have held the one-person, one-vote rule inapplicable to judicial election… The holding in *Wells* rejected a constitutional challenge based on the Equal Protection Clause of the Fourteenth Amendment.") *Chisom* – discussed in greater depth below – ironically concerned the same Louisiana districts as *Wells*, this time attacked under Section 2 of the VRA.

[186] LA. REV. STAT. ANN. § 13:101 (West 1999).

[187] U.S. BUREAU OF THE CENSUS, TABLE 20: POPULATION OF THE 100 LARGEST URBAN PLACES: 1970 (June 17, 1998), http://www.census.gov/population/www/docu-mentation/twps0027/tab20.txt.

In *Hadley*, as in every other case that we can find dealing with the question of apportionment, the "governmental functions" involved related to such things as making laws, levying and collecting taxes, issuing bonds, hiring and firing personnel, making contracts, collecting fees, operating schools, and generally managing and governing people. In other words, apportionment cases have always dealt with elected officials who performed legislative or executive type duties, and in no case has the one-man, one-vote principle been extended to the judiciary.[188]

The panel went beyond *Hadley*, however, to reject the notion that judicial elections should be included in the same jurisprudential cate-gory as legislative and executive elections:

The primary purpose of one-man, one-vote apportionment is to make sure that each official member of an elected body speaks for approximately the same number of constituents. But as stated in *Buchanan v. Rhodes*,[189] "Judges do not represent people, they serve people." Thus, the rationale behind the one-man, one-vote principle, which evolved out of efforts to preserve a truly representative form of government, is simply not relevant to the makeup of the judiciary."[190]

As the Louisiana panel noted, it was in good company: every lower court to consider the question up to that point had held that equipopulation did not apply to judicial districts.[191] Moreover, since *Wells*, every lower court to discuss whether judicial districts must be equipopulous has characterized *Wells* as establishing that equipopulation does not apply to judicial districts and largely followed it without comment.[192]

C. Explaining Wells: "Representativeness" and Administration

It is hard to disagree with Justice White's dissent to *Wells* – joined by Justices Douglas and Marshall[193] – that the District Court's legal reasoning, on which the Court appeared to rely, was shaky at best:

The District Court in this case seized upon the phrase "persons ... to perform governmental functions," and concluded that such per-sons were limited to "officials who performed legislative or executive type duties." ... I find no such limiting import in the phrase. Judges are not private citizens who are sought out by litigious neighbors to pass upon their disputes. They are state officials, vested with state powers and elected (or appointed) to carry out the state government's judicial functions. As such, they most certainly "perform governmental functions."[194]

---

[188] Wells v. Edwards, 347 F. Supp. 453, 455 (M.D. La. 1972).

[189] 249 F. Supp. 860, 865 (N.D. Ohio 1966).

[190] *Wells*, 347 F. Supp. at 455.

[191] Holshouser v. Scott, D.C., 335 F. Supp. 928 (M.D.N.C. 1971); N.Y. State Ass'n of Trial Lawyers v. Rockefeller, 267 F. Supp. 148 (S.D.N.Y. 1967); Skolnick v. Ker-ner, 260 F. Supp. 318 (N.D. Ill. 1966); Romiti v. Kerner, 256 F. Supp. 35 (N.D. Ill. 1966); Stokes v. Fortson, 234 F. Supp. 575 (N.D. Ga.1964); Buchanan v. Rhodes, 249 F. Supp. 860 (N.D. Ohio 1960), *appeal dismissed*, 385 U.S. 3 (1960).

[192] The U.S. Courts of Appeals cases embracing *Wells* include *Kirk v. Carpeneti*, 623 F.3d 889, 897 (9th Cir. 2010); *Rodriguez v. Bexar Cty.*, 385 F.3d 853, 860 n.3 (5th Cir. 2004); *Kuhn v. Miller*, 194 F.3d 1312 (6th Cir. 1999); *Nipper v. Smith*, 39 F.3d 1494, 1510 n. 33 (11th Cir. 1994); *Republican Party of N.C. v. Martin*, 980 F.2d 943, 954 (4th Cir. 1992); *Voter Information Project, Inc. v. City of Baton Rouge*, 612 F.2d 208, 210–11 (5th Cir. 1980); *Ripon Soc. v. Nat'l Republican Party*, 525 F.2d 567, 579–580 (D.C. Cir. 1975). *Accord* Holshouser v. Scott, 335 F. Supp. 928 (M.D.N.C. 1971), *aff'd mem*, 409 U.S. 807 (1972); Concerned Citizens of S. Ohio v. Pine Creek Conservancy Dist., 473 F.

[193] Wells v. Edwards, 409 U.S. 1095, 1096–97 (1973).

[194] *Id.*

The few authors to have written on *Wells* have come to largely the same conclusion: whatever the merits of judicial district equipopulation, the District Court's "representation" rationale, one the dissenters assumed the Court relied upon,[195] was "wrongheaded."[196] After all, the Court has long recognized that state courts make "law" just as state legislatures do;[197] there can be few governmental functions more general than those performed by a court of "general jurisdiction."

Yet this presents a puzzle, one articulated with some exasperation by the *Wells* dissenters: if *Wells* is so obviously inconsistent with past Court precedent[198] (and, as we will see, has been further undermined by subsequent cases), why, over the spirited dissent of three Justices, did the Court deem equipopulation so obviously inapplicable that it did not even bother to issue a full opinion? And why has almost[199] every court to have subsequently considered *Wells*, including the Supreme Court itself, followed it without question or further complaint?

There are two generally accepted explanations. First, when considering equipopulation and state supreme courts, as Pamela Karlan and Sherrilyn Ifill have argued, courts continue to reject the role of judges as "representatives" in the same sense as other elected officials.[200] On this view, judges see themselves as "administering the law" rather than espousing the "cause of a particular political constituency."[201] In an oft-cited passage, another District Court panel, rejecting equipopulous judicial districting, declared "judges do not represent people, they serve people."[202] As the Supreme

[195] *See* Pamela S. Karlan, *Electing Judges, Judging Elections, and the Lessons of Caperton*, 123 HARV. L. REV. 80, 83 (2009) ("Justice White's dissent assumed that the Court's ruling rested on its agreement with the lower court's statement that judges 'are not representatives in the same sense as are legislators or the executive' because '[t]heir function is to administer the law, not to espouse the cause of a particular constituency.'").

[196] Wendy R. Weiser, *Regulating Judges' Political Activity After White*, 68 ALB. L. REV. 651, 697 n.226 (2005). Authors that have likewise rejected *Wells* include Sherrilyn A. Ifill, *Judging the Judges: Racial Diversity, Impartiality and Representation on State Trial Courts*, 39 B.C. L. REV. 95, 133 (1997) (arguing the Court failed to address inconsistencies between the District Court's holding and its past ruling) and Larry W. Yackle, *Choosing Judges the Democratic Way*, 69 B.U. L. REV. 273, 297 n.87 (1989) (observing *Wells* was "unfortunate" for while "[i]t is true that judges do not represent constituents in the familiar, legislative sense… there is no self-evident explanation for weighting some voters' preferences more than others in a system in which government chooses to employ elections for judicial selection").

[197] *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938) ("[T]he Constitution of the United States ... recognizes and preserves the autonomy and independence of the States – independence in their legislative and independence in their judicial departments.").

[198] Indeed, later that year, in *Sugarman v. Dougall*, 413 U.S. 634, 647 (1973), while striking down a New York statute barring nonresident aliens from civil service jobs, the Court declared that "persons holding state elective… judicial positions… perform functions that go to the heart of representative government."

[199] The solitary exception to the uniform wall of approval for *Wells* can be found in *Voter Information Project*, *Inc. v. City of Baton Rouge*, 612 F.2d 208, 211 (5th Cir. 1980), where the Court felt "excellent arguments" had been made for equipopulation, while noting it was bound by the Supreme Court's determination in *Wells*.

[200] Karlan, *supra* note 110, at 83 ("[Justice White suggests] the Court's ruling rested on its agreement with the lower court's statement that judges 'are not representatives in the same sense as are legislators or the executive' because '[t]heir function is to administer the law, not to espouse the cause of a particular constituency.'); Ifill, *supra* note 111, at 133 ("The Supreme Court has also described the representative function of state judges by emphasizing that judges are not representatives in the same way as legislators.").

[201] Stokes v. Fortson, 234 F. Supp. 575, 577 (N.D. Ga. 1964).

[202] Buchanan v. Rhodes, 249 F. Supp. 860, 865 (N.D. Ohio 1966). *Accord* Holshouser v. Scott, 335 F. Supp. 928, 932 (M.D.N.C. 1971), *aff'd*, 409 U.S. 807 (U.S.N.C. 1972); Buchanan v. Gilligan, 349 F. Supp. 569, 571 (N.D. Ohio 1972); N.Y. State Ass'n of Trial Lawyers v. Rockefeller, 267 F. Supp. 148, 153–54 (S.D.N.Y. 1967).

Court put it in *Williams-Yulee*, albeit in the context of campaign contributions, "Judges are not politicians, even when they come to the bench by way of the ballot. And a State's decision to elect its judiciary does not compel it to treat judicial candidates like campaigners for political office."[203]

The principle of the "legislature as the fountainhead of representative government," which sits at the root of *Baker v. Carr* and its progeny, seems inapplicable to officials who are, despite being elected, conceived as functionaries following the law established by the political branches.[204] Indeed, the general conclusion that judges are not "representative," in the sense of directly giving voice to the popular will, is at the bedrock of American conceptions of the judicial role.[205]

Second, companion decisions to *Wells* relating to district courts identified additional salient considerations that cut against equipopulous districting for local judges: geography and caseload. The case is best put by *Buchannan v. Rhodes*, cited in the lower court's opinion in *Wells*:

Judges do not represent people, they serve people. They must, therefore, be conveniently located to those people whom they serve. Location, then, is one of many significant factors which the legislature may properly consider when carrying out its constitutional mandate to create an effective judicial system. The State constitutional provision requiring one judge per county *bears a reasonable relation to the State's aim*: a conveniently effective judicial system; the efforts heretofore by the legislature to increase the number of jurists in populous counties reflect no departure from reason.[206]

Notice the Court's choice of words which invoke, without citation, the "reasonable relation" exception to equipopulation announced in *Reynolds*.[207] Similarly, the court in *Stokes v. Fortson* argued: [T]here is no way to harmonize selection of these officials on a pure population standard with the diversity in type and number of cases which will arise in various localities, or with the varying abilities of judges and prosecutors to dispatch the business of the courts. An effort to apply a population standard to the judiciary would, in the end, fall of its own weight.[208]

As a practical matter, as applied to local courts, this reservation is intuitively appealing. Local judges, like other local officials, must be local to be useful.[209] Accordingly, tiny and under-populated districts may still require a local court, while a busy urban courthouse may, thanks to efficiencies of scale, not require

[203] Williams-Yulee v. Fla. Bar, 135 S. Ct. 1656, 1662 (2015).

[204] *See* THE FEDERALIST NO. 78, at 489 (Alexander Hamilton) (Henry Cabot Lodge ed., 1891) (attacking directly elected judges for having "too great a disposition to consult popularity" rather than "nothing ... but the Constitution and the laws"). *See also Williams-Yulee*, 135 S. Ct. at 1666 (citing Hamilton, *supra*).

[205] *See* The Federalist No. 78 (Alexander Hamilton).

[206] *Rhodes*, 249 F. Supp. at 865 (N.D. Ohio 1966) (emphasis added).

[207] Reynolds v. Sims, 377 U.S. 533, 579 (1964).

[208] Stokes v. Fortson, 234 F. Supp. 575, 577 (N.D. Ga. 1964). *Accord* Buchanan v. Gilligan, 349 F. Supp. 569, 571 (N.D. Ohio 1972) (noting the same); N.Y. State Ass'n of Trial Lawyers v. Rockefeller, 267 F. Supp. 148, 153–54 (S.D.N.Y. 1967) ("[P]opulation is not necessarily the sole, or even the most relevant, criterion for determining the distribution of state judges.").

[209] Elaine Nugent-Borakove, et al., *Strengthening Rural Courts: Challenges and Progress*, NAT'L CTR. FOR ST. CTS. (2011), http://www.ncsc.org/sitecore/content/ microsites/future-trends-2011/home/Specialized-Courts-Services/3-2-Strengthening-Rural- Courts.aspx.

a number of judges in pro-portion to the serviced population.[210]

But underlying both of these explanations is a basic assumption: that the law of democracy can be applied to judicial elections either wholesale or not at all. In none of these opinions is there the sophistication of Chief Justice Roberts' opinion in *Williams-Yulee*, which seeks out an intermediate position where judicial elections *are* subject to an element of the law of democracy (First Amendment campaign finance jurisprudence) but not to the same degree as a legislative election.[211] If a *Williams-Yulee* approach were to be applied in the judicial districting context, we perhaps may have seen an equipopulation element be applied, but colored by the unique characteristics of judicial elections. As it was, courts saw themselves as either applying the rules wholesale or not at all, and chose what they perceived to be the most prudent option.

As might be expected, many Fourteenth Amendment suits demanding judicial equipopulation, as well as VRA suits demanding the redrawing of judicial districts using race as a factor, have fallen afoul of this absolutism.[212] Even cases recognizing a due process interest under a *state* constitution in relatively equipopulous districts allowed additional considerations, especially caseload, to simply override population in the abstract, without scrutinizing or weighing the factors against each other.[213]

As I will address in Part V, caseload and geography concerns lose considerable force as soon as the courts in question are multi-member apex state courts. But assuming that a trial judge sits alone and is elected from the same geographic region over which it has jurisdiction,[214] there are few viable equal protection arguments for absolutely equipopulous districting that draw on the principles of *Reynolds* and its progeny. This is so *even if* the courts were to concede that a judge was a "representative" under the *Reynolds* case-line.[215]

In this context, we can analogize the local trial judge to the local executive official: New York City (population 8,550,405)[216] and Sherrill, New York

[210] N.Y. State Ass'n of Trial Lawyers v. Rockefeller, 267 F. Supp. 148, 154 (S.D.N.Y. 1967) (citing caseload figures to claim "[t]he volume and nature of litigation arising in various areas of the state bears no direct relationship to the population of those areas. [T]he problem of delay in this court is not confined to populous urban counties as plaintiffs suggest"); *accord* James Peter Coolsen, *From the Benches and Trenches: Case Management Innovation in a Large, Urban Trial Court*, 30 JUST. SYS. J. 70 (2009) (documenting particular challenges and opportunities for efficiencies in urban court systems).

[211] Williams-Yulee v. Fla. Bar, 135 S. Ct. 1656, 1665 (2015).

[212] *See, e.g.*, S. Christian Leadership Conf. of Ala. v. Evans, 785 F. Supp. 1469, 1472 (M.D. Ala. 1992), *aff'd sub nom.* S. Christian Leadership Conf. of Ala. v. Sessions, 56 F.3d 1281 (11th Cir. 1995) (the number of lawyers in a district is a salient factor for determining district size, emphasizing centrality of case volume and not population in design of a judicial district).

[213] *See* Blankenship v. Bartlett, 363 N.C. 518, 523 (2009) (holding that under state equal protection clause, factors permitted to trump general equipopulation rule for state courts include geography and caseload).

[214] Litigation based on judges elected from a different region over which they pre-side is rare. The few cases I could find that consider the issue were unsuccessful. *See* Kuhn v. Miller, 194 F.3d 1312 (6th Cir. 1999) (rejecting "smaller judicial district elected judge over larger area" argument). *But see* Republican Party of N.C. v. Mar-tin, 980 F.2d 943, 953 (4th Cir. 1992) (accepting the argument in the context of a *Bandemer* claim (see Part V, below)).

[215] Of course, per *Wells*, determining that judges are not "representatives" is sufficient if not necessary to exclude trial courts, along with supreme courts, from equipopulation.

[216] Search Results for New York City, NY, U.S. CENSUS BUREAU, http://www.cen-sus.gov/search-results.html?page=1&stateGeo=&searchtype=web&cssp=&q=new+york+city%2C–y&search.x=0&search.y=0&search=submit (last visited Nov. 17, 2016).

(population 3,066)[217] each have one mayor. But there is no viable "vote dilution" or "differential power" argument that would find the New York City mayoralty unconstitutional and demand its replacement by 2,789 mini-mayors for jurisdictions carved out of the city so as to ensure the voters of New York City were "equal" with the voters of Sherrill. In both cases, voters of a certain area have an equal opportunity to elect the official with jurisdiction over that area.[218]

Accordingly, most suits attacking unequal trial court districts (that do not bring up claims of racial voting dilution, which I address in Part III below) rest on a secondary consequence of unequal districts: under-staffed judicial districts lead to longer trial delays than properly staffed districts.[219]

The first problem with these suits is a prosaic one: to the extent to which an attack on unequal distribution of trial judges calls for the appointment of more judges or staff in high-caseload districts, the suit would fall afoul of the same procedural and substantive obstacles con-fronting suits simply seeking more funding for the court system; in short, it is almost impossible for a court to extract from a legislature money the legislature does not wish to spend.[220]

Second, the "entire claim [for equal resources at the local level] rests on the assumption that there is a federally protected right to have state court judges apportioned among judicial districts and counties in such manner as to prevent any greater delay in the adjudication of cases in one area or political subdivision of the state than another… [T]here [is] a total absence of authority for the existence of any such right."[221] Subsequent decisions simply cite *Wells* itself to reject similar "service-provision" challenges to unequal judicial districts.[222]

Third, and perhaps most importantly, even if we could articulate a right to equal judicial resources, a service-provision suit whose claim of harm is predicated on unequal disposition of litigation or criminal

[217] Search Results for Sherrill, NY, U.S. CENSUS BUREAU, http://www.census.gov/search-results.html?q=sherrill%2C+new+york&search.x=0&search.y=0&search=submit&page=1&stateGeo=none&searchtype=web (last visited Nov. 17, 2016).

[218] *Cf.* Butts v. New York, 779 F.2d 141, 148 (2d Cir. 1985) ("We cannot, how-ever, take the concept of a class's impaired opportunity for equal representation and uncritically transfer it from the context of elections for multi-member bodies to that of elections for single-member offices. There can be no equal opportunity for representation within an office filled by one person.").

[219] I refer to these as "service-provision" suits, since the judicial services provided to litigants in some districts are done on less equal terms than services provided to other litigants.

[220] *See generally* Howard B. Glaser, *Wachtler v. Cuomo: The Limits of Inherent Power*, 14 PACE L. REV. 111 (1994) (describing the legal and political dispute be-tween the New York judicial system and the Governor over judiciary funding); An-drew Yates, Note, *Using Inherent Judicial Power in a State-Level Budget Dispute*, 62 DUKE L.J. 1463–1502 (2013), http://scholarship.law.duke.edu/dlj/vol62/iss7/5 (examining the underlying legal problems); Julian Darwall & Martin Guggenheim, *Funding the People's Right*, 15 N.Y.U. J. LEGIS. & PUB. POL'Y 619, 664 (2012) (discussing funding for judicial services more generally).

[221] N.Y. State Ass'n of Trial Lawyers v. Rockefeller, 267 F. Supp. 148, 151 (S.D.N.Y. 1967); *accord* Buchanan v. Gilligan, 349 F. Supp. 569, 571 (N.D. Ohio 1972); De Kosenko v. New York, 311 F. Supp. 126, 127 (S.D.N.Y. 1969); Kail v. Rockefeller, 275 F. Supp. 937, 939–40 (E.D.N.Y. 1967); Buchanan v. Rhodes, 249 F. Supp. 860, 861 (N.D. Ohio 1966).

[222] *See, e.g.*, Field v. Michigan, 255 F. Supp. 2d 708, 711 (E.D. Mich. 2003) (rejecting challenge to realignment of trial court districts because the issue was settled by *Wells*); Eugster v. State, 171 Wash. 2d 839, 844 (2011) (rejecting equal population challenge to appellate districts under state equal protection clause, which was interpreted to be congruent with the federal equal protection clause and *Wells*).

matters cannot reasonably demand that judges be assigned to districts on a pure population basis or districts drawn on a pure population basis, because *population does not predict caseload and thus need for judges in the trial courts*.[223] Thus, there is no reason to sup-pose the remedy – equipopulation – would be well targeted at the presumed harm.

Of course, local court districts can be – and occasionally are – drawn in a partisan fashion, or so as to be racially discriminatory. They can be structured so as to deprive certain areas of necessary judicial resources while overproviding them in other areas. The irony is that equipopulation *can* be a tool for addressing these disparities: in *Karcher v. Daggett*, for example, the Court struck down a New Jersey redistricting plan because it had a 0.1384% deviation from the ideal. This is a smaller deviation than the census error rate. But that was hardly the point: the point was to shift the burden to the state to show that its districting plan was not excessively partisan (and this was an insuperable burden since the districting plan was solely the product of partisan politics).[224] The Court did not require equipopulation so much as use its absence to get at an impermissible motive. But by completely excluding judicial districts from equipopulation, the courts rob themselves of this and any other helpful tool to correct inequitable, partisan, or downright racist judicial districting schemes.

As I will discuss in the next section, in the absence of federal constitutional norms, the states have begun to experiment with a variety of political controls. But adopting the more nuanced view of the law of democracy in *Williams-Yulee*, perhaps using equipopulation as a burden-shifting factor or, in certain contexts, imposing it as a requirement, courts can have their cake and eat it too: applying democratic norms in the admittedly special context of a judicial election.

D. Equipopulation Rules under State Constitutional Law

To their credit, several states have responded to the deficit of federal constitutional law with constitutional responses of their own.[225] Taking each of the seven states with districted Supreme Courts in turn:

Nebraska is an exemplary jurisdiction: the state constitution re-quires that the state supreme court be redistricted after each decennial census[226] without regard to county lines. The 2010 redistricting resulted in only a two percent deviation from the ideal,[227] well within the so-called "ten percent rule" of judicial tolerance for legislative districts.[228] As yet, there appears to be no partisan valence to

[223] *See generally infra* Part V, and note 276.

[224] Karcher v. Daggett, 462 U.S. 725 (1983).

[225] The viability of this option would depend on state rules relating to standing and justiciability. *See* Helen Hershkoff, *State Courts and the "Passive Virtues": Rethinking the Judicial Function*, 114 HARV. L. REV. 1833, 1839 (2001) (noting these standards are often more generous at the state than at the federal level).

[226] NEB. CONST. art. V, § 5 ("The Legislature shall divide the state into six contiguous and compact districts of approximately equal population [and] shall redistrict the state after each federal decennial census. In any such redistricting, county lines shall be followed whenever practicable").

[227] 2011 Neb. Laws 1108–09; *see* LEGIS. JOURNAL, 102d Leg., 1st Sess. 1712–13 (Neb. 2011); REDISTRICTING COMM., 2011 COMMITTEE STATEMENT ON LB699, 102, 1st Sess. (Neb. 2011). Notably, this redistricting bill was approved unanimously.

[228] *See* Martin v. Mabus, 700 F. Supp. 327, 332–35 (S.D. Miss. 1988) (approving up to fifteen percent population deviations as a matter of 'general equity' when com-plying with a VRA-required subdistricting injunction); *cf.* Mahan v. Howell, 410 U.S. 315 (1973) (upholding a Virginia Senate map with 16.4% deviation).

these changes, though Nebraska may be a special case owing to its unicameral, nonpartisan legislature.[229]

South Dakota requires districts to be "compact" though not equipopulous,[230] but the legislature engages in decennial redistricting to balance district population.[231]

Kentucky requires limited equipopulation for its supreme court (provided counties are not divided)[232] but the state legislature has failed to act on this mandate since 1991.[233]

While the **Illinois** constitution requires that judicial districts other than Cook County be "of substantially equal population,"[234] the state's appellate judicial districts have not been reapportioned since 1963.[235] The last attempt to do so, in 1997, was thrown out by the Illinois Supreme Court for unconstitutionally splitting judicial circuits between multiple supreme court districts.[236] The Circuit Courts (Illinois's courts of general jurisdiction) were tweaked slightly in 2005.[237] The constitutionalization of Cook County as a single judicial district electing only three of seven supreme court justices, however, entrenches the disproportionate power of rural Illinois in the election of the state supreme court.[238]

Louisiana has no equipopulation rule but requires a legislative supermajority to alter judicial districts.[239] The last redistricting occurred in 1997.[240] An attempt to require redistricting on state law basis following the decennial census failed.[241]

---

[229] *See* Susan Welch & Eric Carlson, *The Impact of Party on Voting Behavior in a Nonpartisan Legislature*, 67 AM. POL. SCI. REV. 854, 865–66 (1973) (finding the nonpartisan nature of the Nebraska Legislature makes predicting vote outcomes substantially more difficult).

[230] S.D. CONST. art. V, § 2 ("All justices shall be selected from compact districts established by the Legislature…"). Compactness has potential leverage to attack gerrymandering. *See* Richard G. Niemi et al., *Measuring Compactness and the Role of a Compactness Standard in a Test for Partisan and Racial Gerrymandering*, 52 J. OF POL. 1155 (1990) (providing analysis of compactness).

[231] *See* 2001 S.D. Sess. Laws ch. 101 153–54; 2011 S.D. Sess. Laws Spec. Sess. ch. 2 8–9 (codified at S.D. CODIFIED LAWS § 16-1-1).

[232] KY. CONST. § 110 ("The General Assembly thereafter may redistrict the Commonwealth; by counties, into seven Supreme Court districts as nearly equal in population and as compact in form as possible.").

[233] 1991 Ky. Acts 2d Ex. Sess. 1–2 (codified at KY. REV. STAT. ANN. § 21A.010 (LexisNexis 2014)).

[234] ILL. CONST. art. VI, § 2 ("The remainder of the State [other than Cook County, i.e. Chicago] shall be divided by law into four Judicial Districts of substantially equal population, each of which shall be compact and composed of contiguous counties.").

[235] 1963 Ill. Laws 929–30 (codified at 705 ILL. COMP. STAT. 20/2).

[236] Cincinnati Ins. Co. v. Chapman, 692 N.E.2d 374, 383–84 (Ill. 1998). Each supreme court district serves as the district for the intermediate appellate court, ILL. CONST. art. VI, § 7(a), with appeals permitted to that appellate court as of right from the circuits within the appellate court's district; the Court concluded that the State Constitution implicitly forbade dividing the circuits between districts.

[237] 2005 Ill. Laws 4–100 (codified at 705 ILL. COMP. STAT. § 22/1 *et seq*.).

[238] A reapportionment of Illinois would principally involve redistributing population from District 2 to Districts 3 through 5 (which as regards to each other are roughly equipopulous already).

[239] LA. CONST. art. V, § 4 ("The districts and the number of [supreme court] judges [are] subject to change by law enacted by two-thirds of the elected members of each house of the legislature.").

[240] 1997 La. Acts 1265–69 (codified as LA. STAT. ANN. § 13:101). This bill was approved unanimously and synchronized supreme court districts with congressional districts.

[241] Johnson v. State, 965 So. 2d 866 (La. App. 1 Cir. 2007) (holding the mere fact that the State failed to pass redistricting legislation in light of updated census data was insufficient to state a cause of action for purposeful discrimination; plaintiff further failed to state a cause of action under LA. CONST. art. I, § 2; voters do not have the right to demand that judicial election districts be reassessed and redrawn at regular intervals).

Mississippi[242] and **Oklahoma**[243] simply empower the legislature to draw districts. The last redistricting in Mississippi was in 1987; in Oklahoma, 1968.[244] However, the Mississippi judicial districts remain roughly equipopulous as of 2010.[245]

Maryland *constitutionally defines* the districts the justices "re-present"[246] and consequently has not been redistricted since a 1994 boundary amendment.[247]

The state responses to the dearth of federal equipopulation jurisprudence for judicial districts put the *Wells* problem in its proper perspective. First, at the moment, only three states (Louisiana, Mississippi and Oklahoma) can begin to draw egregiously non-equipopulous and gerrymandered districts for their Supreme Courts. Moreover, Louisiana and Oklahoma, which are in fact badly malapportioned at the supreme court level, have rich constitutional voting rights in their respective state constitutions,[248] presenting an alternative and perhaps easier litigation route.[249]

On the other hand, it's not satisfactory to declare a federal right to fair representation vindicated because of nominal protection under state constitutions.[250] Illinois and Kentucky have flouted the equipopulation mandates of their state constitutions;[251] it is difficult to expect *state* supreme courts to demand that state legislatures redistrict that very court, with obvious electoral repercussions. This is why federal courts entered the "political thicket" in the first place – to ensure that states were living up to the basic obligations of democracy no matter the vagaries of each state's constitution.[252] The present state constitutional protections for equipopulation are promising, but federal intervention can guarantee that those promises are kept.

---

[242] MISS. CONST. art. VI, § 145 (amended by §§ 145a-145b to expand the court from three to nine judges, with the six judges being divided between the existing districts and elected at-large, with terms staggered).

[243] OKLA. CONST. art. VII, § 2.

[244] MISS. CODE ANN. § 9-3-1 (West 1999); OKLA. STAT. ANN. tit. 20, § 2 (West 2002).

[245] The average population deviation as measured by total population is 1.69% ac-cording to calculations on file with the author; the largest district has 1.01 million people while the smallest has 961,000 people. Were the legislature divided like this, it is decidedly unlikely that review would be triggered.

[246] MD. CONST. art. IV, § 14.

[247] 1994 Md. Laws 1196–1200.

[248] *See, e.g.*, OKLA. CONST. art. II, § 4 ("No power, civil or military, shall ever interfere to prevent the free exercise of the right of suffrage"); LA. CONST. art. I, 10 (requiring that "[e]very citizen of the state… shall have the right to register and vote"). *See generally* William J. Brennan Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977) (examining litigation to defend rights under state constitutions); Josh Douglas, *State Constitutions: A New Battleground in Voting Rights*, JURIST (Apr. 3, 2012 3:00 PM), http://jurist.org/forum/2012/04 joshua-douglas-voter-id.php (describing recent successes in defeating Voter ID laws under state constitutional voting rights provisions rather than federal constitutional claims).

[249] *See, e.g.*, Blankenship v. Bartlett, 681 S.E.2d 759, 766 (N.C. 2009) (holding state equal protection clause subjects local judicial districting to intermediate scrutiny). *But see* Eugster v. State, 259 P.3d 146, 150 (Wash. 2011) (holding state equal protection clause does not require equipopulation for intermediate appellate court's districts).

[250] *But see* Civil Rights Cases, 109 U.S. 3, 25 (1883) (holding that the federal government is powerless to legislate to secure rights that are at least nominally se-cured by a state constitution).

[251] 705 ILL. COMP. STAT. 20/2 (1964); KY. REV. STAT. ANN. § 21A.010 (1991).

[252] Reynolds v. Sims, 377 U.S. 533, 566 (1964) ("[A] denial of constitutionally protected rights demands judicial protection; our oath and our office require no less of us. As stated in *Gomillion v. Lightfoot*: 'When a State exercises power wholly within the domain of state interest, it is insulated from federal judicial review. But such insulation is not carried over when state power is used as an instrument for circumventing a federally protected right.'") (quoting Gomillion v. Lightfoot, 364 U.S. 339, 347 (1960)).

III. Racial Dilution in Judicial Districts

A. Summary of the Voting Rights Act as Applied to Judicial Districts

Traditionally, challenges to judicial districting under the VRA could rely on Section 5[253] or Section 2 of the Act.[254] However, after *Shelby County v. Holder* effectively invalidated the great bulk of Section 5's preclearance regime, such challenges must rely on Section 2.[255] Section 2 provides in relevant part that "no voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color."[256] Section 2 presented a more complex question for judicial distracting for two reasons.

First, prior to the creation of a "results standard" in the 1982 VRA Amendments (replacing an intentional discrimination standard), states had a plethora of facially neutral rationales for unequal districts, making the requisite showing of intention impossible.[257]

Second, the 1982 VRA Amendments unintentionally[258] complicated the issue because they provided for a violation of Section 2 if and only if racial groups had "less opportunity than other members of the electorate to participate in the political process and to elect *representatives* of their choice."[259] Since, as discussed above, the received wisdom was that judges were not "representatives," there was a viable argument that the new VRA excluded judicial districts, just as the Court had excluded judicial districts from the equipopulation requirement of *Reynolds*.[260]

The Supreme Court, in the 1991 cases *Chisom v. Roemer*[261] and *Houston Lawyers Ass'n v. Attorney General of Texas*,[262] dismissed these arguments and held that Section 2 applied to judicial

[253] Voting Rights Act of 1965 § 5, Pub. L. No. 89-110 (codified as amended at 42 U.S.C. § 1973 (2006)). The Supreme Court summarily affirmed a lower court holding applying Section 5 to judicial elections in *Martin v. Haith*, 477 U.S. 901 (1986); it returned to the question, with evident irritation, in *Clark v. Roemer*, 500 U.S. 646, 653 (1991), declaring unanimously that a contrary district court decision to exempt some judicial elections from Section 5 "lack[ed] merit."

[254] Voting Rights Act of 1965 § 2.

[255] 133 S. Ct. 2612 (2013). There is at least some evidence that districting lines for judges received less attention from the Department of Justice than those for legislatures. The Department interposed objections only to twenty-two judicial districting changes (almost all at the most local level), while objecting to four hundred and twenty-eight redistricting plans in total. *See* Dep't of Justice, *Section 5 Objection Letters*, https://www.justice.gov/crt/section- 5-objection-letters (last visited Nov. 20, 2016) (statistics compiled from database).

[256] Voting Rights Act of 1965 § 2.

[257] *See, e.g.*, Neuborne, *supra* note 58, at 623 (discussing the Louisiana Supreme Court's racial gerrymander: "[s]o, cynical Louisiana lawmakers told themselves (and everyone else) that the real reason for the New Orleans multimember Supreme Court district was to establish a unified urban constituency, and they got away with it for eighty years because it was impossible to disprove")

[258] *See* Thomas Boyd & Stephen Markman, *The 1982 Amendments to the Voting Rights Act: A Legislative History*, 40 WASH. & LEE L. REV. 1347 (1983) (finding that at no point did Congress contemplate exempting judicial elections from the VRA).

[259] 52 U.S.C. § 10301 (West 1982) (emphasis added).

[260] *See* Chisom v. Roemer, 501 U.S. 380, 415 (1991) (Scalia, J., dissenting) (making precisely this argument); League of United Latin Am. Citizens v. Clements, 999 F.2d 831, 869 (5th Cir. 1993) (collecting lower court cases).

[261] *Chisom*, 501 U.S. at 389 (holding Section 2 applies to multi-member courts).

[262] 501 U.S. 419, 427 (1991) (holding Section 2 applies to trial courts).

elections. Retention elections are likewise included under Section 2.[263] Contrast the equipopulation decisions: here, the Court determined that the law of democracy, as applied to racially biased districting lines, would apply to state judiciaries. This was, just like the equipopulation exclusion, a wholesale proposition, despite the absence of the equipopulation principle in judicial elections which meant that the standard of "dilution" was difficult to measure, especially at the trial court level.[264] The *Chisom* majority responded to this challenge in a footnote:

[A]n analysis of a proper statutory standard under § 2 need not rely on the one-person, one-vote constitutional rule. See *Thornburg v. Gingles*; see also *White v. Regester* (holding that multimember districts were invalid, notwithstanding compliance with one-person, one-vote rule).[265]

What the Court really said here was that it understood the difficulties that might be created by including judicial elections in this area of elections jurisprudence but it didn't care. The prudential concerns of judicial districting, decisive in the equipopulation context, now were insufficient to keep the VRA out – and so they were completely discarded.

Once again, the Court's binary approach to democracy reared its ugly head. While the normative case for applying the VRA to judicial districts seems unanswerable, what was needed was an *institutionally sensitive* method of drawing judicial districts. The Court did not pro-vide this. Thus, compelled by the Court's refusal to provide a new standard, the lower courts went on to apply a three-part test cobbled together from bits of *Thornburg v. Gingles*[266] to determine whether a judicial districting plan violates Section 2.[267] The *Gingles* test finds a Section 2 violation when:

1.The minority group is "sufficiently large and geographically compact to constitute a majority" in a single-member district, such that the district is majority-minority with respect to citizens of voting age,[268]

2.The minority group is "politically cohesive" and,

3.The majority votes "sufficiently as a bloc to enable it – in the absence of special circumstances – usually to defeat the minority's preferred candidate."[269]

Whatever the merits of this test, plaintiffs seeking to challenge judicial districting satisfied it in only two cases. The reason should not surprise us by now: lower courts held that the *Gingles* test was suitable only for politicians, and judges, of course, were not politicians.

---

[263] Though the Supreme Court has not unequivocally so held, the Circuit Courts of Appeal have taken it as a given. *See, e.g.*, Bradley v. Work, 154 F.3d 704, 709 (7th Cir. 1998) (applying Section 2 to retention elections: "It is the voters directly who make the choice [about judicial retention] through the casting of their ballots. That is what the Voting Rights Act is all about").

[264] *Chisom*, 501 U.S. at 407–08.

[265] *Id.* at 403 n.32 (Scalia, J., dissenting) (citations omitted).

[266] 478 U.S. 30, 36 (1986).

[267] *See* Rodriguez v. Bexar Cty., 385 F.3d 853, 860 n.3 (5th Cir. 2004) ("[T]he district court ... expressed concern regarding the application of the *Gingles* threshold test to single-member districts that are not required to comply with the one-person, one-vote requirement. Since Section 2 includes judicial selections ... we are at a loss as to what other standard than *Gingles* might apply."); *accord* Cousin v. Sundquist, 145 F.3d 818, 825 (6th Cir. 1998); Milwaukee Branch of the NAACP v. Thompson, 116 F.3d 1194, 1196 (7th Cir. 1997); Rangel v. Morales, 8 F.3d 242, 243 (5th Cir. 1993).

[268] Bartlett v. Strickland, 556 U.S. 1 (2009) (establishing that the first *Gingles* prong is satisfied only when a district can be drawn that is majority-black).

[269] Thornburg v. Gingles, 478 U.S. 30 (1986). *See generally* ISSACHAROFF ET AL., *supra* note 78, at 652–733 (summarizing relevant jurisprudence).

B. Successful VRA Challenges to Judicial Districts: Louisiana and Mississippi

Out of thirty-two VRA challenges to judicial districting in which there was at least one reported opinion,[270] there have been, under the *Chisom* paradigm, only two successful challenges to judicial districting schemes under Section 2. The first is the convoluted *Chisom* line itself, which concerned the Louisiana Supreme Court and intermediate appellate courts (establishing the applicability of Section 2 to judicial elections).[271] The second is *Martin v. Allain*,[272] a Mississippi case. Both concerned the classic *Gingles* claim: that multi-member districts were created to "swamp" minority voters.[273]

Martin found violations of Section 2 in certain lower-court districts in Mississippi on the strength of a large pile of explicit, documentary evidence that state officials deliberately cut black constituents out of judicial elections by designing multi-member districts to guarantee that only white constituents would be elected judges.[274] To no-one's surprise, the state lost. The case was bifurcated into liability and remedy phases; at the liability phase, however, the court held that a Section 2 violation only occurred in those districts where "blacks constitute a sufficiently large and geographically compact group so that the district could be divided into single-member subdistricts of substantially equal population one of which would have a substantial black population and black voting age majority."[275]

In the remedy phase,[276] the district court threw out the plaintiff's proposed plans and substituted one of its own (drawn up by a court-appointed expert), making as it did so the only articulation by a court of salient factors when redistricting local districts to comply with Section 2. In addition to embracing the "traditional factors of contiguity, compactness, community of interest, natural boundaries, and preservation of existing precinct lines,"[277] the district court: Rejected the need for "compensation for minor population shifts on a regular basis" because equipopulation did not apply to the judiciary. Accordingly, the most permanent boundaries possible were selected for the judicial subdistricts (in particular, preserving whole counties – note once again a return to the county-based policy we observed already sat at the heart of judicial districting schemes).

Accepted subdistricting as a remedy in part because the Mississippi Constitution already provided for subdistricted judges having jurisdiction over the whole district – in particular, on the Supreme Court.[278]

Established a fifteen percent maximum range of deviation for a population variance among subdistricts

[270] *See generally* Ellen Katz et al., *Documenting Discrimination in Voting: Judicial Findings Under Section 2 of the Voting Rights Act Since 1982*, 39 U. MICH. J.L. REFORM 643, 735 (2006) (listing all cases decided under Section 2, the vast bulk of which have attacked legislative districting at the state and local level).

[271] Chisom v. Edwards, 690 F. Supp. 1524 (E.D. La. 1988) (finding multi-member New Orleans multimember district violated Section 2).

[272] Martin v. Allain, 658 F. Supp. 1183 (S.D. Miss. 1987).

[273] For a focused discussion of the general history of VRA Section 2 challenges and multimember districts, see George Bundy Smith, *The Multimember District: A Study of the Multimember District and the Voting Rights Act of 1965*, 66 ALB. L. REV. 11 (2002).

[274] Martin v. Allain, 658 F. Supp. 1183, 1202 (S.D. Miss. 1987).

[275] *Id.* at 1204.

[276] Martin v. Mabus, 700 F. Supp. 327 (S.D. Miss. 1988).

[277] *Id.* at 332–35.

[278] MISS. CODE ANN. §§ 23-15-991 to 997 (West 1994)

within a judicial district because "a general equality in population among the single-member subdistricts within a judicial district will be best for judicial administrative purposes." Although the Court did not say as much, this variance is almost certainly within the bounds of tolerance established for population disparities in bodies *subject* to the equipopulation rule.[279]

The decision was not appealed.[280] We can draw two inferences from this case: first, in common with all Section 2 cases, much de-pends on the facts; second, any remedy to racial dilution in a judicial district must, notwithstanding the Supreme Court's insouciance on the subject, take into account the complexity of judicial administration.

The sophistication of *Martin v. Mabus* returns us to the example of *Williams-Yulee*, for in both opinions judges were faced with a democratic principle (no racially motivated districting and no restrictions on campaign speech, respectively) that simply could not be applied wholesale to the judicial elections context. But rather than mechanically apply or disapply doctrines developed in the legislative and executive arenas, the courts tailored the doctrines to match the special circumstances of judicial elections. By contrast, the absolutism of the Supreme Court's approach to racial districting in *Chisom* positively interfered with the parties' efforts to develop a more racially just outcome.

Chisom began with the long-standing incongruity of New Orleans being assigned an at-large judicial district while all other judicial districts were single-member. Most importantly, it was largely undisputed that had New Orleans been districted on a single-member basis, it would have elected at least one black supreme court justice.[281]

The *Chisom* litigation lasted from 1987 to 1992, at which point the exhausted parties entered into a settlement.[282] However, it is un-clear whether the *Chisom* plaintiffs would have won had the state continued to fight. In the initial bench trial on the plaintiffs' Section 2 claims, the district court rejected almost all of the factual predicates necessary to establish a *Gingles* claim, including a history of racially polarized voting and racially polarized voting in the multi-member district itself.[283] The district court also cast doubt on the proposed remedy, drawing on equipopulation doctrine to do so:

Thus, if two districts were drawn without crossing parish boundaries (as is the case in the rest of the state) and if the "ideal district" were based upon population alone, no single member district may fairly be drawn in which blacks would constitute a majority of the voting age population and registered voters... It appears the only way to provide a sizable single member district in which blacks would constitute a voting age majority would be to create a gerrymandering district lacking geographical compactness.[284]

---

[279] *See* Mahan v. Howell, 410 U.S. 315, 329 (1973).

[280] In the recollection of one of the counsel in this case, the new Secretary of State (Ray Mabus) was no longer interested in fighting racial exclusion at this point, while the plaintiffs felt the district court's decision represented the best deal available. *See* Email from Professor Samuel Issacharoff to Alec Webley on Judicial Districting Litigation (Jan. 6, 2015) (on file with author).

[281] For an excellent summary of this litigation, see Neuborne, *supra* note 58, at 623.

[282] Chisom v. Edwards, 970 F.2d 1408 (5th Cir. 1992) (announcing settlement); LA. REV. STAT. ANN. § 13:101 (West 1999) (implementing settlement).

[283] Chisom v. Roemer, CIV. A. NO. 86-4057, 1989 WL 106485 (E.D. La. Sept. 19, 1989).

[284] *Id.*

Therefore, while *Chisom* can be marked as a success – and it certainly generated pressure on all fronts to diversify the state judiciary[285] – it is also an example of the challenge that would come to bedevil other attempts at litigation. It is just very difficult, often impossible, to apply wholesale the doctrines of legislative districting to judicial districting.

C. Unsuccessful VRA Challenges to Judicial Districts

Against these slender reeds of success, lower courts have over-whelmingly rejected Section 2 claims made against judicial districts. We can group these cases into two broad categories: ones in which the claim failed at the liability stage, and ones in which the claim failed when considering remedy.

The liability stage has doomed several judicial districting suits where plaintiffs simply failed to show that race was the principal salient factor in the election,[286] that racial bloc voting was sufficiently present,[287] or that race explained minority electoral success.[288] This represents a general trend in Section 2 litigation: it is extremely difficult to satisfy the *Gingles* districting criteria.[289]

The far greater systemic problem for Section 2 suits in the judicial context is the question of remedy. There are three conceivable remedies to racially biased districting: the creation of subdistricts, the implementation of limited voting, and more radical actions like ditching judicial elections altogether.[290] Courts have displayed hostility to all three.

Subdistricting remedies have been rejected for three sets of rea-sons. First, in common with other *Gingles* suits, it is often the case that plaintiffs cannot draw a map with the requisite black majorities to satisfy the first *Gingles* prong.[291]

[285] Neuborne, *supra* note 58, at 623.

[286] *See* S. Christian Leadership Conference of Ala. v. Sessions, 56 F.3d 1281, 1295 (11th Cir. 1995); Maxey v. Cuomo, 91 CIV. 7328 (TPG), 1996 WL 529024 (S.D.N.Y. Sept. 18, 1996) ("[I]n no respect is the pleading here sufficient. Not only are there no satisfactory allegations under [*Gingles*], but there is no sufficient pleading of intentional discrimination.").

[287] *See* Mallory v. Ohio, 173 F.3d 377, 385 (6th Cir. 1999) (finding insufficient evidence of bloc voting); Bradley v. Work, 154 F.3d 704, 709 (7th Cir. 1998) (finding the same); Rangel v. Morales, 8 F.3d 242, 243 (5th Cir. 1993) (finding single election was not sufficient to show that whites exhibited requisite bloc voting to satisfy *Gingles*); Anderson v. Mallamad, IP 94-1447-C H/G, 1997 WL 35024766 (S.D. Ind. Mar. 28, 1997) (finding insufficient evidence of bloc voting).

[288] *See* Rodriguez v. Bexar Cty., 385 F.3d 853, 860 (5th Cir. 2004) (finding His-panic success over two electoral cycles was not a "special circumstance"); Cousin v. Sundquist, 145 F.3d 818, 825 (6th Cir. 1998) (finding insufficient evidence showing the minority-preferred candidate lost sufficiently frequently to invoke *Gingles*); Milwaukee Branch of the NAACP v. Thompson, 116 F.3d 1194, 1196 (7th Cir. 1997) (same); Anthony v. Michigan, 35 F. Supp. 2d 989, 1007 (E.D. Mich. 1999) (holding fifty percent non-incumbent election rate for black voters in the Clark County circuit court elections is not a "special circumstance" under *Gingles*); Williams v. State Bd. of Elections, 718 F. Supp. 1324, 1331 (N.D. Ill. 1989) (finding insufficient evidence that black voters are sufficiently unsuccessful to qualify as a *Gingles* violation).

[289] *See* ISSACHAROFF ET AL., *supra* note 78, at 653–720 (discussing in detail the challenges involved in meeting the required showings at each stage of the *Gingles* test); *see also* Katz et al., *supra* note 185 (analyzing hundreds of past Section 2 cases and finding the majority of these cases failed at the liability stage for these reasons).

[290] This solution was proposed only once, in *White v. Alabama*, 74 F.3d 1058, 1069–70 (11th Cir. 1996), where the plaintiffs requested the direct appointment of sufficient minority judges. This remedy was rejected, with the Eleventh Circuit finding it contrary to the "spirit and the purpose of the Voting Rights Act" which was to allow voters to *elect* the candidates of their choice.

[291] *E.g.*, Magnolia Bar Ass'n, Inc. v. Lee, 994 F.2d 1143, 1150 (5th Cir. 1993); France v. Pataki, 71 F. Supp. 2d 317, 325 (S.D.N.Y. 1999); Al-Hakim v. Florida, 892 F. Supp. 1464, 1474 (M.D. Fla. 1995) *aff'd*, 99 F.3d 1154 (11th Cir. 1996).

Second, and much more problematically for our purposes, even a *Gingles*-compliant districting proposal can be rejected because of the administration problems implicit in creating entirely separate court districts with elected judges. Thus in *Southern Christian Leadership Conference of Alabama v. Sessions*, the Eleventh Circuit argued:

Caseload, population, population density, square miles per judge, attorneys per judge and other factors contribute to the allocation of judicial resources. Therefore, the reallocation of counties among circuits would have ramifications across the state. For example, Bibb County, which is currently one of five counties in the Fourth Circuit, would become a single county circuit. Whether a county of 16,576 could reasonably and efficiently support its own circuit is uncertain.[292]

Third, if a plaintiff tries to circumvent this administration problem by proposing to keep the judicial districts the same but dividing them into subdistricts for the purposes of elections, the plan is still rejected on the strength of the state's "linkage interest" – ensuring that the entire electorate over which a judge presides can hold that judge accountable at the ballot box. Thus, the Sixth Circuit held in *Cousin v. Sundquist*:

Even if we had held plaintiffs' vote dilution claim valid, we would not have affirmed a remedy such as they proposed in this case be-cause it is at odds with the important state interest in "linkage." Proper adherence to the principle of linkage ensures that a state court judge serves the entire jurisdiction from which he or she is elected, and that the entire electorate which will be subject to that judge's jurisdiction has the opportunity to hold him or her account-able at the polls. Single-member [sub]districts, as several courts have noted, eliminate the identity between the electoral and juris-dictional bases of its judges, thereby violating the state's significant linkage interest. This linkage interest is also important because it lies at the heart of philosophical decisions about the role of judging in our system of government...[293]

Finally, while limited or cumulative voting (where voters cast multiple votes for multiple candidates)[294] has occasionally been pro-posed as a viable alternative to subdistricting,[295] the two courts to con-sider the option *as a remedy*[296] have been hostile to it. In

[292] S. Christian Leadership Conference of Ala. v. Sessions, 56 F.3d 1281, 1297 (11th Cir. 1995); *accord* Davis v. Chiles, 139 F.3d 1414, 1423–24 (11th Cir. 1998) (rejecting proposed subdistricting remedy because it impermissibly interferes with the structure of the judicial system); Concerned Citizens for Equal. v. McDonald, 63 F.3d 413, 417 (5th Cir. 1995) (applying *Holder v. Hall*, 512 U.S. 874 (1993), which precluded any VRA challenge to the size of a governmental body, to judicial elections such that a remedy that proposed increasing the number of judges in a particular district was precluded); Nipper v. Smith, 39 F.3d 1494, 1545 (11th Cir. 1994) (rejecting creation of new judicial districts as a remedy).

[293] 145 F.3d 818, 825 (6th Cir. 1998); *accord* Milwaukee Branch of the NAACP v. Thompson, 116 F.3d 1194, 1196 (7th Cir. 1997); *Nipper*, 39 F.3d at 1543 (noting linkage interest is relatively minor in liability stage but critical in remedy stage).

[294] *See* ISSACHAROFF ET AL., *supra* note 78, at 1187–91.

[295] *See* Richard Engstrom, *Single Transferable Vote: An Alternative Remedy for Minority Vote Dilution*, 27 U.S.F. L. REV. 779 (1992); Rob Richie & Andrew Spencer, *The Right Choice for Elections: How Choice Voting Will End Gerrymandering and Expand Minority Voting Rights, from City Councils to Congress*, 47 U. RICH. L. REV. 959 (2013).

[296] In one case, a limited voting scheme for judges, albeit one implemented by the legislature, has been upheld against legal attack. *See* Orloski v. Davis, 564 F. Supp. 526, 530 (M.D. Pa. 1983) (upholding a limited voting scheme for the election of Commonwealth Court judges). In other settings, legislatures have been given scope under the VRA to structure non-judicial elections as they please. *See, e.g.*, Dudum v. Arntz, 640 F.3d 1098 (9th Cir. 2011) (upholding cumulative voting for San Francisco Board of Supervisors).

Cousin v. Sundquist, the Sixth Circuit dismissed limited voting out of hand, arguing that "Section 2 of the Voting Rights Act specifically precludes its use to achieve proportional representation. *See* 42 U.S.C. § 1973(b)[297] ... Yet this is precisely the effect and, proponents would argue, the strength of cumulative voting as a remedy."[298] In *Nipper v. Smith*, the Eleventh Circuit was scathing in its rejection of cumulative voting:

Requiring judges to run for unnumbered seats on the court, meaning that all of the judges seeking reelection would be forced to op-pose each other, would have a detrimental effect on the collegiality of the court's judges in administrative matters... . In addition to dampening lawyer interest in a judicial career, requiring judges to face opposition every time their terms expire would adversely affect the independence of the judiciary: Judges would begin running for reelection from the moment they took office...

Finally, a cumulative voting system, like a sub-districting system, would encourage racial bloc voting. That, in turn, would necessarily fuel the notion that judges were influenced by race when administering justice.[299]

Likewise, in *Martin v. Mabus* (the remedy decision in the one successful VRA case in Mississippi, discussed above), the district court refused to accept a proposed "limited voting" scheme as a remedy for racial gerrymandering, finding "that limited voting is experimental and contrary to most election laws of Mississippi and the policy contained therein" as well as "contrary to most general concepts of a democratic two-party system" and "a radically new, judge-made process."[300] Thus, piece-by-piece, the Eleventh Circuit at least has eliminated any possible remedy for racially discriminatory judicial districts. As one panel later lamented:

Together with *Nipper*, *SCLC*, and the additional case of *White v. Alabama* [all discussed above] we will with this decision have dis-allowed redistricting, subdistricting, modified subdistricting, cumulative voting, limited voting, special nomination, and any conceivable variant thereof as remedies for racially polarized voting in at-large judicial elections… Given such rulings [we have not] been able to envision any remedy that a court might adopt in a Section Two vote dilution challenge to a multi-member judicial election district. Thus, in this circuit, Section Two of the Voting Rights Act frankly cannot be said to apply, in any meaningful way, to at-large judicial elections.[301]

It is difficult, given this weight of negative precedent, to say that Section 2 cases are viable except in the most egregious and easily remedied cases.

These difficulties were not inevitable. Instead, they arise from the dualism in judicial elections regulation we have seen in every other context hitherto discussed: either state judicial elections are "in" or they are "out." There is no intermediary space. In the VRA context, the Supreme Court ordered lower courts to put judiciaries "in" the VRA paradigm; lower courts responded by finding other grounds to throw them "out" of the paradigm. Yet the *Martin v. Mabus* court fashioned a new

[297] Now 52 U.S.C. § 10301(b) (West 1982), reading in relevant part: "provided, that nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population."

[298] Cousin v. Sundquist, 145 F.3d 818, 829 (6th Cir. 1998).

[299] Nipper v. Smith, 39 F.3d 1494, 1546 (11th Cir. 1994).

[300] 700 F. Supp. 327, 337 (S.D. Miss. 1988).

[301] Davis v. Chiles, 139 F.3d 1414, 1423–24 (11th Cir. 1998).

districting paradigm in order to square the incongruities between the VRA adapted for legislative districts and the judicial districting case before it. Without citation and perhaps without realizing it, the Supreme Court followed suit in *Williams-Yulee*. As we will see in Part V, once courts adopt the sophisticated intermediate position of *Williams-Yulee* and its predecessors, it becomes possible to square legislatively- focused statutes like the VRA with the specific concerns of judicial districting.

IV. Judicial Districts and Partisan Voting Dilution

A. Partisan Dilution and Equal Protection: Davis v. Bandemer and the Quest for a Justiciable Principle for Partisan Gerrymandering

The Supreme Court first indicated that partisan manipulation of election districts could violate the Constitution in *Davis v. Bandemer*.[302] In this deeply divided decision, Justice White, who wrote for the plurality, suggested that a districting scheme for which the plaintiffs could show both "intentional discrimination against an identifiable political group" and an "actual discriminatory effect on that group" such that the "electoral system is arranged in a manner that will consistently degrade a voter's or group of voters' influence on the political process as a whole" would violate the Constitution.

Bandemer has "served almost exclusively as an invitation to litigation without much prospect of redress."[303] This invitation was at least partially withdrawn in *Vieth v. Jubelirer*,[304] another fractured decision in which the plurality (Justices Scalia, Roberts, O'Connor, and Thomas) attempted to overrule *Bandemer*. The plurality was stymied by Justice Kennedy, who wrote separately to throw out every pro-posed standard for partisan gerrymandering claims while expressing the hope that perhaps one day such a claim might be possible. "If a subsidiary standard could show how an otherwise permissible classification, as applied, burdens representational rights," he wrote, "we could conclude that appellants' evidence states a provable claim under the Fourteenth Amendment."[305]

Despite this sliver of hope, partisan gerrymandering claims have continued to go nowhere, at least as far as legislatures are concerned.[306] Yet a workable standard could be articulated with respect to judicial districting, if we examine partisan gerrymandering standards through the lens of decisions like *Williams-Yulee*, where democratic law standards are viewed through the prism of the special concerns of the judiciary. The remainder of this Part will be dedicated to sketching out this standard.

B. Applying Bandemer to Judicial Districts: GOP v. Martin

The fourteen states with at least some partisan judicial elections[307] could present a claim that district lines fall afoul of the partisan gerrymander outlawed in *Davis v. Bandemer*.[308] Indeed, the one case in

[302] 478 U.S. 109 (1986).

[303] Vieth v. Jubelirer, 541 U.S. 267, 279 (2004) (plurality opinion) (quoting ISSACHAROFF ET AL., *supra* note 78, at 783).

[304] *See id.* at 281.

[305] *Id.* at 313–14 (Kennedy, J., concurring)

[306] Ethan Weiss, *Partisan Gerrymandering and the Elusive Standard*, 53 SANTA CLARA L. REV. 693 (2013); *accord* Richard L. Hasen, *Looking for Standards (in All the Wrong Places): Partisan Gerrymandering Claims After* Veith, 3 ELECTION L.J. 626 (2004) (dismissing the entire quest as an exercise in futility).

[307] Eight states have partisan judicial elections at all levels: Alabama, Illinois, Lou-isiana, Michigan, New Mexico, Pennsylvania, Texas, West Virginia. Six limit partisan elections to particular levels of the judiciary: Indiana (trial courts only), Kansas (14/31 districts only), Missouri (circuit court only), New York (trial courts only), Ohio (primaries only), Tennessee (trial courts only). NAT'L CTR. FOR ST. CTS., *supra* note 2.

[308] *See* Davis v. Bandemer, 478 U.S. 109 (1986).

any appeals court anywhere that *did* find the *Bandemer* criteria satisfied concerned judicial districts.

In *Republican Party of North Carolina v. Martin*,[309] the Fourth Circuit found, in its analysis of the North Carolina state superior (i.e. trial) court election system, the requisite intent to discriminate on a partisan basis, and the requisite effect of that intention, to have stated a claim under *Bandemer*. However, the North Carolina Superior Court was elected in a decidedly odd fashion: each *local* judge was elected in a *statewide* at-large election. Ironically, district lines per se were irrelevant to the judicial election system.[310] The Republican Party documented numerous occasions where the legislature rejected attempts to change this system.[311] As for discriminatory effect, precisely one Republican party judicial candidate won election anywhere in the state between 1968 and 1992, a fact to which the Fourth Circuit returned again and again as probative evidence of both intent and effect.

The subsequent history of *Martin* illustrated the practical difficulties of pursuing this case-line. After remand from the Fourth Circuit, the district court upheld the complaint and issued a permanent injunction on the operation of the statewide election system after dis-position on the record following 132 witness statements and nearly twenty volumes of trial exhibits.[312] Yet not five days afterwards, immediately prior to the injunction coming into effect, a full five Republican candidates were elected to the superior court.[313] The state had tipped Republican, and now the system served to privilege over-whelmingly the party formerly excluded.

The Fourth Circuit stayed the injunction to allow the district court to incorporate this turn of events into its analysis, a consideration that proved moot as the North Carolina legislature established a more conventional districted election system shortly afterwards.[314] Al-though in its facts and disposition *Martin* is clearly an outlier, the Fourth Circuit's original *Martin* decision has never been overturned by the Supreme Court, and the *Martin* holding as regards at-large elections has been embraced at least in dicta by the Seventh Circuit.[315]

Yet the facts of *Martin* were extreme – allowing relief because of a distinctly odd electoral system that resulted in one Republican elected out of nearly 220 elections despite twenty-seven percent Re-publican representation in the electorate. A subsequent case brought against the at-large system of electing Illinois Supreme Court justices from Cook

[309] *See* Republican Party of N.C. v. Martin, 980 F.2d 943 (4th Cir. 1992).

[310] *Martin* itself, despite being the only successful partisan gerrymandering case in U.S. history, eventually amounted to nothing: the realignment of North Carolina in 1994 led to the vacation of single-district injunction in *Republican Party of North Carolina v. Hunt*, 77 F.3d 470 (4th Cir. 1996).

[311] *See* Republican Party of N.C. v. Martin, 980 F.2d 943, 955 (4th Cir. 1992).

[312] *See* Republican Party of N.C. v. Hunt, NO. 88–263–CIV–5–F, 1994 U.S. Dist. LEXIS 19962 (E.D.N.C. Nov. 3, 1994).

[313] *See* Ragan v. Vosburgh, Nos. 96-2621, 96-2687, 96-2739, 1997 U.S. App. LEXIS 6626, at *3–12 (4th Cir. Apr. 10, 1997) (summarizing the complex procedural history of the case).

[314] *See id.*

[315] Smith v. Boyle, 144 F.3d 1060, 1062 (7th Cir. 1998) ("The Supreme Court has not yet had a case in which the use of at-large elections to fill judicial offices is challenged as a denial of equal protection because aimed at preventing the election of candidates of one of the parties. But like the Fourth Circuit in *Republican Party v. Martin* – the only case similar to this one that we've found – we cannot see an objection in principle to what would be after all only a modest extension of existing law.").

County was rejected out of hand by the Seventh Circuit because plaintiffs could not prove that the system was designed with partisan discriminatory intent.[316]

Moreover, *Martin* predated the Court's partial reconsideration of *Bandemer* in *Vieth*. No subsequent cases have been heard on a *Bandemer* claim, and it is possible the lower courts will read *Vieth* as precluding, or at least complicating, future judicial district partisan gerrymandering litigation. An equally significant obstacle to further success is the Court's endorsement of partisan, issues-based judicial elections in *Republican Party of Minnesota v. White*.[317] Any claim that parties are harmed because the partisan districting scheme deprives them of a "neutral" judge as regards the law would surely have failed if the Court continued treating judicial elections as indistinguishable from legislative elections.[318]

C. Could Due Process Provide an "Administrable Standard" for Gerrymandering of Judicial Districts?

Williams-Yulee may have changed this calculus. When the Court found that the "integrity of the judiciary" is an interest sufficient to justify a naked content-based restriction on speech,[319] it situated judicial elections in the broader context of the unique requirements of judges: that they be impartial.[320] Beginning with this premise, the Court might be receptive to a partisan gerrymandering claim rooted in requirements of judicial impartiality and the particular separation-of-powers harms of judicial district gerrymandering to fashion the requisite "easily administrable standard" that would apply constitutional partisan gerrymandering rules on judicial districts.

In particular, Justice Kennedy's opinion in *LULAC v. Perry*,[321] which touched in part on *Vieth*, stressed that partisan gerrymandering claims have hitherto failed because they have failed to "show a bur-den, as measured by a reliable standard" on the rights implicated by legislatures – namely direct representation.[322] While to an extent partisan gerrymandering prevents particular groups from being represented in the judiciary (such as Republicans in North Carolina under *Martin*), partisan gerrymandering could also be shown to give undue power to particular *parties before the court* on the basis of legislative preference. The judicial independence interest then would stand in for 'representation' as the value against which a measurable standard could be drawn.

---

[316] *Id.* at 1061.

[317] *See* Republican Party of Minn. v. White, 536 U.S. 765, 778 (2002) (distinguishing bias against *parties*, which is impermissible, from bias about legal questions or positions, declaring "even if it were possible to select judges who did not have preconceived views on legal issues, it would hardly be desirable to do so").

[318] However, in a case involving *political parties* (i.e. an elections dispute) there might be a quasi-*Caperton* claim that by virtue of being a member of the political party the judge serves to benefit indirectly from adjudicating a dispute in a certain party's favor – especially if the legislative or executive election at issue has the authority to alter that judges' electoral district. Again, there is a total dearth of precedent and little scholarship on this point. *See* David E. Pozen, *The Irony of Judicial Elections*, 108 COLUM. L. REV. 265, 322–23 (2008) (noting state legislatures have a strong interest in ensuring partisan uniformity of state courts since election law issues are overwhelmingly decided at the state level).

[319] Williams-Yulee v. Fla. Bar, 135 S. Ct. 1656, 1666 (2015).

[320] *See id.* at 1674 (Ginsburg, J., concurring) ("Partiality, if inevitable in the political arena, is disqualifying in the judiciary's domain."); *accord* Marshall v. Jerrico, Inc., 446 U.S. 238, 242 (1980) ("The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases.").

[321] League of United Latin Am. Citizens v. Perry, 548 U.S. 399 (2006).

[322] *Id.* at 418.

Vieth notwithstanding, Justice Kennedy's *LULAC* opinion could be read to support an attack using separation of powers doctrine on excessively partisan judicial districting. A system of naked partisan manipulation of judicial districts that ensures judges of a particular legislatively-favored ideology maintain a stranglehold on state juris-prudence serves to decrease the independence of the judiciary.

Accordingly, if the legislature acted to ensure partisan control of a state supreme court by gerrymandering, the judges of that court could be said to be functionaries of the legislature, which might give rise to a claim the separation of powers is threatened.[323] Consider, as a very simple example, the notion that a legislative majority, dissatisfied with a certain state supreme court justice's ruling (perhaps in favor of the opposition), acts to simply redraw her seat so as to make her election impossible. Under these circumstances, it can no longer be the "business of judges to be indifferent to popularity."[324] Worse, if the state legislature has unfettered power to gerrymander out judges it dis-likes, it is not to "the People" but to state legislators that judges must defer if judges are to have any hope of being re-elected. This is not an idle threat. The Kansas legislature has threatened to defund the judiciary if it rules against it in a high-profile school funding case.[325] While the Kansas Supreme Court is chosen via 'merit selection' without districts, if legislators had the power to simply district the judges out of existence, can there be much doubt they would at least threaten to do so? After all, legislators are practiced in this tactic: they use it perennially against each other.

This 'separation of powers' argument, that districting powers give legislatures undue power over the judiciary, draws on deeper wellsprings of constitutional concern than the more usual 'populism hurts independence' line of separation of powers argument common to the anti-elections literature.[326] Given that about two-thirds of the states have express separation of powers provisions,[327] one can make out the lines

[323] Little attention has been given to the link between judicial independence and partisan gerrymandering, but separation of powers concerns have always animated anti-judicial-election advocates. *See, e.g.*, Republican Party of Minn. v. White, 536 U.S. 765, 798 (2002) (Stevens, J., dissenting) ("There is a critical difference between the work of the judge and the work of other public officials in litigation, issues of law or fact should not be determined by popular vote; it is the business of judges to be indifferent to unpopularity."); Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 225–26 (1995) (collecting cases on separation of powers); George D. Brown, *Political Judges and Popular Justice: A Conservative Victory or a Conservative Dilemma?*, 49 WM. & MARY L. REV. 1543, 1602 (2008) (stressing incongruity between elected judges and separation of powers). *But see* Scott W. Gaylord, *Unconventional Wisdom: The Roberts Court's Proper Support of Judicial Elections*, 2011 MICH. ST. L. REV. 1521, 1549 (2011) (arguing popular election is itself supportive of separation of powers).

[324] Chisom v. Roemer, 501 U.S. 380, 401 n.29 (1991) (quoting John Paul Stevens, *The Office of an Office*, 55 CHI. B. REC. 276, 280–81 (1974)).

[325] Mark Joseph Stern, *Kansas Gov. Sam Brownback Threatens to Defund Judiciary if It Rules Against Him*, SLATE (June 8, 2015, 5:05 PM), http://www.slate.com/ blogs/the_slatest/ 2015/06/08/kansas_governor_sam_ brownback_threatens_to_defund _judiciary_if_it_rules.html.

[326] *See* THE FEDERALIST NO. 78, at 484 (Alexander Hamilton) (Henry Cabot Lodge ed., 1891) ("[I]t proves, in the last place, that as liberty can have nothing to fear from the Judiciary alone, but would have everything to fear from its union with either of the other departments; that as all the effects of such a union must ensue from a dependence of the former on the latter, notwithstanding a nominal and apparent separation"); *accord* Wayman v. Southard, 23 U.S. 1, 13–14 (1825) (underlining importance of separation of powers to underlying constitutional scheme).

[327] G. Alan Tarr, *Interpreting the Separation of Powers in State Constitutions*, 59 N.Y.U. ANN. SURV. AM. L. 329, 337 (2003).

of a challenge to any redistricting scheme that would unduly damage judicial independence.[328] This challenge, of course, would depend on the particular separation of powers jurisprudence of each state, analysis of which is beyond the scope of this article.

More relevant here, separation of powers might also be the foundation for a federal due process claim. Justice Kennedy expanded on his views of state judges in his concurrence, joined by Justice Breyer, in *New York State Board of Elections v. Lopez Torres*.[329] There, the Court rejected a First Amendment challenge to partisan New York state nominating processes for supreme court (i.e. trial court) judges. Justice Kennedy felt compelled to write:

[T]he persisting question [in partisan elections] is whether that process is consistent with the perception and the reality of judicial independence and judicial excellence. *The rule of law, which is a foundation of freedom, presupposes a functioning judiciary respected for its independence*, its professional attainments, and the absolute probity of its judges. And it may seem difficult to reconcile these aspirations with elections. [I]t is unfair to [elected judges themselves] and to the concept of judicial independence if the State is indifferent to a selection process open to manipulation, criticism, and serious abuse.[330]

Along the lines of this concurrence, we could see a due process claim against partisan judicial districting proceeding as follows: first, a showing that the legislature sought to alter the decisions emerging from the judiciary by changing judicial districts; second, a showing of the tangible harm by which a litigant is deprived due process owing to this legislative meddling into the judiciary; third, an argument that separation of powers is integral to due process. Such a strategy, emphasizing separation of powers, might avoid the problem of a *Bandemer*-style claim collapsing into a broader compliant about the politicization of the judiciary, which would likely fall on deaf ears.[331] Now that the Court has fully embraced an appropriately nuanced understanding of judicial elections and the law of democracy, the time may be ripe to give this theory a try.

V. Addressing the Democratic Deficit in Judicial Districting

We have seen that federal courts treat judicial districts, for rea-sons good and bad, as separate and apart from concerns rooted in the law of democracy. We have also seen that this stems from an unnecessarily binary conception of

[328] *See* James A. Gardner, *A Post*-Vieth *Strategy for Litigating Partisan Gerry-mandering Claims*, 3 ELECTION L.J. 643 (2004) (describing the controlling Kennedy concurrence in *Vieth* as a "shambles" and arguing for a retreat to state courts).

[329] 552 U.S. 196 (2008).

[330] *Id.* at 212–13 (emphasis added). While Kennedy vigorously dissented in *Williams-Yulee*, he did so on the grounds that the salient differences between judicial and legislative elections were in his view irrelevant to the First Amendment question presented. Williams-Yulee v. Fla. Bar, 135 S. Ct. 1656, 1683–84 (2015) (Kennedy, J., dissenting). Explicit in his concurrence was the assumption that a direct, unmediated elections process would sufficiently preserve judicial integrity. In *Lopez-Torres*, by contrast, Kennedy was considering a *mediated* democratic system in which partisan officials manipulate the ultimate outcome – just like partisan redistricting.

[331] As, indeed, it has already. *See, e.g.*, Newman v. Voinovich, 789 F. Supp. 1410, 1413 (S.D. Ohio 1992) *aff'd*, 986 F.2d 159 (6th Cir. 1993) (rejecting a white male's attempt under the VRA to block a Republican Governor's judicial nomination of a Republican judicial candidate, following the recommendation of nominees by the G.O.P. county chair, on standing grounds, because the practice has nothing to do with minority access to an elected office).

judicial elections in our constitutional scheme: they are either in or out of each major doctrinal piece of the law of democracy. *Williams-Yulee* points the way towards a more nuanced understanding of the place of judicial elections in our constitutional constellation. In what follows I sketch several sets of solutions in the spirit of *Williams-Yulee* that aim to address the representational and administrative concerns of the courts while still ensuring that judges are elected according to basic democratic standards applicable to all other elected officials.

A. Imposing Equipopulation and the VRA on State Supreme Courts

As we have seen, the judicial exemption from the law of democracy rests on two rationales: the belief that judges are not representatives, and concerns that a requirement for equipopulous, nondiscriminatory districting would interfere with judicial efficiency. Both arguments simply do not apply to the districting schemes of state supreme courts and should be rejected so as to require that at least apex courts of statewide jurisdiction be elected on an equipopulous basis.[332]

Begin with the second rationale for nonequipopulous judicial districting: that judicial efficiency would be impaired. However strong this objection may be when applied to local courts, it is hard to apply this second rationale to state *supreme* courts, which are collective bodies that typically control their own dockets and decide cases collectively. Adding more supreme court judges does not make the court more efficient[333] or cause malapportioned districts to suffer unduly in the (usually limited) one-judge jurisdiction of that supreme court.[334]

Turning to the "representativeness" claim, the harm represented by unequal *supreme* court districts seems broadly similar to those suffered in the legislative case. State supreme courts make "law" of the same importance as that made by the state legislature.[335] It is hard to argue

[332] The equipopulation I call for here would resemble for all intents and purposes the standard applied to state legislatures; if, as I argue, judges are representatives and no special judicial caseload considerations apply, then the same factors applicable to drawing legislative districts would apply to judicial districts. Accordingly, while there remains a lively debate over whether just registered voters or all residents should be counted in legislative districts, compare *Burns v. Richardson*, 384 U.S. 73, 97 (1966) (registered voters) with *Garza v. County of Los Angeles*, 918 F.2d 763, 775–76 (9th Cir. 1990) (total population), *cert. denied*, 498 U.S. 1028 (1991). The contours of this debate would be largely unchanged in the judicial context. There may, however, be stronger arguments for including prisoners in the population count for judicial districts (especially were such districts to be created more locally than supreme courts owing to inferable relative caseload considerations) than for legislative districts. *See generally* Dale E. Ho, *Captive Constituents: Prison-Based Gerrymandering and the Cur-rent Redistricting Cycle*, 22 STAN. L. & POL'Y REV. 355, 359–60 (2011); Nathaniel Persily, *The Law of the Census: How to Count, What to Count, Whom to Count, and Where to Count Them*, 32 CARDOZO L. REV. 755, 787 (2011). I note in passing that the Court has refused to clarify the requirement further, save to hold that total population is an *acceptable* basis for equipopulous apportionment. Evenwel v. Abbott, 136 Ct. 1120, 1123 (2016).

[333] *See* Harry T. Edwards, *The Effects of Collegiality on Judicial Decision-Making*, 151 U. PA. L. REV. 1639, 1675 (2003) (retired D.C. Circuit judge discussing the efficiencies involved in multi-member courts noting greater efficiency among smaller groups).

[334] *See Superintending Control Over Inferior Tribunals*, 112 A.L.R. 1351 (1938, updated 2014) (noting that at the state supreme court level, most single-justice practice relates to injunctions against inferior tribunals which occurs 'only in extreme cases and under unusual circumstances'); *accord* Maura S. Doyle, *Single Justice Practice in the Supreme Judicial Court*, *in* 2 APPELLATE PRACTICE IN MASSACHU-SETTS § 21 (Mass. Continuing Legal Education Inc., 2016).

[335] Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938).

that supreme courts are not more "general" than bodies like a county commissioner's court,[336] the governing board of a community college system,[337] a local school council,[338] a sanitation district,[339] or a water pollution abatement and public transport body;[340] all of which were found to be "general governmental bodies."

In both the legislature and the state supreme court, officials are elected to represent and be accountable to the popular will, and excel-lent empirical research has substantiated the intuitively appealing claim that elected judges really *are* representative in that they are more responsive to public pressure in deciding legal questions than non-elected judges.[341] Indeed, in the case of the districted Illinois Supreme Court, the state adopted a districting scheme *precisely so as to ensure the court represented the entire state* rather than being elected entirely from the population of Cook County (which, then and now, contains most of the state's lawyers).[342]

The "judges are not representatives" rationale of *Wells*, if ever supportable on its own merits, has been further undermined[343] by *Chisom v. Roemer*,[344]

[336] Avery v. Midland Cty., 390 U.S. 474, 484–85 (1968) (concluding that the county commissioners court exercises "general governmental powers" and therefore "no substantial variation from equal population in drawing districts" is permitted).

[337] Hadley v. Junior Coll. Dist., 397 U.S. 50, 53–54 (1970) (noting that trustees "exercised general governmental powers over the entire district" and had powers "general enough" with "sufficient impact throughout the district to justify" treating the board as a general governmental entity).

[338] *Compare* Pittman v. Chi. Bd. of Educ., 64 F.3d 1098, 1101 (7th Cir. 1995), *cert. denied*, 517 U.S. 1243 (1996) (holding local school councils were "local and specialized ... governmental bod[ies]"), *with* Fumarolo v. Chi. Bd. of Educ., 566 N.E.2d 1283, 1299 (Ill. 1990) (finding the Chicago local school boards exercised a "general governmental function" that "affect[ed] the entire community").

[339] *In re* Petition of Lower Valley Water & Sanitation Dist., 632 P.2d 1170, 1175 (N.M. 1981).

[340] Cunningham v. Mun. of Metro. Seattle, 751 F. Supp. 885, 890–91 (W.D. Wash. 1990).

[341] Melinda Gann Hall, *Justices as Representatives: Elections and Judicial Politics in the American States*, 23 AM. POL. RES. 485, 488–90 (1995); *accord* Newman v. Voinovich, 986 F.2d 159, 163 (6th Cir. 1993) ("We agree ... that judges are policy-makers because their political beliefs influence and dictate their decisions on important jurisprudential matters."); *see also* Woodward v. Alabama, 134 S. Ct. 405, 408–09 (2013) (Sotomayor, J., dissenting from denial of cert.) ("Alabama judges, who are elected in partisan proceedings, appear to have succumbed to electoral pressures [to impose the death penalty].") (citing Symposium, *Politics and the Death Penalty: Can Rational Discourse and Due Process Survive the Perceived Political Pressure?* 21 FORDHAM URB. L.J. 239, 256 (1994) (comments of Bryan Stevenson) (concluding, based on "a mini-multiple regression analysis of how the death penalty is applied and how override is applied, [that] there is a statistically significant correlation between judicial override and election years in most of the counties where these overrides take place")); EQUAL JUSTICE INITIATIVE, THE DEATH PENALTY IN ALABAMA: JUDGE OVERRIDE 16 (July 2011), http://eji.org/sites/default/files/death-penalty-in-alabama-judge-override.pdf (observing that the proportion of death sentences imposed by over-ride in Alabama is elevated in election years).

[342] *See* Emil Verlie, *Illinois Constitutions* xxix-xxx (Ill. State Historical Library, 1919), http://www.historykat.com/IL/statutes/verlie-emil-joseph-illinois- constitutions-springfield-ill-trustees-illinois-state-historical.html (describing how the districting system introduced in the 1870 Illinois Constitution aimed to soothe regional tensions within the state by empowering 'minority interests').

[343] A summary affirmance like *Wells* is a disposition on the merits but can be superseded even by lower courts when its rationale has been eroded by subsequent "'doctrinal developments.'" Hicks v. Miranda, 422 U.S. 332, 344 (1975) (quoting Port Auth. Bondholders Prot. Comm. v. Port of N.Y. Auth., 387 F.2d 259, 263 n.3 (2d Cir. 1967)); *cf.* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 857 (1992) (noting that one justification for overruling a past Supreme Court decision is "evolution of legal principle").

[344] 501 U.S. 380 (1991).

discussed above, in which the Supreme Court interpreted the word "representatives" in the 1983 VRA Section 2 amendments to extend to state supreme court justices.[345] Justice Stevens' opinion for the Court ranged more widely than merely interpreting the VRA amendments when considering the meaning of the critical word "representatives," arguing:

[I]f executive officers, such as prosecutors, sheriffs… and state treasurers, can be considered "representatives" simply because they are chosen by popular election, then the same reasoning should apply to elected judges… [T]he fundamental tension between the ideal character of the judicial office and the real world of electoral politics cannot be resolved by crediting judges with total indifference to the popular will while simultaneously requiring them to run for elected office.[346]

While the Court expressly cabined its holding to the scope of the coverage of Section 2 of the VRA as amended in 1982,[347] the Court's reasoning seems to undermine one of the two central justifications for exempting judges from equipopulation.

If judges truly *are* representatives for the purposes of the VRA, in what justifiable way can this representative function be distinguished from the representative function of other elected officials embraced in *Hadley* and similar cases? The *Chisom* majority's only answer to this objection[348] was to note that it was possible to craft a standard to assess compliance with Section 2 without relying on equipopulation.[349] Moreover, the Court simply failed to explain how the "fundamental tension" between the role of *supreme* court judges as representatives and as impartial decision-makers could be helpfully mediated by exempting supreme court judicial districts from equipopulation rules.

Subsequent cases have only deepened the dilemma. In the past three decades, the Court has held judges are "appointees on a policymaking level" for the purposes of the Age Discrimination in Employment Act,[350] rejected judicial canons constricting judicial campaigning because American judges were "representatives,"[351] and allowed judges to be selected like any candidate by a partisan nominating convention process since judges in that context were *also* representatives.[352]

When a supreme court is elected by district so as to be "representative," implicit in its structure is the idea that certain voters ought to have more power or less power in selecting its judges.[353]

---

[345] Section 2 of the VRA outlaws changes in voting systems that have a "discriminatory impact" on racial groups. The Court had already found that Section 5 of the VRA applied to judicial elections in *Clark v. Roemer*, 500 U.S. 646, 649, 651–52 (1991), but *Chisom* turned on the definition of the word "representatives" and is there-fore more relevant to the districting question. *See Chisom*, 501 U.S. at 395–96.

[346] *Chisom*, 501 U.S. at 399–401.

[347] *Id.* at 390. Of course, express cabining may simply be disregarded by the lower courts if it seems inconsistent with the main holding. *Compare, e.g.*, United States v. Windsor, 133 S. Ct. 2675, 2696 (2013) ("This opinion and its holding are confined to those lawful marriages."), *with* SmithKline Beecham Corp. v. Abbott Labs., 740 F.3d 471, 483–84 (9th Cir. 2014) (applying *Windsor* analysis to unrelated issue).

[348] *Chisom*, 501 U.S. at 415 (Scalia, J., dissenting).

[349] *Id.* at 403 n.32 (majority opinion).

[350] Gregory v. Ashcroft, 501 U.S. 452, 467 (1991).

[351] Republican Party of Minn. v. White, 536 U.S. 765, 784 (2002) ("This [is a] complete separation of the judiciary from… representative government… It is not a true picture of the American system."). *See* Pozen, *supra* note 233, at 316 n.208 (arguing *White* has undermined the rationale in *Wells*).

[352] N.Y. State Bd. of Elections v. Lopez- Torres, 552 U.S. 196, 203–04 (2008).

[353] *See* John L. Warren III, *Holding the Bench Accountable: Judges Qua Representatives*, 6 WASH. U. JURIS. REV. 299, 304–05 (2014) (discussing representativeness theory relevant to state judges in greater depth).

Yet a supreme court affects the entire state, much as a legislature does. It seems appropriate in this situation to claim that:

[W]hen the representatives are malapportioned among the several districts within the political unit, then the voting strength of the individual citizens in these subdivisions is of unequal weight. It is the dilution of power in the vote of citizens situated in districts suffering from inadequate representation which brings into play to Equal Protection Clause.[354]

If a judge is elected, it seems reasonable to declare that judges too "represent people, not trees or acres… elected by voters, not farms or cities or economic interests."[355] Likewise, there seems to be no good reason to treat state supreme court districts as at all different from a legislature's districts in the context of claims made under the VRA: the concerns for judicial administration that may have force at the local level simply do not apply to state supreme courts.[356]

The Court's decision in *Williams-Yulee* further strengthens this conclusion by carefully balancing its declaration that "judges are not *politicians*"[357] with its recognition that states are perfectly entitled to make judges dependent "on the public will" – i.e., a *representative* of the voters.[358] This representativeness is not in the sense of dealing in favors as much as it is ensuring dependency on popular opinion, with-out which an election is pointless. It is precisely this kind of nuance and subtlety that permits a jurisprudence that selectively applies constitutional equipopulation standards to some kinds of districted courts and not others, just as some kinds of campaign speech restrictions, like the direct solicitation ban in *Williams-Yulee*, survive First Amendment scrutiny and not others, like the ban on judicial candidate's discussion of their position on judicial issues in *Republican Party of Minnesota v. White*.[359]

B. Alternative Voting in Local Court Voting Rights Act Claims

As we've seen, the present regime has led to two problems in judicial districting at the local level: inequitable allocation of re-sources and effective immunity to the VRA. I do not here consider judicial recourse to resource misallocation; as discussed above, such a course of action involves deep and complex questions of the scope and limits of judicial power that lie beyond the scope of this article. Fortunately, the solution to the *judicial* districting problems currently interfering with proper enforcement of the VRA is relatively modest: embracing alternative vote systems – in particular, the single transferrable vote.

Begin with the problem. The specific challenge presented by judicial districting is at the remedy stage: the vicissitudes of the *Gingles* framework otherwise

[354] Buchanan v. Rhodes, 249 F. Supp. 860, 865 (N.D. Ohio 1966) (offering argument relied upon and extensively quoted in *Wells*, nonetheless using this argument to *reject* an equipopulation demand, though of a trial court).

[355] Reynolds v. Sims, 377 U.S. 533, 562 (1964).

[356] *See* Harry Edwards, *The Effects of Collegiality on Judicial Decision-Making*, 151 U. PA. L. REV. 1639 (2003) (discussing the efficiencies involved in multi-member courts); P.V. Smith, Annotation, *Superintending Control Over Inferior Tribunals*, 112 A.L.R. 1351 (2014) (noting that at the state supreme court level, most single-justice practice relates to injunctions against inferior tribunals which occurs "only in extreme cases and under unusual circumstances"); *accord* Doyle, *supra* note 249. Of course, this claim applies only to the unique difficulties presented to VRA claims made against judicial districts – the existing challenges of Section 2 litigation would still apply to judicial districts just as they presently apply to all other kinds of electoral districts.

[357] Williams-Yulee v. Fla. Bar, 135 S. Ct. 1656, 1662 (2015) (emphasis added).

[358] *Id.* at 1672–73 (citation omitted).

[359] Republican Party of Minn. v. White, 536 U.S. 765, 779–80 (2002).

impose themselves equally on both judicial and legislative districts.[360] That remedy problem is simple. No court will ever accept a districting approach for lower courts that does not incorporate caseload considerations. Yet caseload is a tricky thing to measure. Caseload has an indirect and nonlinear relationship to population in a given jurisdiction,[361] with the current economic climate,[362] status as 'judicial hell-hole,'[363] local propensity for driving while drunk,[364] and structure of court system[365] all playing an appreciable role. More-over, caseload is itself only a crude measure of the actual burdens on a court.[366]

The problem for VRA advocates, then, arises when the new lines necessary to remedy the racial impact of the present districts are lines that imbalance, or could imbalance, court caseload. Faced with so many unknowns affecting caseload, the presence of caseload as a compelling state interest essentially shifts the burden of proving that caseload would be adequately addressed under the new

[360] *See* Nicholas O. Stephanopoulos, *The South After Shelby County*, 2013 SUP. CT. REV. 55, 57 (2013) (finding that Section 2 is worse than Section 5 at stopping redistricting that breaks up districts in which minority voters are numerous enough to elect their preferred candidates, but it's better at blocking voting restrictions than is commonly realized). *See generally* Katz et al., *supra* note 185, at 737–55 (listing all cases decided under Section 2 and the particular problems presented therein).

[361] *See* TERRI MARCH, INST. FOR CT. MGMT., PLANNING FOR THE FUTURE: THE LINK BETWEEN CASELOAD GROWTH AND RAPID POPULATION INCREASES (2009), https://www.ncsc.org/~/media/Files/PDF/-Education%20and%20Careers/CEDP%20Papers/2009/March_PlanningForFuture.ashx (finding that population had a roughly exponential relationship to case filings in the Nevada local court system); ROBERT C. LAFOUNTAIN ET AL., CT. STATISTICS PROJECT, EXAMINING THE WORK OF STATE COURTS: AN ANALYSIS OF 2010 STATE COURT CASELOADS (2012), http://www.court statistics.org/other-pages/~/media/Microsites/Files/CSP/DATA%20PDF/CSP_DEC.ashx (finding California, the nation's most populous state, is ranked forty-seventh in cases filed per capita while Wyoming, the least populous, is ranked fourth).

[362] *See* Thomas B. Marvell, *Caseload Growth - Past and Future Trends*, 71 JUDI-CATURE 151 (1987–1988) (examining the growth and decline of caseload during the 1980s recession).

[363] *See* American Tort Reform Foundation, *Judicial Hellholes 2013/2014: Madison and St. Clair County, Illinois* (2013), http://www.judicialhellholes.org/2013-2014/madison-st-clair-counties-illinois/. In 2014, for example, Madison County's status as an asbestos litigation hub meant that the county saw 15,368 civil complaint filings with a population of 269,282, while McHenry county had only 13,096 filings despite a population of 308,760. *See* ADMIN. OFF. OF THE ILL. CTS., 2014 ANNUAL REPORT OF THE ILLINOIS COURT: STATISTICAL SUMMARY 20–55 (2015) (compiling caseload filing data); *Quick Facts: Illinois*, U.S. CENSUS BUREAU, http://www.census.gov/quickfacts/ table/PST045215/17 (last visited Oct. 31, 2016) (compiling population summaries).

[364] *See* Automobile Association of America, *DUI Justice Link: Caseloads* (Jul 1, 2014), http://duijusticelink.aaa.com/issues/procedures/caseloads ("The rate of DUI cases results in heavier caseloads, forcing the judges and prosecutors to spend less time on each case.").

[365] *Structure of Courts Shapes Distribution of Caseloads*, CT. STATISTICS PROJECT, http://www.courtstatistics.org/Civil/20122Civil.aspx (last visited Nov. 11, 2016).

[366] *See generally Caseflow and Workflow Management*, NAT'L CTR. FOR ST. CTS., http://www.ncsc.org/Services-and-Experts/Areas-of-expertise/Caseflow-and-Work-flow-management.aspx (last visited Nov. 11, 2016) (listing a plethora of studies and services relating to the calculation of caseload and the appropriate allocation of judicial resources thereby, including CourtMD, an online tool that manages caseload levels); Patricia Wald, Opinion, *Senate Must Act on Appeals Court Vacancies*, WASH. POST (Feb. 28, 2013), http://www.washingtonpost.com/opinions/senate-must-act-on-appeals-court-vacancies/2013/02/28/e8ad3d3a-8051-11e2-b99e-6baf4ebe42df_story.html (presenting argument from the former D.C. Circuit Chief Judge that the Circuit's steady diet of "complex, time-consuming, labyrinthine disputes" means its ostensibly low caseload is a misleading measure of judicial burden).

lines to the litigants. This is a burden that litigants usually cannot surmount.[367] The solution is to take the lines out of the remedy. Assuming the lines drawn create districts that "swamp" black voters with white ones, we can address racially disparate impact by replacing the existing voting system within the existing (presumably caseload-acceptable) districts with the single transferrable vote, the cumulative vote, or another method of proportional representation.

There has been extensive discussion of the merits of alternative or proportional voting systems in connection with legislative districting,[368] especially since the Supreme Court in *Shaw v. Reno*[369] invalidated districting lines that "rationally could not be understood as anything other than effort to separate voters into different districts on the basis of race."[370] Quite apart from widespread academic endorsement of voting systems for racially divided polities,[371] both the single transferrable vote (which essentially selects the most preferred candidates of the entire voting population rather than the majority) and cumulative voting (where voters have multiple votes they can distribute amongst candidates as they think fit) have received more or less uniform judicial approbation[372] and scholarly approval[373] whenever they have been implemented to address VRA violations.

Setting aside the usual arguments for and against cumulative voting or other methods of plural voting, there have been only two serious judicial attacks on such a system for judicial elections. The first was launched by the Sixth Circuit, which found in *Cousin v. Sundquist*[374] that

[367] *See supra* Part III.C.

[368] *See, e.g.*, Engstrom, *supra* note 210; Rob Richie & Andrew Spencer, *The Right Choice for Elections: How Choice Voting Will End Gerrymandering and Expand Minority Voting Rights, from City Councils to Congress*, 47 U. RICH. L. REV. 959 (2013); Richard Pildes, *Gimme Five: Non-Gerrymandering Racial Justice*, NEW REPUBLIC, Mar. 1, 1993, at 16. *See generally* ISSACHAROFF ET AL., *supra* note 78, at 1187–1238 (surveying cases and commentary on the cumulative, limited, and single transferrable vote).

[369] 509 U.S. 630 (1993).

[370] *Id.* at 649.

[371] *See generally* MICHAEL GALLAGHER & PAUL MITCHELL, THE POLITICS OF THE ELECTORAL SYSTEM (2005) (presenting an excellent comprehensive survey of debates on proportional representation in plural societies, including the United States); PIPPA NORRIS, ELECTORAL ENGINEERING: VOTING RULES AND POLITICAL BEHAVIOR (2004) (discussing the impact of electoral systems on voting behavior); ANDREW REYNOLDS ET AL., ELECTORAL SYSTEM DESIGN: THE NEW INTERNATIONAL IDEA HANDBOOK (2d ed. 2005) (surveying international approaches to racial salience in elections); Frank Cohen, *Proportional Versus Majoritarian Ethnic Conflict Management in Democracies*, 30 COMP. POL. STUD. 607 (1997) (comparing single-member districts to multi-member districts and finding the former more suited to reducing racial salience).

[372] *See* Whitcomb v. Chavis, 403 U.S. 124 (1971) (approving multi-member districts); Dudum v. Arntz, 640 F.3d 1098 (9th Cir. 2011) (approving the single transferrable vote); McCoy v. Chicago Heights, 6 F. Supp. 2d 973 (N.D. Ill. 1998) (approving cumulative voting), *aff'd sub. nom.*, Harper v. Chicago Heights, 223 F.3d 593 (7th Cir. 2000); Dillard v. Chilton Bd. of Ed., 699 F. Supp. 870 (M.D. Ala. 1988) (approving cumulative voting); McSweeney v. City of Cambridge, 665 N.E.2d 11 (Mass. 1996) (endorsing the single transferrable vote). The Court in *Chapman v. Meier*, 420 U.S. 1 (1975) should not be read to the contrary; it merely required a "persuasive justification," *id*. at 26–27, for the use of multimember districts. *Contra* Samuel Isacharoff, *Supreme Court Destablization of Single-Member Districts*, 1995 U. CHI. LEGAL F. 205, 238 (discussing the Court's movement away from *Meier*'s "persuasive justification" holding). For judicial elections, caseload considerations would easily suffice.

[373] *See, e.g.*, Richard Briffault, *Lani Guinier and the Dilemmas of American Democracy*, 95 COLUM. L. REV. 418 (1995); Richard Engstrom et al., *Cumulative Voting as a Remedy for Minority Vote Dilution: The Case of Alamogordo, New Mexico*, J.L. & POL. 469 (1989); Pamela Karlan, *Maps and Misreadings: The Role of Geographic Compactness in Racial Vote Dilution Litigation*, 24 HARV. C.R.-C.L. L. REV. 173 (1989).

[374] 145 F.3d 818, 829 (6th Cir. 1998).

mandating proportional representation as a remedy to racially gerrymandered districts would run afoul of the prohibition on proportional representation contained in Section 2.[375] Yet as even the court in *Cousin* noted shortly after making this argument, "under the district court's mandated system of cumulative voting, proportional representation ... is not assured."[376] Either cumulative voting is proportional, in which case it might be problematic, or it is not. It cannot, as the Sixth Circuit seems to read it, be both.

Indeed, the notion that cumulative voting or the single transferrable vote would lead to the creation of a system that represents a racial group in proportion to its share of the population lacks strong empirical support. This is because, as Pamela Karlan recognized, the 'exclusion threshold' in a given district may well be below or above the minority's proportion of the population.[377] The point of all forms of proportional representation under serious consideration in the United States is they permit the specification of *preferences* after the first preference, thus providing a potent incentive to create precisely the kind of coalitions that cut across racial and ethnic lines[378] that the Supreme Court among others has yearned for in *Shaw*.[379]

But these arguments detained neither the Sixth nor Eleventh Circuit for long.[380] Instead, it is clear that the chief reluctance of both courts to sanction cumulative or other forms of plural voting was their view that cumulative voting would make judicial elections more like elections. They would "dampen lawyer interest in a judicial career" and require endless campaigning for re-election on the part of judicial candidates.[381] In other words, and not without cause, these two courts are arguing not merely against cumulative voting but against the very notion of free and democratic elections for judges.

This won't do. If the state chooses to specify popular election for its judges – when that popular election is already leading precisely to all the harms the courts describe cumulative voting as introducing[382] – it cannot be permitted to do so in a racially discriminatory fashion merely because the remedy to that discrimination ensures the election is

[375] 52 U.S.C. § 10301(b) (1982) ("*Provided*, that nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.").

[376] *Cousin*, 145 F.3d at 830.

[377] Karlan, *supra* note 288, at 222.

[378] *See generally* DONALD HOROWITZ, ETHNIC GROUPS IN CONFLICT (1991) (offering perhaps the seminal account of the 'vote-pooling' advantages of preferential systems).

[379] Shaw v. Reno, 509 U.S. 630, 649 (1993).

[380] Nipper v. Smith, 39 F.3d 1494, 1546 (11th Cir. 1994). *See generally supra* Part III.C.

[381] *Nipper*, 39 F.3d at 1546.

[382] *See, e.g.*, Jennifer Jensen & Wendy Martinek, *The Effects of Race and Gender on the Judicial Ambitions of State Trial Court Judges*, 62 POL. RES. Q. 379, 386 (2009) ("[P]erhaps those who are most ambitious have distaste for the political aspect of their positions and career goals, even if they realize that they must contend with these aspects. In other words, they might want to move up in a judicial career but hate the politics involved."); BANNON & REAGAN, *supra* note 4 (describing pressures leading judges to start fundraising ever earlier in the cycle, signaling perpetual campaign-ing). Collegiality is a tricky thing to measure, but it seems fairly plain that collegiality problems are pretty evenly distributed across appointed and elected judiciaries. *See, e.g.* Letter from Chief Justice Howard Taft to Helen Taft Manning (June 11, 1923) *quoted in* ALPHEUS THOMAS MASON, WILLIAM HOWARD TAFT: CHIEF JUSTICE 215–17 (1964) (describing Justice McReynolds, one of the Supreme Court's most delightful members, as "selfish to the last degree, ... fuller of prejudice than any man I have ever known, ... one who delights in making others uncomfortable. He has no sense of duty... . really seems to have less of a loyal spirit to the Court than anybody ... the most irresponsible member of the Court ... [i]n the absence of McReynolds every-thing went smoothly."). Nipper v. Smith, 39 F.3d 1494, 1546 (11th Cir. 1994).

more representative. As the Supreme Court itself explained, albeit in the First Amendment context:

That opposition [to judicial elections and the negative effects flowing therefrom] may be well taken (it certainly had the support of the Founders of the Federal Government), but… [i]f the State chooses to tap the energy and the legitimizing power of the democratic process, it must accord the participants in that process… the [Constitutional] rights that attach to their roles.[383]

These arguments would be far less of a problem if courts did not conceive, as both Circuits did, of judicial elections as being binary in their approach to the law of democracy. We can easily say that judicial elections have special considerations without then moving to simply throw out any VRA challenge to its districting scheme. That multi-member districts would "require judicial colleagues to run against each other," undermining "that treasured institution of judicial collegiality"[384] might be a militating concern that must be addressed at the remedy stage rather than an absolute bar to remedy. Causation and correlation are difficult to disentangle here. The prospect of a competitive election can bring incumbents together,[385] while elsewhere the absence of competitive elections does not prevent contention.[386] Indeed, the Sixth Circuit, an unelected body, is itself something of an expert on the causes and effects of judicial infighting.[387]

The right response to these countervailing considerations is the response taken by the Supreme Court in *Williams-Yulee* or the lower court in *Martin v. Allain*: give the countervailing judiciary-specific considerations their due weight, but do so in the context of a democratic election that receives a very high level of due process, equal protection, and First Amendment protection. These considerations point in the direction of carefully, sensibly crafted plural voting schemes. Courts should be more willing to give them a try.

C. Barriers to Judicial Malapportionment under State Law

The litigation outcomes I have described – the limited return of equipopulation either by an attack on *Wells* as applied to state supreme courts or under specific state constitutional provisions and a tweak to the remedies available under the VRA – have one thing in common: they rely on courts. But durable solutions almost certainly require action by the political branches of the states. This is especially so in this area, which as we have seen is fraught with judicially-crafted exemptions to doctrines and statutes.

---

[383] Republican Party of Minn. v. White, 536 U.S. 765, 787–88 (2002); *accord* Renne v. Geary, 501 U.S. 312, 349 (1991) (Marshall, J., dissenting).

[384] Cousin v. Sundquist, 145 F.3d 818, 830 (6th Cir. 1998); *accord Nipper*, 39 F.3d at 1546. The Sixth Circuit is perhaps the leading expert on court operations in the absence of judicial collegiality. *See* William Peacock, *Was Boyce Martin a Victim of 6th Cir. Judicial Infighting?*, FINDLAW.COM (Apr. 3, 2014, 1:56 PM), http://blogs.findlaw.com/sixth_circuit/2014/04/was-boyce- martin-a-victim-of-6th-cir-judi-cial-infighting.html (laying out court's extensive experience in this area).

[385] *See* BANNON & REAGAN, *supra* note 4, at 28–30 (describing collaboration amongst Florida Supreme Court justices each targeted for removal by the state Republican party).

[386] *See* Crocker Stephenson et al., *Justices' Feud Gets Physical*, MILWAUKEE JOUR-NAL-SENTINEL (June 25, 2011), http://www.jsonline.com/news/statepolitics/124546064.html ("Supreme Court Justice Ann Walsh Bradley late Saturday accused fellow Justice David Prosser of putting her in a chokehold during a dispute in her office earlier this month. 'The facts are that I was demanding that he get out of my office and he put his hands around my neck in anger in a chokehold,' Bradley told the Journal Sentinel.").

[387] *See* Peacock, *supra* note 299 (laying out court's extensive experience in this area).

Indeed, were the Supreme Court to repudiate *Wells v. Edwards*, and were lower courts willing to properly enforce the VRA against judicial districts, the impact on state courts may well still be limited. Geography, caseload, and possibly the "representativeness" identified in voting dilution litigation[388] as well as compliance with the VRA,[389] are all "rational" deviations from equipopulation or racial equality that would likely permit states to enact even larger deviations.

More to the point, it is likely that only by legislative or state constitutional action that resource-provision inequities of uneven judicial districting (to the extent that they exist) can be redressed;[390] the use of the judicial power to remedy these "service-provision" suits is fraught with nigh-insurmountable difficulties.[391] Fortunately, whatever their legal deficits, service-provision suits rest on deeply commonsense principles: it is unreasonable to permit judges in some areas to have very low caseloads while forcing others to have unduly burdensome ones. Fairly distributing caseloads across state judicial systems is embraced as a matter of principle and practice across many jurisdictions, especially those that have chosen to move to an integrated judicial system.[392]

Beyond lower court caseload equalization, the preceding sections point towards an outline of best practice. Just as we have seen that judicial districting should, in many instances, be bound by the same constitutional rules as legislative districting, many of the arguments for independent legislative redistricting commissions apply with the same force to judicial district adjustment.[393] Indeed, retired judges – which seem to be America's go-to group when it seeks

[388] Clark v. Roemer, 777 F. Supp. 471, 480 (M.D. La. 1991) (mandating subdistricts that do not have substantially equal populations to remedy VRA-violative voter dilution).

[389] State *ex rel*. Martin v. Preston, 325 N.C. 438, 438 n.2 (1989) (noting desire to comply with the Voting Rights Act is a public purpose justifying departure from state equipopulation rules).

[390] And raised in a variety of (mostly early) equipopulation suits. *See* Field v. Michigan, 255 F. Supp. 2d 708, 711 (E.D. Mich. 2003); Buchanan v. Gilligan, 349 F. Supp. 569, 571 (N.D. Ohio 1972); De Kosenko v. New York, 311 F. Supp. 126 (S.D.N.Y. 1969); N.Y. State Ass'n of Trial Lawyers v. Rockefeller, 267 F. Supp. 148, 151 (S.D.N.Y. 1967); Kail v. Rockefeller, 275 F. Supp. 937, 939 (E.D.N.Y. 1967); Buchanan v. Rhodes, 249 F. Supp. 860, 861 (N.D. Ohio 1966); Eugster v. State, 171 Wash. 2d 839, 844 (2011).

[391] *See supra* Part II.C.

[392] *See* NAT'L CTR. FOR STATE CTS., PRINCIPLES OF JUDICIAL ADMINISTRATION (2012), http://www.ncsc.org/~/media/Files/PDF/Information%20and%20Resources/Budget%20Resource%20Center/Judicial%20Administration%20Report%209-20-12 personnel. Principle 6: Court leadership should allocate resources throughout the state or local court system to provide an efficient balance of workload among judicial officers and court staff."); *see, e.g.*, NEB. CONST. art. V, § 12 ("The Legislature may provide that any judge of the district court who has retired may be called upon for temporary duty by the Supreme Court."); NEB. REV. STAT. § 24-303 (West 2009) ("The Supreme Court may order the assignment of judges of the district court to other districts whenever it shall appear that their services are needed to relieve a congested calendar or to adjust judicial caseloads, or on ac-count of the disqualification, absence, disability, or death of a judge, or for other adequate cause."). *See generally Court Unification: State Links*, NAT'L CTR. FOR ST. CTS., http://www.ncsc.org/Topics/Court-Management/Court-Unification/State-Links.aspx?cat= State%20Resources%20for%20Court%20Unification (last visited Nov. 11, 2016) (presenting state-by-state analysis of motivations for unification and implications for equalizing caseload distribution).

[393] *See generally* Kristina Betts, *Redistricting: Who Should Draw the Lines? The Arizona Independent Redistricting Commission as a Model for Change*, 48 ARIZ. L. REV. 171 (2006) (laying out principal arguments in favor of independent commissions). *Accord* Jeffrey C. Kubin, *The Case for Redistricting Commissions*, 75 TEX. L. REV. 837 (1997). *But see* Bruce E. Cain, *Redistricting Commissions: A Better Political Buffer?*, 121 YALE L.J. 1808 (2012) (finding that while redistricting commissions "have succeeded to a great degree

above-the-fray mediators – would be especially suited for the role of judicial district adjusters, since they would be experts in the relative caseload and geo-graphic considerations at issue.[394] Such commissions can be easily created as auxiliaries of existing judicial councils and conferences.[395] Likewise, redistricting principles should be legislatively or constitutionally entrenched, including objective analysis of relative caseloads, compactness, nondiscrimination, and rough equipopulation.[396] Such entrenchment both provides a measure by which we can assess the work of an independent redistricting commission and helps those com-missions come to a consensus on district lines by helpfully structuring internal deliberations.

This legislative solution to problems of judicial districting is a bare sketch. In particular, while it seems uncontroversial to assume that objective criteria could be developed to govern the division of lower-court districts, the representative nature of state supreme courts (as discussed above) make such an exercise fraught with some of the same difficulties as legislative districting.[397] Yet such an objection points towards at least institutionally independent structures, even if those structures will be required to make principled judgments not capable of nice objective verification, since doing so would at least enhance the representativeness and independence of an elected judiciary.

Conclusion

Much of the commentary on *Williams-Yulee* has revolved around its implications for the First Amendment and campaign finance juris-prudence.[398] I hope that I have shown that the implications of the decision lie also in places deeper and more obscure than the campaign finance debate. Indeed, we can

in [the goal of reducing conflicts of interest in boundary-drawing], they have not eliminated the inevitable partisan suspicions associated with political line-drawing and the associated risk of commission deadlock").

[394] *See, e.g.*, WIS. STAT. ANN. § 15.61 (West 2016) (providing for a six-person government accountability board that supervises elections, consisting entirely of re-tired judges); Betts, *supra* note 308, at 198–99 ("It would be difficult to argue that a person of any other profession or position would be more apt to conduct redistricting than judges."); Nicholas D. Mosich, *Judging the Three-Judge Panel: An Evaluation of California's Proposed Redistricting Commission*, 79 S. CAL. L. REV. 165, 211 (2005) (discussing the benefits of judicial panels in contrast to other forms of redistricting commission); *Model State Redistricting Reform Criteria*, FAIRVOTE, http://www.fairvote.org/redistricting#model_state_redistricting_reform_criteria (last visited Nov. 11, 2014) (describing a model commission as one including retired judges).

[395] *See Courts Statistics Project: Judicial Councils*, NAT'L CTR. FOR ST. CTS., http://data.ncsc.org/QvAJAXZfc/opendoc.htm?document=Public%20App/SCO.qvw&host=QVS@qlikviewisa&anonymous=true&bookmark=Document\BM02 (last visited Nov. 11, 2016) (listing each state's judicial council).

[396] *See, e.g.*, MISS. CONST. art. VI, § 152 (requiring the legislature to define "certain criteria by which the number of judges in each district shall be determined, such criteria to be based on population, the number of cases filed and other appropriate data"). *See generally Budget Resource Center: Analysis & Strategy*, NAT'L CTR. FOR ST. CTS., http://www.ncsc.org/Information-and-Resources/Budget-Resource-Center/ Analysis_Strategy.aspx (last visited Oct. 11, 2016) (describing in detail various principles of allocation by which misallocated judges can be effectively reassigned).

[397] *See* Vieth v. Jubelirer, 541 U.S. 267, 358 (2004) (Breyer, J., dissenting) ("[P]olitical considerations will likely play an important, and proper, role in the drawing of district boundaries.").

[398] *See, e.g.*, Lawrence Baum, *Symposium: The Justices' Premises About Judicial Elections*, SCOTUSBLOG (Apr. 30, 2015, 2:42 PM), http://www.scotusblog.com/ 2015/04/symposium-the-justices-premises-about-judicial-elections/.

see *Williams-Yulee* as a truly revolutionary decision only when we view it in the context of judicial districting decisions, where it becomes apparent that the decision has finally forced the Supreme Court out of the binary that treats judicial elections as either identical to or alien to legislative elections.

With *Williams-Yulee* and its invitation for more sophisticated treatment of judicial elections in hand, policymakers have been presented with a rare opportunity: legal prophylaxis. Judicial districting is a systemic weakness in our present democratic system that, while presently confined to a few states and localities, is nonetheless corrosive to core principles of our nation's democracy. But it can be addressed if policymakers strike now. The filibuster – another ancient parliamentary peculiarity now deployed with devastating force on both sides of the aisle to frustrate any legislation whatsoever – would have been easy to restrain had such an effort been attempted in 1805 when its potential for abuse was not well understood.[399] Likewise, partisan legislative gerrymandering is now so fixed a part of our political scene that neither party will willingly give it up.[400] Judicial districts, for now, lie beyond the maelstrom of partisan mutually assured destruction. Swift, decisive action ensures that at the very least the gerrymandering line can be drawn at legislative districts: this far and no further.

One might well respond: if districts for judicial elections lack democratic protections and can be put to harmful abuse, why not sim-ply abolish judicial elections altogether? A single reason stands out above all: voters simply do not want to give up their ability to elect judges.[401] The Supreme Court has declared that "the Constitution permits states to make a different choice" and adopt judicial elections; it is not abolishing them any time soon.[402] Whatever one thinks of the merits of judicial elections, then, we are stuck with them. This being the case, courts should turn their attention to judicial districting and similar mechanisms of judicial elections, imposing the same protections to which we have become accustomed for all other elected bodies, so we can make the best of the hand we're dealt.

Nota redacției: Articolul a fost publicat inițial în *New York University Journal of Legislation & Public Policy 19/4/pp.851–912 (2016)*, Revista Forumul Judecătorilor primind permisiunea autorului și a revistei americane în vederea republicării exclusive a studiului în România.

[399] *See* Catherine Fisk & Erwin Chemerinsky, *The Filibuster*, 49 STAN. L. REV. 181, 188 (1997) (discussing the previous question rule, which permitted debate termination with a simple majority).

[400] *See* Jamin B. Raskin, *Nonrepresentational Line-Drawing and the Universal Representational Imperative: Why Judges Should Replace Gerrymandering with Proportional Representation*, 30 YALE L. & POL'Y REV. 51, 55 (2012) ("And so, across the country, the race between the parties to nail down every last congressional seat accelerates, with controlling parties seeking to pack as many rivals as they can into a handful of districts while locking in a ten-year advantage in all the others. No state legislative caucus will "unilaterally disarm," as the politicians say in the cloakroom…"); *accord* Adam B. Cox, *Partisan Gerrymandering and Disaggregated Redistricting*, 2004 SUP. CT. REV. 409, 450 (2004) (arguing state-by-state reform of redistricting creates heterogeneity that might lead to nationally suboptimal results).

[401] *See, e.g.*, JAMES GIBSON, ELECTING JUDGES (2012) (finding that popular legitimacy for state supreme courts has little relation to method of selection; if anything, voters believe elected courts are more legitimate than appointed ones); James Gibson, et al., *The Effects of Judicial Campaign Activity on the Legitimacy of Courts: A Sur-vey-Based Experiment*, 20 POL. RES. Q. 1 (2010) (finding that even attack ads do not fully obviate the legitimizing function of elections for state courts); Darrel Rowland, *Poll: Ohioans Support System of Selecting Judges*, COLUMBUS DISPATCH (Dec. 12, 2012 6:50 AM), http://www.dispatch.com/content/stories/local/2012/12/12/12-justice-selection.html (finding more than eighty percent of Ohioans wanted to retain popular election of state supreme court judges).

[402] Williams-Yulee v. Fla. Bar, 135 S. Ct. 1656, 1662 (2015).