

Proportional Representation: The Outlook for Its Constitutionality in the State of New York

Michael J. O'Reilly

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to permit such uncertainty in the law, especially since the determination of the issues is often left to the mercy and discretion of one deciding judge. By this we do not mean to indicate that we believe that the judges wilfully disregard the law. We believe, as do so many others, that " * * * the Court is a human institution; that it has the fallibility of a human institution; that each of its members has his human limitations, his strength and his weaknesses; each has his own political, social and economic philosophies, some of them avowed and which are sought to be controlled and others entirely subconscious but woven into the very texture of his being."⁵²

Constitutional Amendments, seeking to extend the control of the government over the social and economic life of the nation, are now being proposed on all sides. Since the ultimate fate of such Amendments would depend upon the construction put upon them by the Supreme Court, we cannot say that this alone would solve the problem. We would suggest that in addition to such Amendment, provision should be made that no state or federal statute should be held unconstitutional save by a vote of two-thirds of the membership of the Court, and that such questions should be promptly submitted to the Supreme Court itself, without prior submission to the lower federal courts.⁵³

LOUIS H. RUBINSTEIN.

PROPORTIONAL REPRESENTATION: THE OUTLOOK FOR ITS
CONSTITUTIONALITY IN THE STATE OF NEW YORK.

Proportional representation is an attempt to realize an equitable representation of sizeable political constituencies in city councils. There are many different plans which aim at this; but the "most carefully devised and promising system" of proportional representa-

⁵² Stated by Bernard L. Shientag, Justice of the Supreme Court of the State of New York in Book Rev. (1936) 10 ST. JOHN'S L. REV. 382, quoting CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* (1921) 168, wherein it is said, "The great tides and currents which engulf the rest of men do not turn aside in their course and pass Judges by."

⁵³ See Book Rev. (1936) 10 ST. JOHN'S L. REV. 385. See also N. Y. Times, June 28, 1936, p. 16L, col. 3, where Prof. Cohen suggests giving Congress power to pass Constitutional Amendments by a majority vote of both Houses, coupled with a clear-cut provision stripping the courts of the power to nullify legislation. He is here quoted as saying, "I think it would be safer for the people to be at the mercy of their representatives than at the mercy of a majority of one in a court whose members frequently are not familiar with the facts of the issue on which they are voting."

tion yet tried is the Hare Plan.¹ This is proportional representation properly so-called.

¹ MACDONALD, *AMERICAN CITY GOVERNMENT AND ADMINISTRATION* (1929) p. 195. The Hare Plan or "proportional representation with the single transferable vote," is intended "to give representation in a legislative body to every group in general thinking alike on political subjects which is considered large enough to deserve representation." The quantity of representation for each group is to be in direct proportion to its numerical strength. The plan is especially devised for election to assemblies or other bodies where there are three or more persons to be elected, each of equal rank with the others.

Under this system each voter receives a ballot containing the names of all the candidates for the council. The names are printed in a single vertical column, and the voter is told to indicate his first choice by placing a figure 1 after the candidate's name; his second choice may be expressed by a 2, his third by a 3, and so on down the line without regard to the number of persons to be elected. The voter can express only one first choice; if the figure 1 is put opposite more than one name the ballot is voided.

After the polls are closed the ballots are taken to some central point to be counted; the invalid ballots are then thrown out. Then each candidate's valid first choices are put into separate packages. The "quota" or minimum number of votes sufficient to elect a candidate is determined. It is well to observe at this point that if the quota is fixed in advance the number of councilmen will vary according to the amount of valid votes cast at each election. The proposed revised New York City Charter provides that one councilman shall be elected for each 75,000 valid votes cast in each borough with an additional councilman for a remainder of 50,000 valid votes.

In the so-called "off years" the number of councilmen may be less than during a major election year. However, in those cities in which the Hare Plan has been adopted the size of the council has been definitely fixed and the quota is determined after each election. Such a quota is known as the "variable quota." This quota is determined by dividing the number of offices to be filled, plus one, into the total number of valid votes cast, and taking the next higher whole number. For example, if there is a council of nine to be elected and 100,000 valid votes are cast, nine plus one makes ten and this into 100,000 gives 10,000, the next higher whole number is 10,001, so 10,001 is the quota.

Any candidate who receives 10,001 votes is declared elected. But it seldom happens that any candidate receives the exact quota. One or two candidates may have a thousand votes to spare; this is called a surplus. Suppose, for instance, that the elected candidate has 1,000 votes over the quota. He is declared elected and the surplus votes are distributed among the other candidates according to the expressed second choices on the ballots or, if machines are used, on the machines. That is, one candidate may be marked off as second choice on 400 of these ballots, another on 300, a third on 200, and a fourth 100. These 1,000 extra ballots are more or less picked at random and it may make a difference which 1,000 are selected. However, mathematicians say that when thousands or even hundreds of thousands of votes are transferred, chance is reduced to a negligible factor. After this transfer has been made the election officials then see if another candidate has attained the quota. This being done the votes of those who are hopelessly out of the running are transferred as in the first instance. However, no votes are transferred to an elected candidate or to a defeated one. This process of elimination continues until the nine candidates are elected or until all but nine are eliminated. This system, as nearly as is possible, makes every person's vote effective.

It is not necessary that ballots be used in the conduct of an election held under proportional representation. A machine has been devised which pre-

The discussion of this method of electing city councilmen takes on added importance when it is considered that on November 3rd of this year the people of the city of New York are to vote on two very important propositions; one, the adoption of a new charter and the other the choice of proportional representation as the method of electing members of the city council.² The question naturally arises as to the constitutionality of P. R. (which hereafter will be used to indicate proportional representation). This question has been raised in a number of cases all outside the jurisdiction of the state of New York.

serves all the principles of the system. At the top of this machine the names of the candidates are listed in alphabetical order. Just below these lists are revolving dials; these dials contain the names of the candidates in the same order as they are on the lists. The voter turns the first dial until the name of his first choice appears, the second dial until his second choice appears and so on for as many choices as he wishes to express. If the voter wishes he may write in more choices. When the voter leaves the booth the curtain rod punches holes in a card to correspond to the choices dialed and clears the machine for the next voter. The punched cards fall into a locked box, which can only be opened at the central counting place, where they are fed through standard sorting and counting machines at the rate of 400 a minute. See 26 *Searchlight* (July, 1936), a pamphlet published by the Citizens Union, as revised and reprinted for September, 1936. See also Proposed Revised New York City Charter, c. XLIII, §§ 1001-1010.

It is important to remember that proportional representation does not mean *reapportionment* or the rearrangement of Congressional or Senatorial districts in order to effect a fair representation of districts in accordance with population.

The need for such a system as the Hare Plan is shown in a study of Congressional elections in the state of Rhode Island for the year 1922 which shows the following results: total vote in three Congressional districts—Democrats, 81,762; Republicans, 73,688. The Democrats elected one Congressman, the Republicans two, an evidence of the inequalities of the ward or single member district system. In the New York City elections for the year 1935, 1,137,000 Democratic votes in the Aldermanic elections elected 62 Aldermen, 447,000 Republican votes elected 3 Aldermen and 127,000 Socialist and other votes did not elect any Alderman. Were not these last voters in reality disfranchised?

Proportional representation is used with great satisfaction everywhere in the Irish Free State and in parts of Australia, New Zealand and Canada. The following cities in the United States elect their councils by proportional representation—Cincinnati, Ohio; Hamilton, Ohio; Toledo, Ohio; Boulder, Colo.; and Wheeling, W. Va.

Under proportional representation there is no necessity for holding primary elections, since the choice of the voter is exercised in the election itself; likewise party emblems are eliminated in general.

² Proposed Revised New York City Charter, c. 43, §§ 1001-1010. Proposition I: "Shall the Charter proposed by the New York City Charter Revision Commission be adopted?" Proposition II: "Shall the system for the election of Councilmen by proportional representation provided for in the Charter proposed by the New York City Charter Revision Commission be adopted?" Proportional representation will take effect only in the event that the new Charter is adopted, even though it is submitted as a separate proposition. See *Matter of Mooney v. Cohen et al.*, — N. Y. —, — N. E. —, N. Y. L. J., Oct. 13, 1936 (Act creating the commission held constitutional).

In the case of *Wattles v. Upjohn et al.*³ involving the adoption of the Hare Plan in the city of Kalamazoo, Mich., the plan was declared unconstitutional. California likewise has declared it unconstitutional in the case of *People ex rel. Devine v. Elkus*.⁴ In both these cases, the basis of opposition lay in a very narrow interpretation of the constitutional provisions of both states providing for the right of an elector to vote *at all elections*. It was held that since it was impossible for a voter to exercise as many first choices as there were candidates to be elected, he was being deprived of a right guaranteed by the state constitution. The *Wattles* case contains sarcastic dicta as to the complications of the system. A second ground was advanced in this case for holding P. R. unconstitutional. This was that the voter was disfranchised because he could not predict the destiny of his vote. This is not possible in any system. Even under the ward or single member district system one's vote is effective only to the extent that a great number of others are of the same kind. True, under the Hare plan there is only one first choice, but the other choices are not automatically ruled out. How effective is a vote for a Democrat in a ward that is overwhelmingly Republican?

It was by extending the provision concerning the right of an elector to vote at *all elections* to include the right to vote for *every officer to be elected* that both Michigan and California ruled P. R. unconstitutional.

Although the case of *Reutener v. The City of Cleveland et al.*⁵ upheld the constitutionality of P. R. in the city of Cleveland, it did not really overrule the *Wattles* case; and even though the *Devine* case was decided after the *Reutener* case the California court could see no reason to be governed by it. This is due to the fact that the *Reutener* case was hinged about the absolute grant of power given to chartered cities by the Home Rule Amendment to the Ohio constitution.⁶ Since these powers of local self-government were unlimited it was entirely within the scope of the municipality to provide for the Hare Plan of P. R. as a means of choosing city councilmen. It was further held that the mode of elections as well as the personnel of officials were features of local self-government committed to chartered municipalities. The case of *Hile v. The City of Cleveland*⁷ tested the same amendment to the city charter as the *Reutener* case but on the ground of the authorization of the people of Cleveland to adopt a form of government different from that prevailing in the different parts of the state. P. R. was declared constitutional and in addition it was held

³ *Wattles v. Upjohn et al.*, 211 Mich. 514, 179 N. W. 335 (1920).

⁴ *People ex rel. Devine v. Elkus*, 59 Cal. App. 396, 211 Pac. 34 (1922).

⁵ *Reutener v. City of Cleveland*, 107 Ohio St. 117, 141 N. E. 27 (1923).

⁶ OHIO CONST. Art. VIII, § 3: "Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations as are not in conflict with the general laws."

⁷ *Hile v. City of Cleveland*, 107 Ohio St. 144, 141 N. E. 35 (1923); *Reutener v. City of Cleveland et al.*, 107 Ohio St. 117, 141 N. E. 27 (1923).

that the Hare Plan did not violate Section 1 of the Fourteenth Amendment to the United States Constitution nor did it contravene Section 4, Article 4 of the same.⁸ A writ of error to the Supreme Court of the United States was dismissed without opinion on the ground that no substantial federal question was involved.⁹

Cases of other states are valuable so far as the constitutional provisions and general laws of those states are similar to ours. Furthermore the fact that under similar provisions, one state Supreme Court has declared a system unconstitutional is no conclusive indication that the court of another state will hold to the same effect.

In the first place with reference to the state of New York, the constitution does contain a provision as to the right of an elector to vote *for all officers that now or hereafter may be elected by the people*.¹⁰ P. R. is not mentioned in the New York constitution nor is its use prohibited or prescribed. Under the state constitution there are only two types of officers who are to be elected by a special method. The governor and the lieutenant governor, for example, must be elected by a plurality of the votes.¹¹ Members of the Senate and Assembly are to be elected from single member districts.¹² There is no obligation upon the state legislature to grant to every city a particular kind of voting not made obligatory under the constitution. In other words, the right to vote is not inherent or natural nor is it synonymous with the ward system.¹³

As to the provision concerning the right to vote for *all officers* it might be asked how this is possible under a single district system. The fact that a citizen of New York can not cast his vote for every senator or assemblyman has never led anyone to entertain serious doubts as to its constitutionality.¹⁴ But simply because under P. R. the councilmen are elected at large such as in the case of the proposed New York charter provision,¹⁵ wherein each borough constitutes a single district for the election of councilmen, there is immediate questioning of its constitutionality. In fact, the opposition is not well founded; for, although the voter exercises but one effective first choice, his other choices are not wasted but go to the electing of other candidates. Nor is the plurality system affected since under both

⁸ U. S. CONST. Amend. 14, § 1, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." U. S. CONST. Art. IV, § 4, "The United States shall guarantee to every State in this Union a Republican form of government." The Ohio Supreme Court held that what was a republican form of government was a political and not a judicial question.

⁹ 266 U. S. 582, 45 Sup. Ct. 94 (1924).

¹⁰ N. Y. CONST. Art. II, § 1.

¹¹ N. Y. CONST. Art. IV, § 3.

¹² N. Y. CONST. Art. III, § 2 and § 5.

¹³ *Werber v. Hughes*, 196 Ind. 542, 148 N. E. 149 (1925); *In re Walker River Irr. Dist.*, 44 Nev. 321, 195 Pac. 327 (1921).

¹⁴ *State ex rel. Guergin v. McAllister*, 88 Tex. 284, 21 S. W. 187 (1895).

¹⁵ *Supra* note 2. N. Y. Laws 1934, c. 867, as amended by N. Y. Laws 1935, c. 292.

methods the candidates who receive the highest number of votes are elected.

It is well to investigate the right to vote *for all officers* so as to determine the intent of the framers of the New York State constitution, and to arrive at an understanding of its true meaning. This section was put into the Constitution of 1821 to abolish the property distinctions of the Constitution of 1777. Under the latter constitution, the right to vote for state senators was limited to those who owned freeholds to the value of 100 pounds. Those who had freeholds to the value of 20 pounds and taxpayers who received a tenement rent of forty shillings a year were entitled to vote for members of the lower house of the legislature. Section 1, Article 2 of the Constitution of 1821 ended this discrimination and allowed all who enjoyed the suffrage to vote on equal terms. And this same provision remains in the present constitution.¹⁶ Obviously this was not intended to mean the right to vote for every member of a legislative body; the single member district method of electing senators and assemblymen prevented it. It merely enacted that no longer were there to be those citizens who could vote only for members of the assembly or those who could vote only for senators. A citizen could vote for every state officer; governor, lieutenant governor, senator, assemblyman and all others. He could cast one effective vote for each one as a separate officer. It never was interpreted to mean that a citizen was to vote for every senator and assemblyman. The question of the intent of the framers of the respective state constitutions did not receive consideration in the Michigan, California and Ohio cases.¹⁷ If it were the intent of the framers that "*for all officers*" should mean "*for every candidate for every office to be elected,*" they were inconsistent in providing for the single member district elections of senators and assemblymen.

The fact that P. R. was not in the contemplation of those who prepared the State Constitution of New York does not infer an implied prohibition of it.¹⁸ Furthermore, reference must be made to the Charter Revision Act itself. Under this Act the Mayor of the city of New York is empowered to appoint a commission to draw up a new charter which is to regulate matters concerning *the property, affairs and government* of the city of New York. In addition, it empowers the commission to submit to the electorate of the city a proposition for the adoption of P. R. as a method of electing city councilmen. Since the legislature does not have to devise a special method

¹⁶ *Supra* note 10.

¹⁷ *Wattles v. Upjohn et al.*, 211 Mich. 514, 179 N. W. 335 (1920); *People ex rel. Devine v. Elkus*, 59 Cal. App. 396, 211 Pac. 34 (1922); *Reutener v. City of Cleveland*, 107 Ohio St. 117, 141 N. E. 27 (1923).

¹⁸ *Jenkins v. State Board of Elections of North Carolina*, 180 N. C. 169, 104 S. E. 346 (1920): "The fact that the Absentee Voters Law originated from extraordinary emergencies and was not contemplated by the framers of the Constitution can make no difference to its validity."

of election for the city government and does not have to provide for the same method as is used to elect its members, it may by special law allow the voters of the city to choose their own method.¹⁹ Hence there is no question here of an *ultra vires* act on the part of the city; it is merely acting under a special law.

Thus it is seen that under P. R. there is nothing inconsistent with the plurality system of voting; it does not prevent a voting *for all officers* so far as the intendment of that phrase is interpreted; the voter may vote for each candidate to be elected but with a slight variation of a serial order under which a vote is really a choice. It is within the power of a legislature to allow cities to choose their own method of election so far as secrecy of voting is not destroyed; the legislature is not compelled to prescribe the single member district system for the election of city councilmen; and, lastly, P. R. is not expressly nor impliedly prohibited.²⁰ In view of these facts the case for the constitutionality of P. R. in this state seems plausible.²¹

MICHAEL J. O'REILLY.

CONTEMPT PROCEEDINGS FOR THE NON-PAYMENT OF ALIMONY—A
CONSIDERATION OF SECTION 1172A OF THE CIVIL PRACTICE ACT.

It has been generally held that contempt proceedings will be allowed for non-payment of alimony as a remedial process necessary to secure to the wife an allowance for the support and maintenance of herself and her children and to prevent them from becoming public charges.¹ The necessity for such proceedings justifies its allowance.

¹⁹ N. Y. Const. Art. XII, §§ 2, 5.

²⁰ State *ex rel.* Otto v. Kansas City, 310 Mo. 542, 276 S. W. 389 (1925) (in which it was held that the departure by Kansas City from the Bicameral Council was valid, there being no constitutional or statutory provision requiring the council to consist of two houses).

²¹ Commonwealth *ex rel.* McCormick v. Reeder, 171 Pa. 505, 33 Atl. 67 (1895). In this case an act providing for the election of a given number of judges notwithstanding the fact that an elector was not allowed to vote for as many persons as there were places to be filled was held constitutional. The question of limited voting was raised in two New York cases. People *ex rel.* Wood v. Crissey, 91 N. Y. 616 (1883); People *ex rel.* Watkins v. Perley, 80 N. Y. 624 (1880) (The question of constitutionality was not discussed and the case was decided on other grounds.). For a study of Cincinnati's experience with proportional representation see TAFT CITY ADMINISTRATION (2d ed. 1933) pp. 96-110. For an exhaustive study of proportional representation see HOAG AND HALLETT, PROPORTIONAL REPRESENTATION (1926).

¹ *Ex parte* Hall, 125 Ark. 309, 188 S. W. 827 (1916); Woodard v. Woodard, 172 Ga. 713, 158 S. E. 569 (1931); Heflinger v. Heflinger, 172 Ga. 889, 159 S. E. 242 (1931); Toth v. Toth, 242 Mich. 23, 217 N. W. 913, 56 A. L. R. 839 (1928); Romaine v. Chauncey, 129 N. Y. 566, 29 N. E. 826 (1892);