SUPER-MAJORITIES AND EQUAL PROTECTION

In *Lance v. Board of Education of County of Roane*,[1] the Supreme Court of Appeals of West Virginia rendered a novel interpretation of the equal protection clause of the fourteenth amendment. At a special election the Board of Education of Roane County, West Virgina submitted to the voters of the County the question of issuing bonds for the purpose of improving local educational facilities. At the same special election there was submitted to the voters a proposal for the laying of additional tax levies in excess of the regular authorized levy. The final tally of votes revealed that 51.55%of the total votes cast favored the issuance of the bonds and 51.51% of the total votes cast favored the additional levy.[2] Under West Virginia law, a three-fifths majority was needed to support the incurring of the bond indebtedness[3] and a sixty percent vote was required in elections to authorize local tax levying bodies to make additional levies.[4] Plaintiffs, who voted in favor of both propositions, brought

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[1] 170 S.E.2d 783 (1969).

[2] The facts are summarized from Lance v. Board of Education of County of Roane, 170 S.E.2d 783 (1969).

[3] W. VA. CONST. art. X, § 8 provides that: "No county, city, school district, or municipal corporation, except in cases where such corporations have already authorized their bonds to be issued, shall hereafter be allowed to become indebted, in any manner, or for any purpose to an amount, including existing indebtedness, in the aggregate, exceeding five per centum on the value of the taxable property therein to be ascertained by the last assessment for State and county taxes, previous to the incurring of such indebedness; nor without, at the same time, providing for the collection of a direct annual tax on all taxable property therein, in the ratio, as between the several classes or types of such taxable property, specified in section one of this article, separate and apart from and in addition to all other taxes for all other purposes, sufficient to pay, annually, the interest on such debt, and the principal thereof, within, and not exceeding thirty-four years. Such tax, in an amount sufficient to pay the interest and principal on bonds issued by any school district not exceeding in the aggregate three per centum of such assessed value, may be levied outside the limits fixed by section one of this article: Provided, that no debt shall be contracted under this section, unless all questions connected with the same, shall have been first submitted to a vote of the people, and have received three-fifths of all the votes cast for and against the same." W. VA. CODE ANN. § 13-1-4 (Michie 1966) provides that: "No debt shall be contracted or bonds issued under this article until all questions connected with the same shall have been first submitted to a vote of the qualified electors of the political division for which the bonds are to be issued, and shall have received three-fifths of all the votes cast for and against the same." W. VA. CODE ANN. § 13-1-14 (Michie 1966) provides that: "If three-fifths of all the votes cast for and against the proposition to incur debt and issue negotiable bonds shall be in favor of the same, the governing body of the political division shall, by resolution, authorize the issuance of such bonds. . . ."

[4] W. VA. CONST. art. X, § 1 provides that: "Subject to the exceptions in this section contained, taxation shall be equal and uniform through the State, and all property, both real and personal, shall be taxed in proportion to its value to be ascertained as directed by law. No one species of property from which a tax may be collected shall be taxed higher than any other species of property of equal value; except that the aggregate of taxes assessd in any one year upon personal property employed exclusively in agriculture, including horticulture and grazing, products of agriculture as above defined, including live stock, while owned by the producer, and money, notes, bonds, bills and accounts receivable, stocks and other similar intangible personal property shall not exceed fifty cents on each one hundred dollars of value thereon and upon all property owned, used and occupied by the owner thereof exclusively for residential purposes and upon farms occupied and cultivated by their owners or bona-fide tenants one dollar; and upon all other property situated outside of municipalities, one dollar and fifty cents;

suit for declaratory judgments ordering the local school board to authorize the laying of the additional tax levy and the issuance and sale of the proposed bonds on the ground that the "super-majority" requirements in the state constitution and statutes were invalid in that they denied to the plaintiffs equal protection of the laws guaranteed to them by the fourteenth amendment. They asserted that the effect of the super-majority vote requirements was to unconstitutionally dilute the weight of an affirmative vote when considered in relation to the weight of a negative vote. More specifically, the plaintiffs contended that in the case of a three-fifths majority requirement the negative vote has one and one-half times the force of an affirmative vote. The Circuit Court of Roane County directed that the complaint be dismissed, this ruling was reversed by the Supreme Court of Appeals of West Virginia.[5] Drawing from the rationale of recent United States Supreme Court decisions dealing with the right to vote, the court held that the requirements of super-majorities in the instances before the court violated the equal protection clause of the United States Constitution. The constitutional validity of West Virginia's interpretation of the equal protection clause merits careful scrutiny since the requirement of super-majorities is commonplace in state and local governments throughout the United States.[6]

The Constitution of the United States protects the right of all qualified citizens to vote in both state and federal elections.[7] In cases involving attempts to deny or restrict the right of suffrage the Supreme Court has consistently made it clear that an effective voting franchise is essential to our system of ordered liberty. The Court has repeatedly recognized that all qualified voters have a constitutionally protected right to vote and to have their votes counted.[8] In *United States v. Mosley*[9] the Court maintained that it is "as equally unquestionable that the right to have one's vote count is as open to protection . . . as the right to put a ballot in a

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and upon all other such property situated within municipalities, two dollars; and the legislature shall further provide by general law, for increasing the maximum rates, authorized to be fixed, by the different levying bodies upon all classes of property, by submitting the question to the voters of the taxing units affected, but no increase shall be effective unless at least sixty percent of the qualified voters shall favor such increase. . . ." W. VA. CODE ANN. § 11-8-16 (Michie 1966) provides that: "A levying body may provide for an election to increase the levies, by entering on its records of proceedings an order. . . .

. . .

The local levying body shall submit to the voters within their political subdivision, the question of the additional levy at either a general or special election. If at least sixty percent of the voters cast their ballots in favor of the additional levy, the local levying body may impose the additional levy."

[5] 170 S.E.2d 783 (1969).

[6] *See, e.g.*, provisions cited notes 3 and 4 *supra.*

[7] U.S. CONST. amend. XV, § 1.

[8] United States v. Mosley, 238 U.S. 383 (1915).

[9] *Id.*

box."[10] The right to vote can neither be denied outright[11] nor destroyed by alteration of the ballots[12] nor diluted by stuffing the ballot box.[13] Writing for the majority in *United States v. Classic*[14] Mr. Justice Stone stated that "Obviously included within the right to choose, secured by the Constitution, is the right of qualified voters within a state to cast their ballots and have them counted. . . ."[15] Racially based gerrymandering and the conduction of so called "white primaries," both of which result in denying the right to vote to some citizens, have been held to be unconstitutional.[16] Most importantly to the *Lance* case, the Court has held that the right to vote "can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise."[17]

In *Gray v. Sanders*[18] the Court held that the Georgia county unit system,[19] which was applicable in statewide primary elections, was unconstitutional since it resulted in a dilution of the weight of the votes of certain Georgia voters merely because of where they resided. The Court noted that the fifteenth and nineteenth amendments prohibited a state from weighting or diluting votes on the basis of race or sex and concluded:

> How then can one person be given twice or ten times the voting power of another person in a statewide election merely because he lives in a rural area or because he lives in the smallest rural county? Once the geographical unit for which a representative is to be chosen is designated, all who participate in the election are to have an equal vote—whatever their race, whatever their sex, whatever their occupation, whatever their income, and wherever their home may be in that geographical unit. This is required by the Equal Protection Clause of the Fourteenth Amendment. The concept of 'we the people' under the Constitution visualizes no preferred class of voters but equality among those who meet the basic qualifications. The idea that every voter is equal to every other voter in this State, when he

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[10] *Id.* at 386.

[11] Guinn & Beal v. United States, 238 U.S. 347 (1915), Lane v. Wilson, 307 U.S. 268 (1939).

[12] United States v. Classic, 313 U.S. 299, 315 (1941).

[13] *Ex parte* Siebold, 100 U.S. 371 (1879), United States v. Saylor, 322 U.S. 385 (1944).

[14] 313 U.S. 299 (1941).

[15] *Id.* at 315.

[16] Gomillion v. Lightfoot, 364 U.S. 339 (1960), Nixon v. Herndon, 273 U.S. 536 (1927), Nixon v. Condon, 286 U.S. 73 (1932), Smith v. Allwright, 321 U.S. 649 (1944), Terry v. Adams, 345 U.S. 461 (1953).

[17] Reynolds v. Sims, 377 U.S. 533, 555 (1964).

[18] 372 U.S. 368 (1963).

[19] The Georgia county unit system was governed by a Georgia statute which was amended in 1962 so as to allocate unit votes to counties as follows: Counties with populations not exceeding 15,000, two units; an additional unit for the next 5000 persons; an additional unit for the next 10,000 persons; an additional unit for the next two brackets of 15,000; and thereafter, two more units for each increase of 30,000. All candidates for statewide office were required to receive a majority of the county-unit votes to be entitled to nomination in the first primary. GA. CODE ANN., §§ 34-3212, 34-3213 (1962).

> casts his ballot in favor of one of several competing candidates, underlies many of our decisions.[20]

In *Wesberry v. Sanders*[21] the Supreme Court held an apportionment of congressional seats which "contracts the value of some votes and expands that of others" is unconstitutional. The Court found further that it is the plain objective of the Constitution to make equal representation for equal numbers of people the fundamental goal in any electoral system.

> No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined. Our Constitution leaves no room for classification of people in a way that unnecessarily abridges this right.[22]

Wesberry establishes that the fundamental principle of representative government in this country is one of equal representation for equal numbers of people, regardless of race, sex, economic status, or place of residence within a state.

In *Reynolds v. Sims*[23] the Court ascertained that there were no constitutionally cognizable principles which would justify departure from the basic standard of equality among voters in the apportionment of seats in state legislatures and concluded that the seats in both houses of a bicameral state legislature must, under the equal protection clause, be apportioned substantially on a population basis.

In *Carrington v. Rash*[24] the Supreme Court held that a state could not fix its qualifications for voters so as to exclude certain otherwise qualified voters because of the way they might vote in the election. This case involved a provision in the Texas Constitution which prohibited any member of the armed forces of the United States who moved his home to Texas during the course of his military duties from voting in any election in Texas as long as he was a member of the armed forces. The state of Texas maintained that it was justified in prohibiting members of the armed forces from voting in local elections. It was argued that a state has a legitimate interest in prohibiting the right to vote when concentrated balloting by such transient groups as military personnel may result in a defeat of the will of the majority of the native civilian community. The state claimed that if military personnel be allowed to vote in local elections bond issues may fall and property taxes may stagnate at low levels because military personnel are unwilling to invest in the future of the community. The Court noted that the theory underlying the argument was that the Texas constitutional provision was necessary to prevent the danger

[20] 372 U.S. 368, 379-80 (1963).

[21] 376 U.S. 1 (1964).

[22] *Id.* at 17-18.

[23] 377 U.S. 533 (1964).

[24] 380 U.S. 89 (1965).

of a "takeover" of a small civilian community by the personnel of a large nearby military base who might have no interest in the future of the community. The Court upheld the right of a state to require that all people, including military personnel, seeking the right to vote be bona fide residents of the community. In striking down the Texas constitutional provision prohibiting military personnel from voting, the Supreme Court held that if one is in fact a resident of the state, with the intention of making the state his home indefinitely, he has a right to an equal opportunity for political representation within the community. Justice Stewart writing for the majority said:

> "Fencing out" from the franchise a sector of the population because of the way they may vote is constitutionally unpermissible. The exercise of rights so vital to the maintainence of democratic institutions . . . cannot constitutionally be obliterated because of a fear of the political views of a particular group of bona fide residents.[25]

More recent Supreme Court decisions[26] have held that the equal protection clause reaches the exercise of state power, whether exercised by the state or a political subdivision. *Avery v. Midland County*[27] held that citizens may not constitutionally be denied equal representation in political subdivisions which also have broad policy-making functions. This doctrine was further explained in *Kramer v. Union Free School District No. 15*,[28] a case which held that a New York statute limiting the franchise in certain school districts to owners or lessees of taxable realty and parents or guardians of children in public schools was in violation of the equal protection clause and *Cipriano v. City of Houma*,[29] a case holding a Louisiana law which gave only "property taxpayers" the right to vote in elections called to approve issuance of revenue bonds by municipal utilities unconstitutional as denying equal protection. These cases maintain that there must be a rational compelling state interest whenever the right to vote is denied. According to *Kramer v. Free Union School District No. 15*, local policies of limiting the franchise in certain school districts to owners or lessees of taxable realty and parents or guardians of children in public schools are not necessary to promote a compelling state interest. Under *Cipriano v. City of Huoma*, differences of opinion as to the advisability of the issuance of revenue bonds by a municipal utility cannot justify excluding either property taxpayers or non-property taxpayers from a bond election when both groups are substantially affected by the utility operation. The opinions in both *Kramer v. Union Free School District*

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[25] *Id.* at 93-4.

[26] Avery v. Midland County, 390 U.S. 474 (1968); Kramer v. Union Free School District No. 15, 395 U.S. 621 (1969), Cipriano v. City of Houma, 395 U.S. 701 (1969).

[27] 390 U.S. 474, 485 (1968).

[28] 395 U.S. 621 (1969).

[29] 395 U.S. 701 (1969).

No. 15 and *Cipriano v. City of Huoma* standing for the proposition that the "one person, one vote" principle has been stated in general terms and without qualification under the equal protection clause are directly in point with the *Lance* case. By requiring a super-majority to pass a bond issue the state is, in effect, partially excluding citizens from exercising their vote at the election because of their opinion as to the advisability of the issuance of revenue bonds. Under *Cipriano v. City of Huoma*, differences of opinion as to the advisability of the issuance of revenue bonds is not a legitimate state interest which will justify restricting the franchise when both groups are substantially affected by the object of the bonds.

The essential question raised in the *Lance* case is whether the Constitution requires that in all public elections the outcome be determined by the will of a simple majority. Historically, such a concept has not been inherrent in the democratic process.[30] But the Constitution viewed as a living foundation of government is not limited by historical shortcomings. Indeed, a study of the Supreme Court decisions relating to the right to vote in the last one hundred years is an apt example of this principle. Consequently it becomes necessary to turn to the interpretations given the equal protection clause by the Supreme Court in recent times.

Since the Supreme Court has held that the equal protection clause requires that once the voting franchise is granted to any group of citizens it must be granted to all in that group equally, the West Virginia court concluded that once a bond or tax levy issue is put before the voters, each voter's vote must be counted equally with any other's vote. On the surface such a deduction seems quite logical. However, one must not overlook the context in which the Supreme Court laid down the rule that the equal protection clause requires that once the right to vote is granted it must be given to all who meet the necessary qualifications equally. If the decisions are narrowly construed to apply only to the particular facts before the Court, then the equal protection requirement that everyone's vote be counted on an equal basis with any other's vote applies only to elections in which the people are electing one to represent them in a legislative assembly. All the Supreme Court decisions dealing with "weighted votes" have been limited to such elections. In actions involving the requirement of a super-majority there is no question of representation or apportionment. In *Lance* all the voters were members of the same geographic unit; there was no question of the geographical or political division of the state; there was no question of the sex of the voters, their occupations, their income or their race; and there was no question of representation or apportionment. The question immediately arises whether the Court intended their holdings to apply to all state elections of whatever nature or format. Does the rationale of the reapportion-

[30] *See, e.g.*, U.S. CONST. art. I, §§ 5 and 7; and art. V.

ment decisions naturally extend itself to a direct referendum? If it does, how must such rationale be applied to referendum elections? The answer to these questions lies in the analysis of the basic rationale of the voting decisions.

The dominant theme behind the recent Supreme Court decisions dealing with the right to vote has been the "one person, one vote" principle of *Gray v. Sanders*.[31] In *Wesberry v. Sanders*,[32] the Court recognized that while it may not be possible to draw congressional districts with mathematical precision, the Constitution requires that "as nearly as practicable one man's vote in a congressional election is to be worth as much as another's."[33] In *Reynolds v. Sims*[34] the Court said:

> . . . it is inconceivable that a state law to the effect that, in counting votes for legislators, the vote of citizens in one part of the State would be multiplied by two, five, or 10, while the votes of persons in another area would be counted only at face value, could be constitutionally sustainable. Of course, the effect of state legislative districting schemes which give the same number of representatives to unequal numbers of constituents is identical. Overweighting and overvaluation of the votes of those living there has the certain effect of dilution and undervaluation of the votes. The resulting discrimination against the individual voters living in the disfavored areas is easily demonstrable mathematically. The right to vote is simply not the same right to vote as that of those living in the favored part of the State. Two, five or 10 of them must vote before the effect of their voting is equivalent to that of their favored neighbor. Weighing the votes of citizens differently, by any method or means, merely because of where they happen to reside, hardly seems justifiable.[35]

The end result of super-majority requirements in referendum elections is to clearly weigh the votes against the proposition more heavily than the votes in favor of the proposition. In the case of a sixty percent vote requirement it takes three favorable votes to equal two unfavorable ones. By simple mathematical reasoning each "no" vote is thus given one and one-half times the weight of a "yes" vote.

The rationale of the super-majority requirements for certain elections is based on the principle that in certain matters of great importance to the political unit, a number of votes greater than a simple majority may be required so that the stability of the political unit may be enhanced. It is true that the more unanimity existing within the political unit the greater the degree of stability that will exist therein. However, such a system carried to its logical conclusion requires unaminous approval of all governmental action. One can easily conclude that a particular matter is so

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[31] 372 U.S. 368 (1963).

[32] 376 U.S. 1 (1964).

[33] *Id.* at 7-8.

[34] 377 U.S. 533 (1964).

[35] *Id.* at 562-63.

wrought with peril that it cannot be safely entrusted to a simple majority of the people and that it should therefore require a near unanimous vote in order to impose it upon the minority.

If the election laws of a particular state should require that all representatives to the state legislature be elected by no less than sixty percent of the votes cast at the election, there would certainly be no doubt as to the unconstitutionality of such statute. Such an arbitrary and discriminatory requirement is completely foreign to the principles upon which our representative government is based. There is, however, no difference between a requirement for an official to receive a sixty percent vote and one for a proposition submitted to the people to receive a sixty percent vote. Similarly, if the legislature should require, because of its importance, a proposition submitted to the voters must receive at least a ninety-nine percent vote to become effective, there would be no hesitancy in determining that the ninety-nine percent figure was arbitrary and discriminatory; yet the figure of sixty percent is of no greater or lesser dignity than ninety-nine percent.

There is no basis in logic why the right to vote should be less sacred in a referendum involving questions of governmental policy than it is in elections for representatives. One is no more of a necessary element of the democratic process than the other. An equal voice in the election of the legislature is of no greater importance to a citizen than the equality of his vote in a referendum election which may result in substantial and important changes in the status quo of the political community. There can be no distinction between voting for competing candidates and voting for propositions regarding the issuance of bonds or the laying of additional tax levies. Under the equal protection clause it seems that each citizen must have an equal voice in not only the establishment of governmental policy by their representatives but also, in its approval when submitted to them for ratification. The only standard which can be applied to effect such equality is that of *Gray v. Sanders*[36]—"one person, one vote."

The effect of the sixty percent requirement is similar to the effect of the provision of the Texas Constitution which was struck down in *Carrington v. Rash*.[37] The majority of those voting at a bond or excess levy election is effectively "fenced out" from their voting franchise because of their views on the question in issue at the election. This, the Court has held, the state cannot constitutionally accomplish whether in fixing the qualifications of voters or in determining the results of the election.

Assuming the constitutional validity of the West Virginia Supreme Court decision in the *Lance* case, what then will the ultimate effect of such rationale be on state and local governments throughout the United

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[36] 372 U.S. 368 (1963).

[37] 380 U.S. 89 (1965).

States. Again, limiting such a decision to its facts, the holding does not go beyond direct referendum elections. But can such rationale logically be limited only to its particular facts? If the requirement of super-majorities is allowed to continue in legislative assemblies, the problem which the *Lance* case addresses itself to will persist. Instead of requiring a super-majority of the citizens to pass upon an issue, the same result of minority control can be achieved by requiring a super-majority of their representatives to approve the issue when put before them. It thus seems apparent that the holding must naturally extend itself to cover all governmental elections whether they be by the people themselves or by their representatives in a legislative assembly. If the decision is so extended, the effectiveness of the machinery of government will be seriously hampered. Effective democratic government depends upon striking a proper balance between stability and equal representation. The rationale of the Supreme Court in the voting cases when applied to the requirements of super-majorities tends to destroy the effectiveness of a government by tilting the scale too heavily in favor of equal representation at the expense of stability.

Currently, the defendants are preparing a petition for Writ of Certiorari to the Supreme Court of the United States. If certiorari is granted and if the Supreme Court follows the rationale of recent cases dealing with the effective exercise of the right to vote, the *Lance* decision must necessarily be affirmed. Such a result will certainly find the Court in the midst of the "political thicket."

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