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ONE MAN—ONE VOTE AND JUDICIAL SELECTION

By legislative enactment, the 1969 Nebraska Legislature created the Nebraska Constitutional Revision Commission, effective May 26, 1969.¹ As an outgrowth of this legislation, the commission comprehensively reviewed the Constitution of Nebraska and presented its suggestions and recommendations for revision of the constitution in a report dated September 24, 1970.² Substantial changes were made in Article V, the judicial article. The fourth recommended revision deals with the redistricting of judicial districts through the provisions of Article V, section 5.³ This comment examines the redistricting provisions of Article V, section 5 in light of the constitutional requirements for equality in voting, and the possible constitutional implications of the suggested revisions.

I. HISTORY OF REDISTRICTING IN NEBRASKA

As in most states, most redistricting activity has occurred in the area of legislative redistricting for voting purposes. The first provisions for establishment of legislative districts are found in the 1854 congressional act creating the Nebraska Territory with provisions for a governor and legislative assembly.⁴ The Organic Law provided that "An apportionment shall be made, as nearly equal as practicable, among the several counties or districts, for the election of the council and representatives, giving to each section of the territory representation in the ratio of its qualified voters as nearly as may be."⁵

Subsequently, in 1866, the first state constitution was drafted and accepted by Congress on March 1, 1867.⁶ This constitution provided that the legislature was to take a census each ten years, in and following 1875, and "apportion and district anew the numbers of the Senate and House of Representatives, according to the numbers of inhabitants, excluding Indians not taxed, and soldiers and officers of the United States army and navy."⁷

¹ NEB. REV. STAT. § 49-239 (Supp. 1969).

² REPORT OF THE NEBRASKA CONSTITUTIONAL REVISION COMMISSION (1970).

³ *Id.* at 51.

⁴ 10 Stat. 277 (1854).

⁵ *Id.* at 278.

⁶ NEBRASKA LEGISLATIVE COUNCIL, NEBRASKA BLUE BOOK 46 (1968).

⁷ NEB. CONST. art. II, § 2 (1867).

In 1875 the Constitution of Nebraska was revised and reapportionment was provided for on a ten-year census basis.⁸ Here it must be pointed out that the state was operating with a two house legislature and provision was made for equal representation in each of the two representative bodies.

The constitution was not altered or amended again until 1919 when it was amended to provide for the creation of election districts "as nearly equal in population as may be and composed of contiguous and compact territory."⁹ Following the 1919 amendment for redistricting, the constitution was not amended for fifteen years. In 1934 the Nebraska Constitution was amended to establish a unicameral legislature.¹⁰ Under the provisions of Article III, section 5 of the Nebraska Constitution of 1919, as amended in 1934, apportionment was to be based on population figures determined by the federal decennial census. The legislature was empowered to reapportion and redistrict "from time to time, but not oftener than once in ten years."¹¹ This could be done when the population figures reflected that it was "necessary to a correction of inequalities in the population of such districts."¹²

Nebraska saw no further activity along the lines of redistricting of legislative districts between 1935 and 1962, when the League of Nebraska Municipalities challenged the 1936 apportionment scheme in *League of Nebraska Municipalities v. Marsh*.¹³ That case, instituted shortly after the United States Supreme Court decided *Baker v. Carr*,¹⁴ sought to have Article III, section 5 of the Nebraska Constitution, as amended in 1934, declared unconstitutional, to have the legislative elections slated for November 6, 1962, restrained until apportionment was properly provided for, and to enjoin submission of a proposed amendment to the electorate.¹⁵ The case was not heard and decided until July 20, 1962, and, in view of the late hour, the court denied all relief, fearing a total upsetting of the

⁸ NEB. CONST. art. III, § 2 (1875).

⁹ NEB. CONST. art. III, § 5 (1919).

¹⁰ NEB. CONST. art. III, §§ 1, 5, 6, 7, 10, 11, 14, 24 (1934).

¹¹ NEB. CONST. art III, § 5 (1934).

¹² *Id.*

¹³ 209 F. Supp. 189 (D. Neb. 1962).

¹⁴ 369 U.S. 186 (1962).

¹⁵ The amendment was embodied in L.B. 217 as passed by the 1961 Nebraska Legislature. It provided for an amendment to Article III, section 5 of the Nebraska Constitution to allow for multiple districts within populous counties of the state and to allow redistricting to be determined on a combined basis of population and area.

elective process for the upcoming election if a last minute remedy were attempted. It did, however, retain continuing jurisdiction over the case for possible future litigation.¹⁶

The amendment to Article III, section 5, passed by the 1961 Legislature, was approved by the electorate on November 6, 1962. It provided for redistricting legislative districts when necessary, but not more often than every ten years.¹⁷ In 1964, the League of Nebraska Municipalities breathed new life into their former suit, this time challenging the validity of the constitutional apportionment provisions accepted by the people of Nebraska in 1962. In *League of Nebraska Municipalities v. Marsh*,¹⁸ the same three judge court which had decided the 1962 case found that the 1962 constitutional amendment was invalid, relying on the numerous reapportionment cases which had been decided by the United States Supreme Court on June 15, 1964.¹⁹ Again this court refused to enjoin the holding of upcoming elections, but stated that the legislature would "have *de facto* status when it meets for regular session in January, 1965; that it should have 'an opportunity to fashion a constitutionally valid legislative apportionment plan' . . ."²⁰

The 1965 Legislature, in L.B. 628,²¹ sought to correct the deficiency in its legislative apportionment but this was again struck down in the 1965 case of *League of Nebraska Municipalities v. Marsh*.²² The thrust of the court's refusal to accept the plan presented in L.B. 628 was that, as written, it required that county lines be followed in the establishment of legislative districts.²³

The League of Nebraska Municipalities challenged the successor to L.B. 628 when it brought an action seeking to declare L.B. 925²⁴ invalid. In *League of Nebraska Municipalities v. Marsh*,²⁵ the court found that the redistricting scheme of L.B. 925, which provided for a maximum of seven percent deviation from the ideal median population, was sufficiently within the ambit of U.S. Su-

¹⁶ 209 F. Supp. at 196.

¹⁷ NEB. CONST. art. III, § 5 (1962).

¹⁸ 232 F. Supp. 411 (D. Neb. 1964).

¹⁹ See 232 F. Supp. at 412 for a complete listing of the cases relied upon by the court.

²⁰ 232 F. Supp. at 414.

²¹ NEB. SESS. LAWS, c. 21, p. 159 (1965).

²² 242 F. Supp. 357 (D. Neb. 1965), *dismissed under S. Ct. Rule 60*, 382 U.S. 1021 (1966).

²³ *Id.* at 360-61.

²⁴ NEB. SESS. LAWS, c. 22, p. 171 (1965).

²⁵ 253 F. Supp. 27 (D. Neb. 1966).

preme Court standards to be valid.²⁶ Thus, Nebraska's present apportionment provisions were finally declared to be acceptable.²⁷

II. REDISTRICTING AND JUDICIAL DISTRICTS

The 1969 Constitutional Revision Commission suggested changing Article V, section 5 because it felt "that Supreme Court judicial districts should be proportioned to population" and therefore recommended "that they be redistricted after each decennial census."²⁸ The revision of this section, and the inclusion of provisions for reapportionment of the judicial districts, presents several problems. The first of these is whether the one man-one vote requirement attaches to a meritorious vote on state supreme court justices. The one man-one vote principle has been applied by the United States Supreme Court in numerous opinions, but none has dealt with meritorious voting. From these opinions a determination of their applicability in this context must be made.

The Court first passed on the one man-one vote question in 1962, in *Baker v. Carr*,²⁹ where the Court determined that the Equal Protection Clause of the U.S. Constitution required that each man's vote be relatively equal in weight with every other man's vote in a given state. Though *Baker* first handled the problem of standing and whether or not redistricting was a political question, after making the issue a justiciable one, it set down the broad general rule that the one man-one vote principle is applicable to a federal election. In *Reynolds v. Sims*,³⁰ the Court extended the same principle to elections for state legislators, finding that each citizen of a voting district had the right to have his vote weigh equally with that of every other citizen of his state in a given election.³¹ The Court ap-

²⁶ *Id.* at 34.

²⁷ Two later federal district court cases dealt with similar Nebraska reapportionment problems. In *Exon v. Tiemann*, 279 F. Supp. 603 (D. Neb. 1967), a 3 judge panel held that the 3 congressional districts created under a 1961 Nebraska act (NEB. REV. STAT. § 5-101 (Reissue 1964)) were so unequal that the law was unconstitutional. Subsequently in 1968, the Nebraska Legislature passed a new congressional redistricting plan. This was upheld by the same 3 judge court in *Exon v. Tiemann*, 279 F. Supp. 609 (D. Neb. 1968).

²⁸ REPORT OF THE NEBRASKA CONSTITUTIONAL REVISION COMMISSION 64 (1970).

²⁹ 369 U.S. 186 (1962).

³⁰ 377 U.S. 533 (1964).

³¹ "Undeniably the Constitution of the United States protects the right of all qualified citizens to vote, in state as well as in federal elections." *Id.* at 554.

plied this same principle to a large number of similar cases, at the time limiting it almost exclusively to state legislative elections.³²

Within a relatively short period after deciding *Reynolds*, the Court began to apply the one man-one vote principle more strictly and in more diverse situations. In *Lucas v. 44th General Assembly of Colorado*³³ the Court invalidated a state legislative apportionment plan, which had been presented to and passed by the voters of Colorado, holding that:

An individual's constitutionally protected right to cast an equally weighted vote cannot be denied even by a vote of the majority of a State's electorate, if the apportionment scheme adopted by the voters fails to measure up to the requirements of the Equal Protection Clause We hold that the fact that a challenged legislative apportionment plan was approved by the electorate is without federal constitutional significance, if the scheme adopted fails to satisfy the basic requirements of the Equal Protection Clause, as delineated in our opinion in *Reynolds v. Sims*.³⁴

The Court made similar application of the Equal Protection Clause in local representative elections in 1968 when in *Avery v. Midland County Commissioners*³⁵ the Court found that equal protection must be afforded the electorate in a vote for a county commissioner's position. The far-reaching impact of this case was noted in that it would effect the local elections of more than eighty thousand units of local government.³⁶ The Court did not stop at the level of local representative government, but in 1970 applied the one man-one vote principle to the election of school trustees in *Hadley v. Junior College District of Metropolitan Kansas City*.³⁷

Having then traced the application of the Equal Protection Clause and the Fourteenth Amendment from the federal election of representatives down to the local election of a school's trustees, the question still remains whether the court would give similar treatment to a merit vote by the electorate on a judicial officer in a judicial district.

³² See generally R. CORTNER, *THE APPORTIONMENT CASES 222-66* (1970) for an excellent general alignment of the cases in which the primary emphasis was placed on the establishment of voting equality in state legislative elections.

³³ 377 U.S. 713 (1964).

³⁴ *Id.* at 736-37.

³⁵ 390 U.S. 474 (1968).

³⁶ R. CORTNER, *supra* note 32, at 256.

³⁷ 397 U.S. 50 (1970).

The Constitution of Nebraska provides: "The powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial, and no person or collection of persons being one of these departments, shall exercise any power properly belonging to either of the others, except as hereinafter expressly directed or permitted."³⁸ The constitution then provides for the election of legislators in Article III, section 7; for the election of parties to fill the executive offices in the executive branch of the state government in Article IV, section 1; and for the initial appointment but subsequent merit reelection of judges in Article V, section 21. The Supreme Court, in most of its reapportionment cases, has dealt with positions wherein general governmental powers were conferred upon the office which is the subject of the particular election at issue. However, the Court has also repeatedly pointed out that "in each case a constant factor is the decision of the government to have citizens participate individually by ballot in the selection of certain people who carry out governmental functions."³⁹ The Court in *Hadley* further stated that "the crucial consideration is the right of each qualified voter to participate on an equal footing in the election process."⁴⁰

Based on the fact that the Nebraska Constitution creates the judiciary as a branch of state government separate and distinct from that of the other two branches, and provides the state's electorate with voting right to determine the judiciary's membership and officeholders, as is done with the other two branches, it would seem that the same protections for the right to vote would attach to the vote on judicial offices as for the legislative and executive offices. The question has come up for review in several federal district courts, but the presiding judges have dismissed allegations that the one man-one vote principle attaches to judicial selection. Distinguishing between legislative and executive election, the court in *Stokes v. Fortson*⁴¹ stated: "[J]udges and prosecutors are not representatives in the same sense as are legislators or the executive. Their function is to administer the law, not to espouse the cause of a particular constituency."⁴² Similarly in *Romiti v. Kerner*,⁴³ the court, though not deciding the issue, stated: "We have little doubt that, in a proper case, there is a valid distinction between applying

³⁸ NEB. CONST. art. II, § 1.

³⁹ 397 U.S. at 54.

⁴⁰ *Id.* at 55.

⁴¹ 234 F. Supp. 575 (N.D. Ga. 1964).

⁴² *Id.* at 577.

⁴³ 256 F. Supp. 35 (N.D. Ill. 1966).

the 'one man, one vote' rule in a legislative reapportionment case to the election of a state supreme court judiciary as provided in the 1962 Judicial Article."⁴⁴

It cannot be denied that there are differences between the function of the judiciary and that of the legislative or executive branches, but the distinction presented in *Stokes* and *Romiti* is of little utility in light of more recent Supreme Court opinions. It should be pointed out here that we are dealing with a federal constitutional question even though the situation through which it arises has its foundation in a state constitutional provision. In *Hadley* the Court stated:

It has also been urged that we distinguish for apportionment purposes between elections for "legislative" officials and those for "administrative" officers. Such a suggestion would leave courts with an equally unmanageable principle since governmental activities "cannot easily be classified in the neat categories favored by civics texts," . . . and it must also be rejected.⁴⁵

Since the Nebraska Constitution provides that "[a]ll elections shall be free; and there shall be no hindrance or impediment to the right of a qualified voter to exercise the elective franchise,"⁴⁶ it would seem that when looking only to the question of whether a vote in a judicial election is to receive the protection of the one man-one vote principle, the answer must be in the affirmative. As the Court stated in *Hadley*:

We therefore hold today that as 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 that each qualified voter must be given an equal opportunity to participate in that election, and when members of an elected body are chosen from separate districts, each district must be established on a basis which will insure, as far as practicable, that equal numbers of voters can vote for proportionally equal numbers of officials.⁴⁷

Extension of the one man-one vote principle to judicial elections could, and in all probability would, be brought within the purview of *Avery* and *Hadley*, if the election presented a potential judge to the electorate for the first time, thus creating a need for the proposed redistricting provisions of Article V, section 5. It is submitted that the rationale behind the extension of the one man-one vote principle to these cases would follow much the same type of ration-

⁴⁴ *Id.* at 46.

⁴⁵ 397 U.S. at 55-56.

⁴⁶ NEB. CONST. art. I, § 22.

⁴⁷ 397 U.S. at 56.

ale as just presented. The close question which still remains is whether the requirement would extent to a vote in a merit election.

Nebraska, in accord with most of the United States,⁴⁸ has adopted the "Missouri Plan" for judicial selection and tenure. The Missouri Plan is a method of judicial selection wherein:

[w]hen a vacancy occurs in a state court, the governor makes an appointment from a list of three candidates presented to him by a commission or committee. . . .

The judge, once selected, holds office until the next general election, at which time the electorate is asked whether the judge should be retained in office. If the vote is yes, the judge serves another term in office; if the vote is no, another judge is appointed as outlined above.⁴⁹

Nebraska adopted this plan by constitutional admendment on November 6, 1962.⁵⁰

The idea of utilizing a merit plan such as the Missouri Plan for judicial selection had been the subject of considerable Nebraska State Bar Association activity prior to 1950. At that time the Association adopted the "American Bar Association Plan for Selection and Tenure of Judges" by resolution at its annual meeting.⁵¹ Based on a bar association referendum which found the majority of its members in favor of a merit plan, the judiciary committee of the Nebraska Bar Association prepared a constitutional amendment for submission to the electorate of the state in the 1954 general election.⁵² This effort, however, failed for lack of the requisite number of petition signatures to place the proposed amendment on the ballot.⁵³ In 1958, a proposed constitutional amendment, L.B. 354, was again prepared by the bar association's judiciary committee. This proposed amendment was submitted to the Nebraska Legislature Judiciary Committee during the 1959 regular session of the legislature.⁵⁴ This bill died in committee, having been "indefinitely postponed."⁵⁵

⁴⁸ See Note, *Constitutional Revision—Judicial Selection—The "Missouri Plan" for New Mexico?*, 9 NATURAL RESOURCES J., 435-36 (1969).

⁴⁹ Harding, *The Case for Partisan Election of Judges*, 55 A.B.A.J. 1162-63 (1969).

⁵⁰ NEBRASKA LEGISLATIVE COUNCIL, NEBRASKA BLUE BOOK 70 n.7 (1968). For a comprehensive history of Nebraska's adoption of the Missouri Plan, see Haggert, *The Case for the Nebraska Merit Plan*, 41 NEB. L. REV. 723 (1962).

⁵¹ *Report of the Committee on Judiciary*, 38 NEB. L. REV. 77 (1959).

⁵² Cronin, *President's Address*, 34 NEB. L. REV. 217 (1955).

⁵³ *Report of the Committee on Judiciary*, *supra* note 51.

⁵⁴ L.B. 354, 69th Neb. Leg. Sess. (1959).

⁵⁵ 69th NEB. LEG. J. 2452 (1959).

The bar association again had a proposed constitutional amendment prepared and presented to the judiciary committee during the 1961 regular session. The amendment was advanced in the form of L.B. 315⁵⁶ and received the approval of Nebraska voters on November 6, 1962.⁵⁷ The implementation of the merit plan in Nebraska required the revision of a number of constitutional sections.⁵⁸ The principal section, however, was Article V, section 21.⁵⁹ That section provides for the creation of a nominating commission,⁶⁰ terms of office and provisions for periodic reelection,⁶¹ and the governor's right to appoint new judges in the event of a vacancy.⁶²

The Constitutional Revision Commission recommended alteration of certain portions of the merit plan as originally enacted. The appointment provision of Article IV, section 11 has been completely altered by the revision,⁶³ however, it does not in any way affect the operation of the merit plan as a whole. Additionally, Article V, section 5 has been revised, but again the basic functioning of the plan is not altered.

Does Article V, section 21 (3) of the Nebraska Constitution implicitly require that the judicial districts created in Article V, section 5, be of equal population? It would seem to be a logical extension of the rule of *Hadley* that "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 that each qualified voter must be given an equal opportunity to participate in that election"⁶⁴ This rule finds application to the merit election plan under the Nebraska Constitution. Since Article II, section 1 provides for a threefold division of governmental powers and Article V, section 21 allows the electorate to pass on the qualifications of the judicial office holder by voting, it follows that this voting right must be protected, both under the Fourteenth Amendment of the U.S. Constitution, and under Article I, section 22 of the Nebraska Constitution. It is

⁵⁶ NEB. SESS. LAWS, c. 25a, p. 741 (1961).

⁵⁷ NEBRASKA LEGISLATIVE COUNCIL, NEBRASKA BLUE BOOK 70 n.21 (1968).

⁵⁸ Adoption of the merit plan necessitated amending NEB. CONST. art. IV, § 11, and art. V, §§ 4, 5, 7, 10, 15, 20 and 21.

⁵⁹ Haggert, *supra* note 50.

⁶⁰ NEB. CONST. art V, § 21(4).

⁶¹ *Id.* § 21(3).

⁶² *Id.* art. IV, § 11 and art. V, § 21(1).

⁶³ REPORT OF THE NEBRASKA CONSTITUTIONAL REVISION COMMISSION 40, 49-50 (1970).

⁶⁴ 397 U.S. at 56.

true that the voting process in issue at this point is not the same type of selection process as in the situation where one of two or more candidates is chosen, but it would seem to be an unduly narrow construction of the term "select"⁶⁵ to deny that choosing between returning a man to a position he now holds on his merits, or removing him from that position in favor of filling it with another is not "selection." It is submitted that there can be no logical or legal reason, valid within the guidelines established by the U.S. Supreme Court, why the one man-one vote protection is not applicable to an electorate's vote in a judicial election.

III. CONSTITUTIONALITY OF USING ESTABLISHED LINES AS ELECTORAL DISTRICT BOUNDARIES

The suggested revision of Article V, section 5 also contains substantially altered language pertaining to the manner in which judicial districts are established.⁶⁶ Besides the different wording of the section,⁶⁷ the revision also brings it into harmony with the reapportionment plan for the legislature found in Article III, section 5. A few minor changes in the legislative reapportionment section have also been recommended.⁶⁸ The question now presented is whether the language providing for the reapportionment and redistricting of the judicial and legislative districts is such that it violates the Equal Protection Clause by precluding the establishment of independent boundaries for the districts if equal population cannot be provided by use of established boundaries. Here the issue

⁶⁵ WEBSTER'S 3D NEW INTERNATIONAL DICTIONARY 2058 (1961): "To choose from a number or group, usually by fitness, excellence or other distinguishing feature."

⁶⁶ "[T]he Legislature shall redistrict the state after each federal decennial census. In any such redistricting, county lines shall be followed whenever practicable, but other established lines may be followed at the discretion of the Legislature. Such districts shall not be changed except upon the concurrence of a majority of the members of the Legislature" REPORT OF THE NEBRASKA CONSTITUTIONAL REVISION COMMISSION 54 (1970).

⁶⁷ "The Legislature shall divide the state along county lines into six compact districts of approximately equal population, which shall be numbered from one to six, consecutive numbers to be given adjacent districts and shall be the Supreme Court judicial districts. Such districts shall not be changed, except upon the concurrence of two-thirds of the members of the Legislature, nor shall any such change vacate the office of any judge." NEB. CONST. art. V, § 5.

⁶⁸ "The Legislature shall redistrict the state after each federal decennial census. In any such redistricting, county lines shall be followed whenever practicable, but other established lines may be followed at the discretion of the Legislature." NEB. CONST. art. III, § 5.

is not whether the legislature has the power to reapportion, but whether the means and guidelines used are adequate.

The Nebraska Constitution requires the use of county lines or other established lines in creating districts for elective purposes.⁶⁹ However, the United States Supreme Court decided two companion cases in 1969 which seem to severely challenge the constitutionality of the Nebraska Constitution's boundary requirement. *Kirkpatrick v. Preisler*⁷⁰ evolved out of a Missouri state congressional redistricting plan wherein the state was divided into congressional districts which varied from "3.13% above the mathematical ideal" to "2.84% below."⁷¹ Missouri argued that the variances should be considered in the light of other factors.⁷² The Court rejected this, stating: "[W]e do not find legally acceptable the argument that variances are justified if they necessarily result from a State's attempt to avoid fragmenting political subdivisions by drawing congressional district lines along existing county, municipal, or other political subdivision boundaries."⁷³ Similarly, in *Wells v. Rockefeller*,⁷⁴ the Court refused to allow a redistricting plan to stand:

To accept a scheme such as New York's would permit groups of districts with defined interest orientations to be over-represented at the expense of districts with different interest orientations. Equality of population among districts in a substate is not a justification for inequality among all the districts in the State.⁷⁵

Application of the *Wells* and *Preisler* cases to the Nebraska constitutional provisions is extremely difficult absent a test plan wherein actual population figures are available. It would seem, however, that the construction of the words "established lines" will be determinative of the validity of the constitutional section in a given case. If variations or deviations of any substance are presented, the courts will, of necessity, require the state to "present . . . acceptable reasons for variations among the populations of the

⁶⁹ REPORT OF THE NEBRASKA CONSTITUTIONAL REVISION COMMISSION 16 (1970).

⁷⁰ 394 U.S. 526 (1969).

⁷¹ *Id.* at 528-29.

⁷² "[I]t is contended that the [Missouri] General Assembly provided for variances out of legitimate regard for such factors as the representation of distinct interest groups, the integrity of county lines, the compactness of districts . . ." *Id.* at 530.

⁷³ *Id.* at 533-34.

⁷⁴ 394 U.S. 542 (1969).

⁷⁵ *Id.* at 546.

various . . . districts”⁷⁶ Conversely, if the legislature establishes equal population districts by use of a broad interpretation of the constitution, redistricting can be accomplished notwithstanding a court’s review of the tentative plan.⁷⁷

IV. CONCLUSION

The Nebraska Constitution, by providing that the judicial branch of state government shall be separate and distinct from the legislative and executive, has indicated that that branch should be accorded the same type of treatment accorded the other two. Through constitutional provisions similar to those provided for the legislative and executive branches, the people of the state are given the opportunity to vote on the continued tenure of state judges. Though the choice is not between a number of candidates, the voter nevertheless retains the right to have the vote which he casts on a given judge be given weight equal to that of every other Nebraska voter. Since the lawmakers have seen fit to allow the electorate to vote on a judge, they are also required to protect that vote. Therefore, the proposed revision of Article V, section 5 is necessary. Retention of the merit plan for judicial selection requires that every man be accorded an equal right to pass on the merits of each judge. While the vote cast is not the same as in an election where a choice is made between candidates, it still involves the constitutionally protected exercise of the voting franchise. By making provisions for the legislature to redistrict judicial districts on a decennial basis, the Constitutional Revision Commission has brought Article V, section 5 within the legally acceptable standards established by the United States Supreme Court granting to the people the opportunity to cast a fairly weighted ballot.

The problem of the use of “established lines” by the legislature in the redistricting of elective districts is one which remains unanswered. It is a problem which can only be resolved on the facts of each case presented. If a plan can be devised wherein established lines are followed, but in which substantial equality among the districts is produced, then the plan will stand. Conversely, if substantial equality cannot be obtained by the use of established lines, but the planning body is precluded from violating the established lines because of the constitution, it is submitted that such a section

⁷⁶ *Swann v. Adams*, 385 U.S. 440, 443-44 (1967). See generally *Moore v. Ogilvie*, 394 U.S. 814 (1969).

⁷⁷ For a general discussion of various suggested modes of reapportioning states for election districts, see *REAPPORTIONING LEGISLATURES* (H. Hamilton ed. 1966).

will be stricken as unconstitutional. The Supreme Court has stated that "the weight of a citizen's vote cannot be made to depend on where he lives."⁷⁸ The courts most certainly will not ignore the fact that some sort of guideline must be used in determining where one district must end and the other begin. "The state legislatures have devised, and the courts have generally tolerated, a variety of solutions to the problem of giving the various partisan and other interests with the metropolis an equitable voice . . ."⁷⁹ Such is the case with Nebraska's constitutional reapportionment provisions.

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⁷⁸ *Reynolds v. Sims*, 377 U.S. 533, 567 (1964).

⁷⁹ Jewell, *Criteria Reflected in Recent Apportionments*, in *REAPPORTIONING LEGISLATURES* 21, 22 (H. Hamilton ed. 1966).