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Constitutional Law--Lance v. Board of Education--Constitutionality of Extraordinary Majority Elections

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states that an incorrigible girl may be returned to the committing court; or at the discretion of the Commissioner of Public Institutions, she may be transferred to another institution or otherwise disposed of. This statute is also much broader than the comparative Maine statute because of the discretionary power which the commissioner has.27 The Maine statute gives the commissioner a choice of either transferring or not transferring. The West Virginia statute gives the commissioner the choice of (1) sending the girl back to court, (2) transferring the girl, or (3) otherwise disposing of the girl. This statutory provision and West Virginia Code chapter 25, article 1, section 16, both separately and combined, give the Commissioner of Public Institutions the power to effect transfers on an ex parte basis. By leaving the ultimate determination to the Commissioner's discretion, the provision permits action which, in light of Shone, presumably is violative of the Federal Constitution. It is questionable whether the West Virginia court would read the requirement of a judicial hearing into the present West Virginia statutes28 because, as in the Maine statute, there is no suggestion that a court's approval is necessary to the transfer.

Delby Barker Stobbs

Constitutional Law — Lance v. Board of Education — Constitutionality of Extraordinary Majority Elections

The plaintiffs were taxpayers, citizens, and registered voters residing in Roane County, West Virginia, who had participated in a special election submitted by the Board of Education to the county voters for approval of a bond issue and an additional five-year tax levy.1 The vote canvass indicated that the bond issue was

28Recently there have been some attempts by the West Virginia Legislature to modernize concepts in chapters 25, 26 and 28 of the West Virginia Code. Of particular relevance was S.B. 292 which died in the House, May 19, 1969. S.B. 292, W. Va. Leg. Reg. Sess. 1969. The bill involved repealing chapters 25 and 28 of the West Virginia Code, abolishing the Department of Public Institutions and the commissioner, and creating a Department of Correction with a new commissioner. Unfortunately, the new provisions would have given the new commissioner the same transfer powers as the present Commissioner of Public Institutions now has.
1The bond revenue was to provide for improvement of existing facilities in the way of classroom construction, and for the removal of fire hazards. The levy revenue was allocated partially to current expenditures as well as to improvements. Lance v. Board of Educ. 170 S.E. 2d 783, 785 (W. Va. 1969).
favored by 51.55% of the total votes cast and the levy by 51.51% of the total votes cast, both short of the required sixty percent approval.² Both issues having received a majority, the plaintiffs appeared before the Board of Education, alleged that the constitutional and statutory extraordinary majority mandates violated their constitutional rights, and demanded that the bonds be issued and the tax be levied. Following refusal of the Board to act, plaintiffs brought two declaratory judgment actions in the circuit court of Roane County requesting the court to declare the sixty percent requirements unconstitutional and void as a violation of the equal protection clause of the fourteenth amendment and of the guaranty clause of article four of the United States Constitution.³ After consolidation of the actions, the trial court sustained the defendant's motions for judgment on the pleadings and directed the dismissal

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²The state constitution and code with reference to bonds provide:

... 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.


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 . . . .


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 . . . .


The state constitution and code with reference to excess levy elections provide:

[N]o increase shall be effective unless at least sixty percent of the qualified voters shall favor such increase, . . .


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 . . . .


Although the excess levy provisions appear to require a percentage approval of the total number of votes, judicial interpretation has indicated that the provisions relate only to the number of votes actually cast.


³In one action, plaintiffs requested the court to order the board of education to authorize and promote the issuance of the bonds on grounds that the three-fifths requirements were unconstitutional. See W. Va. Constr. art. X, § 8; W. Va. Code, ch. 13, art. 1, §§ 4, 14 (Michie 1966). In the other action, the plaintiffs requested the court to order the board to impose the levy, challenging the validity of the sixty percent vote requirements. See W. Va. Constr. art. X, § 1; W. Va. Code ch. 11, art. 8, § 16 (Michie 1966).
of the complaint thus upholding the validity of the constitutional and statutory provisions.

Plaintiffs appealed, and the court granted leave to move to reverse the trial court’s judgment. Held, reversed and remanded. The plaintiffs’ votes were debased and diluted thereby depriving them of the equal protection of the laws guaranteed by the fourteenth amendment. The challenged constitutional and statutory provisions violate the fourteenth amendment’s protections as embodied in the “one person, one vote” concept and, as such, are void, Lance v. Board of Education, 170 S.E. 2d 783 (W. Va. 1969).4

I. The Majority Argument
   A. Jurisdiction

The majority initiated its argument by noting jurisdiction pursuant to the supremacy clause, which establishes the court’s authority to invalidate a state constitutional provision inconsistent with the Federal Constitution.5 The declaratory judgment action was then recognized as the proper proceeding for the controversy.6 Following the determination of the propriety of the proceeding, the

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4Following the court’s determination and prior to the remand to the circuit court, a motion for leave to intervene as additional parties defendant and for rehearing was filed with the supreme court by counsel for a number of Roane County citizens. In asserting their right of intervention, the movants contended that the initial proceeding was a friendly action in that both parties sought the same interest, and submitted that the original opinion was erroneous in that the “one person, one vote” concept did not support the conclusions. They alleged that there was no discriminatory factor involved in the state provisions (at issue) which would adversely affect one’s equal protection under the law, pointing out that the provisions only qualify the power of a political subdivision to levy taxes and to incur indebtedness. Moreover, they contended that the action of the supreme court invalidated the provisions in their entirety since the three-fifths vote requirements are inseverable. Motion and Brief for Leave to Intervene as Additional Parties Defendant and for Rehearing, Lance v. Board of Educ. 170 S.E. 2d 783 (W. Va. 1969). (Filed Aug. 6, 1969).

5The supreme court granted on November 11, 1969, the intervention of additional parties defendant but denied the rehearing petition by the same 4-1 margin as in the original decision. Lance v. Board of Educ. 170 S.E. 2d 783, 804 (W. Va. 1969).

6The court cited as authority the supremacy clauses of the United States and West Virginia Constitutions and three United States Supreme Court cases declaring state constitutional provisions to be violative of the fourteenth amendment This issue is discussed more fully with reference to Judge Raymond’s dissent, in a subsequent comment in this issue.

court considered the relevance of a West Virginia constitutional provision demanding "equal representation in government." The majority found a similarity of purpose between this provision and the federal equal protection clause. Though the appellants argued that the provision illustrates that the principle of majority rule is firmly embedded in our state government, the significance of the majority's finding of a similarity is arguable. Specifically, what does the state constitutional provision connote beyond the mere requirement of equality in all apportionments for representation? In addition, a question arises as to whether one clause in a state constitution should even be considered in countering the validity of another clause in the same document.

B. Justiciability

The next significant question considered by the court was that of justiciability. The court found that the plaintiffs' assertion that the dilution of their votes denied them their fourteenth amendment rights presented a justiciable question cognizable by the courts. The majority did not examine the question in depth but apparently relied on the obvious similarities between Baker v. Carr and Lance. It is arguable that the issue of justiciability should not have been dismissed so lightly, in that a legislative reapportionment controversy and an extraordinary majority requirement for

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3Cf. State ex rel. Smith v. Gore, 150 W. Va. 71, 143 S.E.2d 791 (1965). This decision concerned the apportionment for representation in a proposed constitutional convention, but is not very helpful to a discussion of the extent of the application of the constitutional provision.
5369 U.S. 186 (1962). Judicial inquiry into the "political thicket" of voting processes has been well established by the apportionment cases. For many years the Supreme Court considered all political questions to involve non-justiciable controversies since the justiciable power of the United States extends only to "case and controversies" U. S. CONST. art. III, § 2. See e.g., Commercial Trust Co. v. Miller, 262 U.S. 51 (1923); Luther v. Borden, 7 U.S. (Harv.) 1 (1849). But after Baker v. Carr, 369 U.S. 186 (1962), all questions with respect to political rights as against state political action were no longer necessarily political questions. In distinguishing a political question from a discrimination that "reflects no policy, but simply arbitrary and capricious action," Id. at 226, the court asserted that the equal protection clause provides adequate grounds for the court to decide whether the discrimination reflected reasonable state policy or was simply arbitrary and capricious. Id. at 209. Is the policy set forth by the West Virginia constitutional provisions in controversy arbitrary and capricious to the same extent as the failure to reapportion the Tennessee legislature was in Baker v. Carr? Arguably it is not. But the issue does not appear to come within any of Mr. Justice Brennan's criteria for determining what consti-
referendums might be distinguished. The discrimination in both situations relates to political rights, yet it must be kept in mind that the justiciability of an issue remains a separation of powers problem. A consideration of the respective roles of political and judicial bodies is not irrelevant. It might be significant to recognize that other vote weighting controversies, notably the reapportionment cases, concerned a political question which was (1) not amenable to probable political solution, and for which (2) a realistic, though novel, judicial solution was available. For example, in the Tennessee reapportionment controversy, the legislature had not reapportioned itself since 1906 and there was little prospect of such action; and the judicial solution was effective. But in the controversy under consideration the realistic judicial solution is obvious, but how remote was the likelihood of a political solution? Specifically, amending the West Virginia constitution and securing the reapportionment of a state legislative body not obliged to act present different magnitude to the voters. Although these distinctions between the reapportionment cases and the West Virginia controversy are apparent upon close examination, it appears that the controversy is cognizable by the courts. The appellants here, just as the plaintiffs in Baker v. Carr, contended they were "denied the equal protection of the laws . . . by virtue of the debasement of their votes," and the court determined that "[t]he right asserted is within the reach of judicial protection . . . ."
C. Controversy

The genuineness of the controversy is the next concern of the court. In light of the court's treatment, it is difficult to determine whether they were discussing "controversy" in a constitutional sense or merely in a general sense. The majority found a genuine controversy by relating the contextual circumstances behind the plaintiffs' complaints, specifically, the physical conditions of the schools and the fact of the failure with a majority vote of the six preceding referendums. But the movants to intervene, arguing the constitutional aspects, asserted that no genuine controversy existed because the parties were seeking the same objective. They contended that this was merely a friendly suit containing no true element of adversity, evidenced by the fact that defendants instructed their counsel to proceed no further. It can be argued that there was no "collision of actively asserted . . . claims" based upon a "'real, earnest and vital controversy between individuals.'" Both the appellants and the appellees were interested in the application of the bond issue and tax levy funds to the betterment of the physical conditions of the schools. But the controversy under consideration seems to meet the West Virginia requirement that the "evidence . . . present a claim of legal right asserted by one party and denied by the other before jurisdiction of a suit may be taken." There appears to have been adequate adversity for an adjudication, in that it was the refusal of the Board of Education to act upon the plaintiffs' demands that constituted the grounds for the action, not the similarity of interests.

After recognizing the existence of a genuine controversy, the court proceeded to establish a denial of appellants' right to equal

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21 This consideration might also be relevant to the issue of justiciability: Does the fact that the parties in the Roane County controversy both sought the same object further demonstrate the political nature of the controversy?
25 In a suit for declaratory relief, an actual controversy exists when a public officer, pursuant to an official duty, denies a right asserted by another party, and the official's personal wishes are not at issue. Mainella v. Board of Trustees, 126 W. Va. 183, 185-86, 27 S.E.2d 486, 487-88 (1943).
protection of the laws. The court based its conclusions on (1) the four major reapportionment cases which established the "one man, one vote" principle; (2) three recent cases which concerned voter exclusion on discriminatory grounds, and (3) a state court decision which invalidated an extraordinary majority requirement for amending a state constitution. The court emphasized in each of these decisions either the factor of weight accorded an individual's vote or the type of election with which the case was concerned.

II. Grounds for Distinction

The challenge to the validity of the sixty percent vote requirements might be distinguished from the cases relied upon by the majority decision in Lance on a number of grounds.

A. Type of Election

Initially, the type of election may furnish grounds for distinction. It can be argued that the "one person, one vote" concept contemplates a narrow construction, in that it only demands that that qualified voters be reflected equally in legislative bodies. Supreme Court interpretation has currently extended the concept only to legislative representation elections. Under this view the

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28 The Appellees and Movants to Intervene asserted that the only matter debased was the power of a political subdivision to lay taxes or incur indebtedness, this being the issue of the controversy. Appellees Note of Argument at 2, and Motion for Leave to Intervene as Additional Parties Defendant and for Rehearing at 4, Lance v. Board of Educ., 170 S.E.2d (W.Va. 1969). This contention was adeptly observed by the court to amount to argument by circumlocution. The action was addressed to the rights of the plaintiffs, and only upon the basis of a prior determination concerning these rights could the extent of the authority of the political subdivision be determined. Lance v. Board of Educ., supra at 790.
29 This term was originated by Mr. Justice Douglas in Gray v. Sanders, 372 U.S. 368, (1963). "The conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can only mean one thing - one person, one vote." Id. at 381.
30 Equal reflection of the individual in the law-making assembly means, for example, that one man may not be reflected as one two-thousandth and another as one ten-thousandth of a legislative vote simply because of variation in district apportionment.
principle would require equal reflection in the legislative body but not equal reflection in the making of laws.\textsuperscript{33} By the same token it can be further argued that the legislative body is free to make whatever rules it pleases as to the percentage of legislative votes required to enact legislation. Thus, the “one person, one vote” concept would guarantee the right to an equal reflection in the legislative assembly but not the right to an equal reflection in the law-making process. This would apparently be true whether the legislating is by a representative body or by a direct referendum of the people.\textsuperscript{32} The application of the “one person, one vote” concept under this interpretation would then hinge on whether the voter is legislating or whether he is choosing a representative. It obviously applies to representation elections, yet its application to the direct legislative responsibilities of the people is not so clear.

It may be asserted that the majority’s treatment of \textit{Lance} is an unwarranted extension of the “one person, one vote” principle into the area of the direct legislative responsibilities of the people. But in making this assertion one would have to explain away \textit{State ex rel. Witt v. State Canvassing Board},\textsuperscript{33} which applied the principle to amending a state constitution. Clearly, the process of amending a state constitution is a direct law-making function of the people.

In addition, this attempt to distinguish \textit{Lance} from the “one person, one vote” line of decisions on grounds of the type of election overlooks what appears to be the implied premise of the “one person, one vote” concept: “Equal protection of the law demands majority rule in voting.”\textsuperscript{34} Without the principle of majority rule as

\textsuperscript{33}This was argued by the defendants in a recent California decision which declared a two-thirds approval requirement for certain types of bond issues unconstitutional. Brief for Respondents, \textit{Larez v. Shannon}, Mem. Decision, Sutter County Superior Court, No. 16043 (Aug. 8, 1969).

\textsuperscript{32}It is recognized that the legislative function often rests in the people. \textit{See} note 83 infra.

\textsuperscript{30}78 N.M. 682, 437 P. 2d 143 (1969).

\textsuperscript{31}This was the basic premise of the apportionment cases and has been extended through all recent vote dilution cases. \textit{See} note 35, infra, for an explanation. The rationale in the majority of the apportionment cases has concentrated on the percentage of the population required to elect a majority of the legislators, and if there has been a substantial deviation, the court has found a denial of equal protection. \textit{See} Kirkpatrick v. Preisler, 394 U.S. 526, 528-30 (1969); \textit{Swann v. Adams}, 385 U.S. 440, 442-45 (1967); \textit{Lucas v. Colorado Gen. Assembly}, 377 U.S. 713, 723-29 (1964); \textit{Kroman v. Sincock}, 377 U.S. 695, 703-08 (1964); \textit{Davis v. Mann}, 377 U.S. 678, 687-89 (1964); \textit{Maryland Comm. v. Tawes}, 377 U.S. 656, 664-70 (1964); \textit{WMCA, Inc. v. Lomenzo}, 377 U.S. 633, 642-52 (1964); \textit{Reynolds v. Sims}, 377 U.S. 533, 544-50 (1964). \textit{See also} \textit{Avery v. Midland County}, 390 U.S. 474, 476 (1968); \textit{Wesberry v. Sanders}, 376 U.S. 1, 2 (1964).
an implied premise, there can be no concept of vote dilution or vote weighting.\textsuperscript{35} And this premise is not novel to the ideological underpinning of our constitutional democracy. The doctrine of natural equality, which together with the concept of liberty forms the philosophical foundation for the basic documents of our government,\textsuperscript{36} requires that no man assert superiority over another.\textsuperscript{37} This assumed innate equality of man provided the theoretical foundation for majority rule.\textsuperscript{38} The notion that the concept of majority rule is fundamental to our idea of equality as embodied in the Constitution has been acknowledged by the Supreme Court on a number of occasions.\textsuperscript{39} Moreover, this underlying premise of majority rule by its very nature admits of no differentiation as to what one is voting for.\textsuperscript{40}

\textsuperscript{35}The concept of vote weighting had to be synthesized from majority rule, in that, the concept admits of no other derivation. For example, in X and Y districts each containing 1000 people, one's vote has the same effect as the votes of three persons in Z district containing 3000 people. Each person is equal in that he has one vote for one legislator. Why, then, is there a denial of equal protection? Such a denial is found only because a minority can thwart the majority in the legislative forum. The will of 2000 persons in W and Y districts can defeat that of the 5000 residents of Z district. Thus, the whole idea of vote weighting or dilution of one's vote is dependent upon the doctrine of majority rule for its existence. The appellants in \textit{Lance} recognized the significance of this frustration of the will of the majority. Brief on behalf of Appellants at 81, Lance v. Board of Educ. 170 S.E.2d 783 (W. Va. 1969).

\textsuperscript{36}See R. \textit{McCay, Reapportionment; The Law and Politics of Equal Representation} 9-54 (1965).

\textsuperscript{37}John Locke, perhaps the strongest philosophical influence in regard to the formation of our representative democracy, spoke of a "state . . . . of equality wherein all the power and jurisdiction is reciprocal, no one having more than another." J. Locke, \textit{Second Treatise of Civil Government} 118 (Everyman's Library ed. 1924).

\textsuperscript{38}See generally, id. at 90-100. "[E]very man, by consenting with others to make one body politic under one government, puts himself under an obligation to everyone of that society to submit to the determination of the majority. . . ." Id. at 97.

\textsuperscript{39}E.g., "[T]he democratic ideals of equality and majority rule, which have served this Nation so well in the past, are hardly of any less significance for the present and the future." Reynolds v. Sims, 377 U.S. 533, 566 (1964). "Equal Protection . . . demands that the plan must be such as not to permit the systematic frustration of the will of a majority of the electorate of the State . . . . [A]ny plan which could be shown systematically to prevent ultimate effective majority rule, would be invalid under accepted Equal Protection Clause standards," Lucas v. Colorado Gen. Assembly, 377 U.S. 718, 753-54 (1964) (Stewart, J., dissenting).

\textsuperscript{40}See \textit{State ex rel. Witt v State Canvassing Bd.} 78 N.M. 682, 437 P.2d 143 (1968). Without the basic premise of majority rule the court could have found no disparity of values given to different votes.
**B. Different Type of Discriminatory Classification**

Secondly, it may be that the cases relied upon by the majority to establish a denial of equal protection do not furnish a direct precedent for the *Lance* decision because it involved a different type of discriminatory classification. The equal protection guarantee safeguards individual rights against all varieties of invidious discrimination\(^4\) whether the state classification is in the form of race,\(^42\) sex,\(^43\) condition,\(^44\) employment,\(^45\) economic status,\(^46\) citizenship,\(^47\) economic regulation,\(^48\) or place of residence.\(^49\) It can be argued that the clause's interpretation as embodied in the "one person, one vote" principle protects an individual only against a single form of discriminatory state action—that due to place of residence.\(^50\) This concept, as it has been judicially applied to date, would not, then, invalidate all discriminatory weighting of votes but only that unreasonable discrimination based on place of residence.\(^51\)

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\(^6\)E.g., Sware v. Board of Bar Examiners, 353 U.S. 232 (1957); Meredith v. Allen County War Memorial Hosp. Comm'n 397 F.2d 33 (6th Cir. 1968).


\(^8\)E.g., Yick Wo v. Hopkins, 118 U.S. 356 (1886).

\(^9\)E.g., Truax v. Raich, 239 U.S. 33 (1915); Cottin v. Kansas City Stock Yards Co., 183 U.S. 79 (1901).


\(^11\)For example, if W lives in one district of two thousand people and W lives in a district of ten thousand people, X has five times the weight in choosing a representative as does Y because he lives in the specific district.

\(^12\)The appellants asserted in *Lance*, "The only question presented to the court in this case is whether the 'one man, one vote' principle as applied to an election of competing candidates . . . is applicable to a referendum type of election." Plaintiffs' Memorandum of Authorities in Opposition to Motion to Intervene and Rehearing at 14, *Lance* v. Board of Educ. 170 S.E.2d 783 (W. Va. 1969). They attempted to show that since the factor of weighting of votes is similar in both representation and referendum elections, the 'one person, one vote' concept is applicable to referendums; and that since there is no legitimate state interest to justify this vote weighting, majority rule is the only constitutional method to conduct referendum elections. Brief on Behalf of Appellants at 19-31, *Lance* v. Board of Educ. *supra*. But the application of the "one person, one vote" principle was extended to referendums in the New
With the exception of two cases, the authority relied upon by the majority decision in Lance illustrates only this single form of discrimination. Baker v. Carr\textsuperscript{22} and Reynolds v. Sims\textsuperscript{23} both concerned the geographical dilution of the individual's vote due to malapportionment in the state legislature. Gray v. Sanders,\textsuperscript{44} concerning Georgia's county unit system for determining the outcome of primary elections for state-wide offices, considered the weight of a citizen's vote within a single constituency but only on grounds that votes of individuals residing in certain counties were debased in relation to those living in others.\textsuperscript{55} The court in Wesberry v. Sanders,\textsuperscript{56} applied this concept to Congressional districting without explicitly relying on the equal protection clause, indicating that "a vote worth more in one district than in another . . . run [s] counter to our fundamental ideas of democratic government."\textsuperscript{57} In State ex rel.

Mexico decision. The appellants failed to recognize that the "one person, one vote" concept to date has only been applied to discriminatory classifications based on place of residence. A more direct assertion of the issue of the case might be stated: "Is the discriminatory classification on grounds of one's convictions justified by a compelling state interest within the meaning of the equal protection clause?" See text at section III infra.

\textsuperscript{22}369 U.S. 168 (1962).

\textsuperscript{23}377 U.S. 533 (1964). "The fact that an individual lives here or there is not a legitimate reason for overweighting or diluting the efficacy of his vote . . . [T]he weight of a citizen's vote cannot be made to depend on where he lives." Id. at 567.

\textsuperscript{24}372 U.S. 368 (1963). "How . . . can one person be given twice or ten times the voting power of another person in a statewide election merely because he lives . . . in the smaller 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." Id. at 379-80.

\textsuperscript{25}"Gray . . . established the basic principle of equality among voters within a state, and held that voters cannot be classified, constitutionally, on the basis of where they live . . . ." Reynolds v. Sims, 377 U.S. 533, 560 (1964). The appellants contended that the "sixty percent requirements . . . present the exact question which was decided in Gray v. Sanders." Brief on Behalf of Appellants at 23, Lance v. Board of Educ., 170 S.E.2d 788 (W. Va. 1969). Rather, it should be pointed out that Gray involved basically the same elements as the reapportionment cases - a representation election and a discriminatory classification based upon place of residence.

\textsuperscript{26}376 U.S. 1 (1964). The Court declared that the words "by the people of the several states" of article I, section 2 of the Constitution meant that "as nearly as practicable one man's vote in a congressional election is to be worth as much as another's." Id. at 8. The court based this argument on grounds that this concept had been applied initially in our country's history when representatives were elected in state-wide elections, and the debates at the Constitutional Convention and the contentions of The Federalist show that the intentions of the framers centered around having representation in the House based on population.

\textsuperscript{44}Id. at 8.
Witt v. State Canvassing Board,68 which involved a state constitutional provision requiring a two-thirds approval in each county and a three-fourths overall approval to amend the constitution, the New Mexico Supreme Court relied on the "one person, one vote" principle to declare that the requirement of a two-thirds favorable vote in each county, a form of geographical discrimination, fell within the prohibitions of the equal protection clause.69 Although the preceding decisions are not solely apportionment cases, they all involve discriminatory weighting of votes with reference to place of residence.69

It is arguable that the remaining two cases relied upon by the majority illustrate parallel but distinct forms of invidious discrimination. Cipriano v. City of Houma61 involved a state statute giving only "property taxpayers" the right to vote in municipal bond approval elections. This discriminatory classification based upon nonownership of property was voided by the Court on equal protection grounds. The court noted that "[t]he challenged statute contains a classification which excludes otherwise qualified voters who are as substantially affected and directly interested in the matter voted up-

67[1968]. The state constitutional requirement demanding a three-fourths overall approval to amend the constitution was not considered since the total state-wide vote for the proposed amendment received over eighty percent approval, thereby rendering the issue moot. This requirement involves the identical form of discrimination under consideration in the West Virginia provisions.

69"Where, as here, a vote in Harding County outweighs a hundred votes in Bernalillo County, the 'one person, one vote' concept announced in Gray v. Sanders, supra, certainly is not met." Id. at 688, 437 P.2d at 149. "[N]o situation could be projected where the Bernalillo County voter would not be substantially discriminated against merely by virtue of the fact that artificial geographical lines of counties determine the value of a vote." Id. at 689, 437 P.2d at 150.

69Other apportionment cases also illustrate that the principle has been applied only to this single form of discriminatory classification. See e.g., WMCA, Inc. v. Lomemio, 377 U.S. 638 (1964). An apportionment scheme cannot "result in a significant under-valuation of the weight of the votes of certain of a State's citizens merely because of where they happen to reside." Id. at 653. Kirkpatrick v. Preisler, 394 U.S. 526 (1969); Avery v. Midland County, 390 U.S. 474 (1968); Swann v. Adams, 385 U.S. 440 (1967); Davis v. Mann, 377 U.S. 678 (1964); Lucas v. Colorado Gen. Assembly, 377 U.S. 713 (1964). The appellees, defendants below, distinguished the apportionment cases from the West Virginia controversy only on grounds that they involved election of public officials rather than voting on issues. They "distinguished" the New Mexico case on the grounds that the two-thirds requirement was so extreme that the case was not analogous. They did not reach the distinction of the type of discrimination involved. Brief for Appellees at 3, Lance v. Board of Educ. 170 S.E.2d 783 (W. Va. 1969).

on . . . " Kramer v. Union Free School District" concerned a New York statute that required otherwise eligible voters in certain school district elections to either own or lease real property, or have children enrolled in the public schools. This decision involved two discriminatory classifications, one on the basis of property non-ownership, the other due to one's family circumstances. Both of these classifications were held to have no rational basis in promoting the articulated state interest, thereby constituting a denial of equal protection of the laws.

It may be contended that the type of discriminatory classifications relied upon by the majority in Lance (i.e. those based on place of residence and on non-ownership of property) are distinguishable from the type of discrimination involved in the three-fifths vote requirements (i.e. that based upon one's convictions). Requiring an electorate within one political subdivision to favor an issue by an extraordinary majority involves the discriminatory weighting of an individual's vote in accord with one's belief on an issue. Thus, it may be argued that the majority relied on residence and nonownership of property classifications to invalidate a personal conviction classification.

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6a Id. at 706.
6b "The appellees asserted that "the State has a legitimate interest in limiting the franchise in school district elections to 'members of the community of interest.'" Id. at 630-31. The Court enumerated many other resident citizens who were "primarily interested" and yet were denied the franchise.
6c It should be noted that the Movants to Intervene erroneously relied on Fortson v. Morris, 385 U.S. 231 (1966), to illustrate the inapplicability of the "one man, one vote" concept. Brief in Support of Motion for Leave to Intervene and for Rehearing at 7, Lance v. Board of Educ., 170 S.E.2d 783 (W. Va. 1969). This controversy established the constitutionality of a Georgia constitutional provision permitting a majority of the Georgia General Assembly to elect the Governor from the two persons having the greatest number of votes cast. Mr. Justice Black distinguished a situation in which voters had the right to participate in an election from a case in which there was actually no such right involved. He pointed out that Gray v. Sanders "had to do with the equal right of 'all who participate in the election' . . . to vote and have their votes counted without impairment or dilution." Fortson v. Morris, 385, U.S. 231, 233 (1966). The Georgia constitutional clause, providing for the choice of a governor by the legislature when the vote fails to produce a majority, is distinguishable from the West Virginia situation in that no right to vote exists after the popular election produces only a plurality winner. See id. at 233-35. Appellees in Lance, defendants below, failed to note this distinction. Brief for Appellees at 3, Lance v. Board of Educ., 170 S.E.2d 783 (W. Va. 1969). See also Sailors v. Board of Educ., 387 U.S. 105 (1967).
The significance of any distinction as to type of discrimination is, however, questionable. When a controversy involves the denial of a basic right as opposed to mere unfavorable treatment by legislative action, the courts generally have not delved in depth into the semantics of classification and reasonableness. Simply stated, any impairment of voting rights should constitute a denial of equal protection absent a showing of compelling state interest or other strong justification by the state. In addition, distinguishing Lance from the other vote weighting controversies on the ground that a different type of discrimination is involved ignores the heavy burden on the state to justify any discriminatory classification involving the fundamental right of voting. Specifically, the personal conviction classification must be shown not to be unreasonably discriminatory in itself so as not to constitute a denial of equal protection.

C. Extent of Vote Impairment

A third ground for distinction rests upon the extent of the vote impairment. Two cases previously distinguished on the basis of the type of discrimination involved might also be distinguished from Lance on another basis. Specifically, the Cipriano and the Kramer cases may be differentiated from the West Virginia vote dilution controversy by the extent of the vote impairment. In these two cases, the Louisiana and New York statutes provided for the complete exclusion from the electorate of certain elements of otherwise eligible citizens. That is, there was a complete disenfranchisement, a situation to which the United States Supreme Court might apply a stricter test of constitutionality. The special test for complete disenfranchisement of elements of the electorate could be: "[W]hether the exclusions are necessary to promote a compelling

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\(^{66}\) See note 104, infra.

state interest." It follows that stronger justification on the part of the state might be required in total disenfranchisement cases than would be required for a vote dilution controversy such as Lance. But, nevertheless, the complete disenfranchisement cases illustrate the emphasis the Court has placed upon the integrity of the vote, and, therefore, should not be dismissed merely because of a difference in the degree of the impairment. These decisions illustrate the heavy burden the Supreme Court has placed upon the state to justify any impairment of this fundamental right.

III. A Denial of Equal Protection

Although the supreme court of appeals did not make clear its rationale in declaring the extraordinary majority requirements violative of the equal protection clause, nevertheless, these state statutory and constitutional provisions should fall within the prohibitions of the clause. The equal protection guarantee extends to all "indiscriminate imposition of inequalities," no matter what the area of discrimination. "[T]he concept of equal protection has been . . . viewed as requiring the uniform treatment of persons standing in the same relation to the governmental action questioned or challenged." Voting and the various stages of the electoral process provide only a single application for the fourteenth amendment's protections. This nation's history has witnessed an evolutionary expansion of suffrage rights in accord with democratic ideals. The constitutionally guaranteed rights of those qualified to cast a

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9Kramer v. Union Free School Dist., 395 U.S. 621, 627 (1969). In Kramer and in Cipriano v. City of Houma, 395 U.S. 701 (1969), the Court said that initially it must be determined whether the exclusionary classifications actually promote the articulated state objective. Kramer v. Union Free School Dist., supra at 632; Cipriano v. City of Houma, supra at 706. Secondly, if the exclusions are requisite to achieve the asserted state interest, then the court must determine if the interest constitutes a compelling state interest. Kramer v. Union Free School Dist., supra at 632, n. 14; Cipriano v. City of Houma, supra at 704. In both these cases the initial issue was sufficient to establish the unconstitutionality of the provisions. But the application of the compelling state interest test with reference to disenfranchisement can be seen in Carrington v. Rash, 380 U.S. 89, 96 (1965).

10See note 104, infra.


12See notes 42-49 supra.


14General manhood suffrage was adopted by the 1830's and sooner in most states. The national mandates include the fifteenth amendment in 1870, the nineteenth amendment in 1920, and the twenty-fourth amendment in 1964. The Voting Rights Act of 1965, 42 U.S.C. §§ 1971, 1973 (Supp. IV 1969), and
vote, to have their votes counted, and not to have them impaired by improper procedures are not questioned. But voting rights 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. The right to vote is considered personal, and hence capable of being discriminated against by state action. And the fact that the constitutional provisions under consideration were approved by a majority of the people cannot override the denial of individual constitutional rights.

The essence of a denial of equal protection is an unreasonably discriminatory classification. But does the requirement of a sixty percent favorable vote constitute a classification in the equal protection sense? It can be argued that the extraordinary majority vote requirements do constitute a “classification” based upon one’s

innumerable United States Supreme Court cases are evidence of this evolution. See e.g., Katzenbach v. Morgan, 384 U.S. 641 (1966); South Carolina v. Katzenbach, 383 U.S. 301 (1966); United States v. Classic, 315 U.S. 299 (1941). The invalidation of many reapportionment schemes and techniques of disenfranchisement demonstrate the expanding protection that the courts are affording voting rights.

Lane v. Wilson, 307 U.S. 268 (1939); Guinn v. United States, 238 U.S. 347 (1915); Ex parte Yarbrough, 110 U.S. 651 (1889).


United States v. Saylor, 322 U.S. 385 (1944); Ex parte Siebold, 100 U.S. 371 (1879).


Lucas v. Colorado Gen. Assembly, 277 U.S. 713, 736-37 (1946); West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943). Also it might be relevant to consider that in the controversy under consideration, it was a statewide majority that approved the provisions, but the voting was in the county unit.

In addition to the argument set out in the text concerning a classification on the grounds of one’s convictions, another type of discriminatory classification might be found in the controversy under consideration - a classification as to types of legislation which results in a denial of equal protection. See Hunter v. Erickson, 393 U.S. 385 (1969). This controversy involved the enforcement of a fair housing ordinance passed by a city council. Following this enactment, a number of town citizens petitioned for a referendum and were able to secure a majority vote on an amendment to the city charter; it required any ordinance prohibiting discrimination in real estate transactions to be approved by the voters in a referendum election before such an ordinance would go into effect. This procedure was prescribed for no other type of legislative enactment. Actually
two areas of classification were alluded to by the court. Initially, the court pointed out how this amendment drew a distinction between two groups of people—those seeking the benefit of the ordinance and those opposing it, giving advantage to the latter. Secondly, the court indicated there was a classification as to types of laws, the referendum being required only for a single type.

This classification as to types of legislation presents an arguable alternative for finding a "classification" in the West Virginia controversy. It might be contended that the bond issues and tax levies constitute a discriminatory classification of revenue referendums in relation to other types of referendums, which denies those seeking the benefit of the revenue referendums the equal protection of the laws. A sample of non-revenue areas for referendum elections indicates only a majority vote is required; local option elections for an alcoholic beverage store, W. Va. Code ch. 60, art. 5, § 7 (Michie 1966); ordinance relating to charges for municipal services, W. Va. Code ch. 8, art. 13, § 13 (Michie 1969); local option election concerning Sunday closing law, W. Va. Code ch. 61, art. 10, § 28 (Michie 1966); approval of zoning ordinance, W. Va. Code ch. 8 art. 8 § 24 (Michie 1969); definition of limits of a sanitary district for sewage disposal, W. Va. Code ch. 16, art. 12, § 1 (Michie 1966); creation of independent free school districts, W. Va. Const. art. XII, 21A, § 14 (Michie 1966); optional stock election districts, W. Va. Code ch. 19, art. 21A, § 14 (Michie 1966); optional stock law, W. Va. Code ch. 19, art. 19, § 8 (Michie 1966). Does the requirement of extraordinary majority for revenue referendums and only simple majority for other referendums constitute a discriminatory "classification" in the equal protection sense? Though this might be argued, additional problems are presented. Initially, there might be an additional obstacle as to whether the appellants in Lance would have standing to raise the issue. Are they deprived of a benefit? Secondly, the West Virginia controversy might be distinguished from Hunter v. Erickson on grounds that the amendment to the city charter itself contained the classification, that is, the classification of types of ordinances. The classification with reference to the West Virginia provisions exists only when considered in relation to other referendum elections; the classification is external to the provisions in question. But is this distinction significant when considering a denial of fourteenth amendment rights?

his convictions. But, similarly, in the “one man, one vote” decisions, one might have cast a vote of greater weight by abandoning his place of residence. Surely one’s convictions are entitled to at least equal weight to that accorded his place of residence in considering the extent of his constitutional protections. The Supreme Court has indicated that a distinction based on political convictions\(^\text{85}\) or one that merely disadvantages those seeking the benefit of specific legislation\(^\text{86}\) constitutes grounds for a classification within the prohibitions of the equal protection clause. A group with similar convictions on a referendum issue can also be reasonably considered protected from unreasonable “classification” within the meaning of the equal protection clause.

Although the states have considerable latitude in prescribing the details surrounding the exercise of the right of suffrage,\(^\text{78}\) and “mere classification . . . does not of itself deprive a group of equal protection,”\(^\text{88}\) classifications must be reasonable,\(^\text{89}\) as opposed to arbitrary or invidious.\(^\text{90}\) The Supreme Court has indicated with reference to voting that “where fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined.”\(^\text{91}\) The reapportionment and voter exclusion decisions not only illustrate the Court’s attitude toward the weight that must be accorded an individual’s vote, but also imposes upon the state the burden of justifying any restraint impairing voting rights.\(^\text{92}\)

\(^{85}\) See Burns v. Richardson, 394 U.S. 73, 88 (1966). This case concerned the Hawaii apportionment system which created multi-member senate districts. See also Carrington v. Rash, 380, U.S. 89, 94 (1965).

\(^{86}\) Hunter v. Erickson, 393 U.S. 385 (1969).

\(^{87}\) Lassiter v. Northampton Election Bd., 360 U.S. 45, 50 (1959); See also Pope v. Williams, 193 U.S. 621 (1904).


\(^{89}\) See e.g., McLaughlin v. Florida, 379 U.S. 184, 191 (1965).

\(^{90}\) Avery v. Midland County, 390 U.S. 474, 484 (1968). “The Equal Protection Clause does not, of course, require that the State never distinguish between citizens, but only that the distinctions that are made not be arbitrary or invidious.”


\(^{92}\) See e.g., Kramer v. Union Free School Dist., 395 U.S. 621 (1969); Cipriano v. City of Houma, 395 U.S. 701 (1969). Normally the burden is upon he who assails the classification to show that it is not rational, Whitney v. California, 274 U.S. 357, 369 (1927), but when the basic “assumption that the institutions of state government are structured so as to represent fairly all the people” is challenged, the presumption of constitutionality no longer exists. Kramer v. Union Free School Dist., 395, U.S. 621, 628 (1969).
In determining the reasonableness of a classification a court "must consider the facts and circumstances behind the law, the interests which the State claims to be protecting and the interests of those who are disadvantaged by the classification." There appears to be little rational justification for a classification that restricts the integrity of the vote, the essence of a democratic system, by giving dominant weight to the opinions of those who express themselves on a given side of an issue. The circumstances that gave rise to the extraordinary majority requirements no longer exist. The interest of those disadvantaged by the classification goes to the very essence of representative democracy because voting rights are the "preservative of all rights." "To the extent that a citizen's right to vote is debased he is that much less a citizen."

Moreover, the interests which the state appears to be protecting are not legitimate objectives: if it is not a mere arbitrary classification (which is prohibited), seemingly its only purpose would be to enhance the legislative power of a specific economic or social minority. And voting classifications on grounds of distinct economic or social interests have been rejected as not serving a legitimate state interest. "[T]o preserve certain rights in a minority group..." at the expense of political equality clearly denies fourteenth amendment rights. Though the appellees suggested that basic issues of

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The constitutional provision relating to bonded indebtedness was incorporated into the new constitution of 1872, a time during which there was great concern (approaching complete distrust) with the electoral processes, relating both to the overriding influence of the masses and to the wisdom of legislative bodies. The provisions relating to the tax levy were products of the depression, a time when the lack of money necessitated the limitation of local taxing power.


Note 90, supra.

In response one might contend that there is no "specific" minority since in a subsequent election a member of the disadvantaged group might become a member of the advantaged class by merely voting in the negative. But this argument is weakened by an analogy to the reapportionment cases. Before the reapportionment decisions, one had merely to move to a district of lesser population to become a member of the advantaged class in a subsequent election; yet this was no reason for not finding a denial of fourteenth amendment rights.


sweeping importance . . . such as fiscal matters" are an adequate state interest to justify extraordinary majority requirements, fiscal interests have been rejected as a justification for the denial of a fundamental constitutional right. The only legitimate state interest that could be suggested as a rationalization for the maintenance of the extraordinary majority vote requirements is that of stability. One might contend that the state must insulate the legislative will from the public whim since referendum voting may lead to a dramatic change if the affirmative side is successful but only to the maintenance of the status quo if the negative side carries. It may be asserted that this state interest in stability constitutes the basic ground for distinguishing a referendum election, in which the people determine policy directly, from the election of a representative, which affects policy only indirectly. However, voting rights are considered fundamental and this state interest in stability is not sufficient to justify their impairment. The state bears a particularly heavy burden to demonstrate a compelling state interest to justify any infringement on voting rights, regardless of the extent of the impairment. No such compelling interest has been demonstrated. In fact, the Supreme Court firmly declared "that the interest of the State, when it comes to voting is limited to the power to fix qualifications." And one's convictions on an issue are just as irrelevant and capricious as a measure of one's voting qualifications.

102Appellees' Motion to Dismiss, Lance v. Board of Educ., 170 S.E. 2d 783 (W. Va. 1969).
104Reynolds v. Sims, 377 U.S. 533, 561-62 (1964). The right to vote is described as "one of the basic civil rights of man," which demands a compelling state interest to justify any infringement. Id.
105See e.g., Kramer v. Union School Dist., 395 U.S. 621, 632 n.14 (1969); Cipriano v. City of Houma, 393 U.S. 701, 704 (1969); Carrington v. Rash, 380 U.S. 89, 96 (1965); Reynolds v. Sims, 377 U.S. 533, 561-62 (1964). Mr. Justice Harlan succinctly explained this doctrine in Shapiro v. Thompson, 394 U.S. 618, 658-61 (1969). A "classification is subject to the 'compelling interest' test if the result of the classification may be to affect a fundamental right, regardless of the basis of the classification." Id. at 660. He then noted the doctrine's application in Reynolds v. Sims, supra, Carrington v. Rash, supra, Harper v. Virginia Bd of Elections, 383 U.S. 663 (1966), and Williams v. Rhodes 393 U.S. 23 (1968), all voting cases. In Harper, v. Virginia Bd. of Elections, supra at 370, the test was phrased "closely scrutinized," and in Reynolds v. Sims, supra at 561-62, the test was phrased "carefully and meticulously scrutinized."
107Id. The right to vote is too fundamental to be burdened by any restrictions that have no relation to voting qualifications. Id. at 670.
as are homesite,107 and wealth.108 The "political views of a particular group" are irrelevant to voter qualifications,109 and, as such, no state interest can be shown to impair voting rights on this basis.

The state constitutional and statutory provisions at issue have established a discriminatory classification based upon the manner in which a person might express himself by his vote. This is constitutionally prohibited: "'The exercise of [voting] rights so vital to the maintenance of democratic institutions'... cannot constitutionally be obliterated because of a fear of the... views of a particular group..."110 Moreover, the type of election is irrelevant since "the State may no more disadvantage any particular group by making it more difficult to enact legislation in its behalf than it may dilute any person's vote or give any group a smaller representation than another of comparable size."111 Thus, a state constitutional provision which sets up an unreasonable classification, discriminating against an individual because of the way he might vote in a referendum election, (that is, on the basis of his convictions) constitutes a denial of fourteenth amendment rights.

IV. Other Arguments

One court recently declared that a state constitutional requirement of two-thirds assent to incur indebtedness by any state subdivision abridges the privileges and immunities guaranteed to the citizens of the subdivision by the fourteenth amendment.112 Current Supreme Court interpretation does not extend to this applica-

107Gray v. Sanders, 372 U.S. 368 (1963). "States can within limits specify the qualification of voters in both state and federal elections... [but] there is no indication in the Constitution that homesite or occupation affords a permissible basis for distinguishing between qualified voters within the State." Id. at 379-80.


109Carrington v. Rash, 380 U.S. 89, 94 (1965). This case involved the exclusion of military personnel from the franchise because of a fear of how they might vote.

110Id.


112Bogert v. Kinzer, Civil No. 27864 (6th Dist, Idaho 1969). This case is now on appeal to the Idaho Supreme Court. The court here considered the weighting and resulting debasement of votes, cited two geographical discrimination cases, and argued analogously from a state constitutional provision requiring non-discriminatory taxation as grounds for the decision. The court did not consider the validity of the provision permitting only property taxpayers to vote in such elections which is clearly unconstitutional under Cipriano v. City of Houma, 395 U.S. 701 (1969).
tion of the privileges and immunities clause.\textsuperscript{122} The federal rights guarantee of the clause "includes those rights and privileges which, under the laws and Constitution of the United States, are incident to citizenship of the United States, but does not include rights pertaining to state citizenship and derived solely from the relationship of the citizen and his state established by state law."\textsuperscript{124} The right to vote in an election of state officials (let alone the right to vote on an issue in an election conducted by a subdivision of the state and have it computed equally with the votes of others) has never been accorded the status of a right or privilege of national citizenship within the meaning of the privileges and immunities clause.\textsuperscript{125} Since the interpretation of the clause has not been construed so as to include voting as a privilege of citizenship of the United States,\textsuperscript{126} the right to have a vote accorded equality of weight in a state-wide or state subdivision election hardly falls within the protections of the clause. However, it is conceivable in light of the fundamental nature of the vote in relation to representative government and the democratic process as a whole, that the protection of the clause might be extended to local voting in years to come.\textsuperscript{127}

It has been argued that standards for judicial regulation can be found in the guaranty clause.\textsuperscript{123} Arthur Bonfield has explored the application and implications of the clause as a device to pro-
mote a fuller realization of American ideals. But the clause has never been successfully applied to representation cases, and its relevance to the West Virginia constitutional and statutory provisions under question present even greater difficulties. Initially, "The State" would have to be interpreted as the "body of citizens;" otherwise the guarantee would be applied on behalf of the state as against the state. In addition, a very broad interpretation of the phrase "Republican form of Government" would be required to attach relevance to voting on an issue.

Daniel F. Hedges

Constitutional Law—Lance v. Board of Education—The Dissenting Opinion

I The Dissenting Opinion

Judge Haymond's vigorous dissent to the majority's decision was two-fold: it denied the authority of the West Virginia Supreme Court of Appeals to declare a provision of the West Virginia constitution unconstitutional, and it denied that the circumstances in Lance were such as to warrant an extension of the "one person, one vote" principle.

In support of its first contention, the minority argued initially that the court was bound by oath to support the West Virginia constitution; secondly that only the sovereign people of West Virginia could ratify, amend and repeal their state constitution; and thirdly that the court's assertion of authority was without precedent.

The dissent's first argument dismissed the supremacy clause of the United States Constitution. Article IV, section five of the West Virginia constitution sets forth the oath by which all public

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3 This guaranty clause argument was presented by the appellees. Brief for Appellees at 51, Lance v. Board of Educ., 170 S.E.2d 783 (W. Va. 1969).

4 U.S. CONST. art. VI.