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

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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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This guaranty clause argument was presented by the appellees. Brief for Appellees at 31, Lance v. Board of Educ., 170 S.E.2d 783 (W. Va. 1969).

U.S. CONST. art. VI.
officeholders in West Virginia swear to uphold the Constitution of the United States and the State of West Virginia. Given the nature of the federal system and the logical implications of the supremacy clause, it is difficult to deny that a state judge's higher allegiance is to the United States Constitution.

Perhaps the simplest argument in support of the authority of the West Virginia Supreme Court of Appeals to determine the issue can be made syllogistically. The United States Constitution is the supreme law of the land. All public officeholders in West Virginia must swear to uphold the West Virginia constitution and the Constitution of the United States. Therefore, in the exercise of its judicial functions, it is the duty of the West Virginia court to uphold the Federal Constitution, "anything in the constitution or laws of any state to the contrary notwithstanding."

The second assertion of the dissent was that only the sovereign people of West Virginia could ratify, amend or repeal the West Virginia constitution. Certainly the constitution itself establishes this point. However, to rely on this basis is to equate the power to ratify, amend and repeal with a power to judicially review. The logical conclusion to be drawn from this argument is that the

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2Every person elected or appointed to any office, before proceeding to exercise the authority, or discharge the duties thereof, shall make oath or affirmation that he will support the Constitution of the United States and the Constitution of this State, and that he will faithfully discharge the duties of his said office to the best of his skill and judgment; and no other oath, declaration, or test shall be required as a qualification, unless herein otherwise provided. W. VA. CONST. art. IV, § 5.

3The dissenting opinion quoted Chief Justice Marshall for the proposition that it would be immoral to impose upon a judge an oath of allegiance to the United States Constitution and then to permit him to violate what he had sworn to support. This principle, Judge Haymond contends, applies as well to the oath of a state judge to support his state constitution. Judge Haymond failed to continue, as did Chief Justice Marshall, that the "particular phraseology" of the United States Constitution (i.e. the supremacy clause) confirms the principle that any law repugnant to the Constitution is void. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 179 (1803).  
4U. S. CONST. art. VI; W. VA. CONST. art. I § 1.  
5W. VA. CONST. art. IV, § 5.  
6U.S. CONST. art. VI.  
7A majority of the members of the Legislature or a majority of those voting in an authorized referendum must vote affirmatively in order to authorize the calling of a convention to alter the West Virginia constitution. W. VA. CONST. art. XIV, § 1. A two-thirds affirmative vote by the members of each house of the Legislature, or an affirmative vote by a majority of those voting in a referendum is sufficient to amend the West Virginia constitution. W. VA. CONST. art. XIV, § 2.
sovereign people of West Virginia have the power to ratify constitutional provisions which violate the United States Constitution, and by implication, to call on the three branches of state government, bound by the state constitution, to uphold the popular decision.

The minority's third argument pointed to the absence of precedent in support of the majority's assertion of authority. In support of this contention, the minority opinion cited three West Virginia cases, State ex rel. Smith v. Gore, Re: The Assessment of Shares of Stock of the Kanawha Valley Bank and Harbert v. The County Court of Harrison County for the proposition that only the sovereign people of West Virginia can alter the West Virginia constitution. However, in none of these cases was there an allegation of a violation of a federally protected right.

In Smith, the sole issue decided was that it was necessary under the constitution and statutes of West Virginia to provide for equal representation on the election of delegates to a state constitutional convention. In the Kanawha Valley Bank case, the only question determined was that the Kanawha Valley Bank, as a taxpaying corporation, had suffered a state constitutional discrimination by having its shares assessed for the payment of ad valorem taxes upon the basis of one hundred per cent of its actual value. The constitutional question raised in Harbert was also a state issue: the court ruled that a 1945 act of the Legislature authorizing a salary increase for the then-presiding judge of the Harrison County Criminal Court was violative of article VI, section 38 of the West Virginia constitution, which prohibits the alteration of the salary of a public officer during his term of office.

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8150 W. Va. 71, 143 S.E.2d 791 (1965).
10129 W. Va. 54, 89 S.E.2d 177 (1946).
11The West Virginia constitution art. X, § 1 prohibits taxing any one species of property higher than any other species of equal value. The money and shares involved were assessed at one hundred percent, while all other property in the taxing unit (Kanawha County), was systematically assessed at a lower percent of value. The case was decided on the basis of a state constitutional requirement. The majority noted that no fourteenth amendment right was involved, because there was no tax discrimination within the class. 144 W. Va. 346, 386, 109 S.E.2d 649, 671 (1959).
The dissent in *Lance* also cited several cases in which the validity of article X of the West Virginia constitution was affirmed.\(^{13}\) Again, no federal questions were raised in any of these cases.

There is a surprising dearth of United States Supreme Court opinion on the jurisdictional question which Judge Haymond raises: state supreme court decisions which have been granted certiorari have been decided on the merits of the controversy and not on the question of jurisdiction. *Reitman v. Mulkey\(^{14}\)* also involved a right claimed under the fourteenth amendment. The case arose from "Proposition 14" which the California electorate embodied in the California constitution in a 1964 referendum. "Proposition 14" provided in part that the state would neither deny nor limit the right of any person to refuse to sell, lease or rent any of his real property to any person of his choosing.\(^{15}\) The California Supreme Court concluded that "Proposition 14" not only repealed existing California law forbidding private racial discrimination, but also established the right to discriminate privately as basic state policy and was, therefore, invalid under the equal protection clause of the fourteenth amendment. In a five to four decision, the United States Supreme Court upheld the California court's decision.

Justice White, in delivering the opinion of the court, stated that the California court had properly examined the constitutional- ity of article I, section 26 "in terms of its 'immediate objective', its 'ultimate effect' and 'its historical context and the conditions existing prior to enactment'."\(^{16}\) The Court gave careful consideration to the California court's views, "because they concern the purpose, scope and operative effect of a provision of the California Constitution."\(^{17}\) "[T]he California court, armed as it was with the knowledge of the facts and circumstances concerning the passage and potential impact of § 26 and familiar with the milieu in which that provision would operate," determined that the State of California had involved itself in "private racial discrimination to an un-

\(^{13}\)See *Berry v. Fox*, 114 W. Va. 513, 172 S.E. 896 (1934); *Bee v. City of Huntington*, 114 W. Va. 40, 171 S.E. 539 (1939); *Finlayson v. City of Shinnston*, 113 W. Va. 434, 168 S.E. 479 (1933); *Herold v. Townsend*, 113 W. Va. 319, 169 S.E. 74 (1933).


\(^{15}\)See also *CAL. CONST. art. I, § 26, see 387 U.S. 369, 371 (1967).*

\(^{16}\)Id. at 373.

\(^{17}\)Id. at 374.
constitutional degree," and the United States Supreme Court accepted that determination.18

The dissenting opinion, written by Justice Harlan, denied the merits of the controversy, asserting that the "encouragement" of private discrimination by state enactment is a matter left open by the United States Constitution, but it did not question the authority of the state court to challenge the constitutionality of its state constitution.19

In a 1965 case,20 the Supreme Court reversed the decision of the Supreme Court of Texas and declared unconstitutional a provision of the Texas constitution permitting a serviceman to vote only in the county where he resided at the time of his entry into the service. The Court did not, however, comment on the authority of the Texas court to rule on the federal constitutional question.

The absence of such comment perhaps inferentially supports the Lance majority's assertion of authority and the Supreme Court has, by dicta, commented with approval on the distribution of federal questions between state and federal tribunals. In Robb v. Connolly,21 the Court placed upon both judicial systems the obligation of enforcing rights guaranteed by the United States Constitution, irrespective of any provision in the laws or constitution of a particular state.

State supreme court cases on federal constitutional questions are more numerous. Closely related to Lance are The Homestead Cases,22 three cases which arose from article XI, section 1 of the Virginia constitution and chapter 157 of the Act of June 27, 1870 (passed in pursuance of the constitutional provision). The Virginia Court of Appeals ruled that the constitutional provision and statute, which granted a two thousand dollar exemption of the property of every debtor, to be in violation of article VIII, section 10 of the United States Constitution, which prohibits a state from passing a law impairing the obligation of contract. The Virginia court upheld the power of a state supreme court to declare unconstitutional a state constitutional provision.

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18*Id. at 378.
19*Id. at 396.
21111 U.S. 624, 637 (1884).
2263 Va. (22 Gratt.) 266 (1872).
The supreme courts of Colorado, Oregon and California have also upheld their authority to adjudicate federal constitutional questions. The Colorado court has declared the determination of federal constitutional questions to be a duty which the people of Colorado cannot abrogate by constitutional provision or otherwise. The Oregon court has ruled that the prohibition against the impairment of the obligation of contract applies to an amendment to a state constitution as well as to the passage of a state law. The California court, recognizing the supremacy clause, concluded that a state constitutional provision must necessarily yield to the "supreme law of the land".

The determination of the fourteenth amendment issued by the West Virginia court does not preclude federal review. Such power of review was initially established by Marbury v. Madison, which confirmed the federal courts' authority to determine the constitutionality of federal laws, and Martin v. Hunter's Lessee, which extended federal appellate review to cases pending in state courts. The appellate rule laid down in Murdock v. City of Memphis authorizes the Supreme Court to determine if a state court erroneously decided the federal question. If the federal question either controls the entire case or the state court's decision on state issues is not sufficient to sustain its judgment, the Supreme Court is empowered to reverse the judgment and render the correct one or remand the case to the state for further proceedings.

Fay v. Noia established the principle that federal courts are not without power to grant habeas corpus relief to an applicant after the state court has decided the federal question on the merits against the applicant. Nor are federal courts without power to grant habeas corpus relief to an applicant whose federal claims would not be heard on direct review because of a procedural default furnishing an adequate and independent ground of state decision. A litigant's procedural defaults in a state proceeding will not pre-

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22People v. Western Union Tel. Co., 70 Colo. 90, 193 P. 146 (1921).
23Haberlach v. Tillamook County Bank, 134 Ore. 279, 298 P. 927 (1930).
2614 U.S. (1 Wheat.) 575 (1816).
2725 U.S. (20 Wall.) 559 (1875).
28372 U.S. 391 (1863).
29Id. at 434.
vent vindication of his federal rights unless the state's compliance with its procedural rule serves a legitimate state interest.\(^{31}\)

The dissenting opinion in *Lance* denied that the one person, one vote principle could be applied to the circumstances there because the election involved was a revenue bond election and not an election of a governmental representative and because there was no question of apportionment on a population basis: each person voting in the Roane County election cast one vote, which was counted as one vote. According to the dissent the issue of the case was simple: the plaintiffs, as affirmative voters, did not poll enough votes to win the election.

A discussion of the merits of the controversy and the application of the one person, one vote principle is found in a comment in this volume on the majority opinion. While it is presumptuous to speculate on Judge Haymond's philosophical inclinations and the motivation behind his attack on the majority's decision, one senses that underlying his substantive argument is a concept of judicial power which denies the justiciability of such basically political questions: such issues are better left to the determination of the electorate, which in 1966, by a vote of 212,883 to 206,542, defeated an amendment which would have removed the sixty percent requirement. This line of thinking is similar to that of Justice Harlan, who wrote in his dissenting opinion in *Wesberry v. Sanders*:\(^{33}\)

This Court, no less than all other branches of the Government is bound by the Constitution. The Constitution does not confer on the Court the blanket authority to step into every situation where the political branch may be thought to have fallen short. The stability of this institution ultimately depends not only upon its being alert to keep the other branches of government within constitutional bounds but equally upon recognition of the limitations on the Court's own functions in the constitutional system.

II The Separability Issue

The majority of the court found only that the sixty percent requirements of article X, section 1 and 8 of the West Virginia con-

\(^{32}\)52 West Virginia Bluebook 350 (1968).
\(^{33}\)376 U.S. 1, 48 (1963).
stitution and chapter 11, article 8, section 16 and chapter 13, article 1, sections 4 and 14 of the West Virginia Code violate the equal protection clause of the United States Constitution and are therefore unconstitutional and unenforceable. In a motion to intervene as additional parties defendant, the intervenors contended that the sixty percent requirements are inseparable from the remainder of the provision: thus the entire bond issue and excess levy procedure would be invalid. There is ample precedent in West Virginia in support of the separability of a statute.24 There is no precedent on the separability of a constitutional provision, since up to this time no constitutional provision has been declared invalid.

The general test is whether the constitutional part of the statute can stand alone, independent of the unconstitutional part, capable of being enforced in accordance with the legislative intent.25 If the general purpose of the statute is not dependent upon the unconstitutional provision, the statute is separable.26 To invalidate the entire clause, substantially all of the act would have to be unconstitutional.27 The United States Supreme Court has stated


26 See County Court v. Painter, 123 W. Va. 415, 15 S.E. 2d 396 (1941).

that separability applies as well to separable provisions of a single section of a statute.\textsuperscript{38}

The West Virginia Supreme Court of Appeals has liberally interpreted separability cases. In State v. Miller,\textsuperscript{39} the court separated an obscenity statute and ruled that it was unconstitutional only insofar as the statute undertook to establish an improper standard. The court has also established the principle that a statute may be unconstitutional in its application to part of the subject matter and valid as to the remainder, and it may be constitutional in operation with respect to one set of facts and not to another.\textsuperscript{40}

From a purely pragmatic standpoint, the court has no alternative but to rule the sixty percent requirement separable from the rest of the provisions. To invalidate the entire provision would be to invalidate the entire bond issuance procedure. The consequences, in terms of existing bonds and levies and the general financial integrity of the State of West Virginia, would be to say the least, disastrous.

\section*{III Implications}

The implications of the Lance decision are obviously far-reaching. The dissenting opinion suggests that all other constitutional provisions requiring a two-thirds or a three-fourths vote for approval are therefore logically invalid. However, six of the seven examples cited concern the internal rules of the Legislature and are not questions on which the general electorate would be entitled to vote.\textsuperscript{41} The minority also cited article X, section 7 of the West Vir-

\begin{itemize}
\item \textsuperscript{38}Berea College v. Kentucky, 211 U.S. 45 at 45 (1908): The same rule that permits separable sections of a statute to be declared unconstitutional without rendering the entire statute void, applies to separable provisions of a section of a statute.
\item \textsuperscript{39}45 W. Va. 59, 112 S.E.2d 472 (1960).
\item \textsuperscript{40}Harbert v. County Court, 129 W. Va. 54, 39 S.E.2d 177 (1946).
\item \textsuperscript{41}A two-thirds vote by the Senate is necessary to convict in an impeachment proceeding. W. Va. Const. art. IV, § 9; The Governor must convene the Legislature on written application by three-fifths of the members of each house. W. Va. Const. art. VI, § 19. During the thirty day session, the Legislature may, by motion adopted by two-thirds of the members of each house, include for consideration such business as it may itself propose; all regular sessions may be extended by concurrence of two-thirds of the members of each house. W. Va. Const. art. VI, § 22; In case of urgency, a four-fifths vote of the members present will pass a bill without its being read on three different days. W. Va. Const. art. VI, § 29; A two-thirds vote by each house will waive the ninety day period between the passage of an act and the date of its effect. W. Va. Const. art. VI, § 30; a two-thirds vote by each house will place a proposed constitutional amendment in the journal. W. Va. Const. art. XIV, § 2.
\end{itemize}
Virginia constitution, which requires a three-fifths vote by a county electorate to increase the aggregate tax assessment.

Statutory provisions which establish three-fifths requirements have greater implications. Sixty percent approval is required to authorize the county court to issue bonds and to increase the levies.\textsuperscript{42} Chapter 8 of the Code, which sets forth the municipal corporation system, contains two sixty percent provisions which give some indication of the impact of Lance on municipal elections. Sixty percent approval is required to authorize a municipal corporation to issue bonds for the improvement and reimprovement of streets, sidewalks and sewers.\textsuperscript{43} The governing body of any "Class III city" or "Class IV town or village" is prohibited from disposing of the municipal waterworks without the approval of sixty percent of the electorate.\textsuperscript{44} The application of the Lance principle to the innumerable municipal revenue elections would change the complexion of West Virginia municipal government.\textsuperscript{45} A conceivable argument is that Lance may be extended to the fundamental election procedure of West Virginia. A plurality is sufficient to nominate and elect; West Virginia has no provision for run-off primary and general elections.\textsuperscript{46} Hypothetically, a candidate who receives only a fraction of a percent more than one-fourth or one-fifth (depending on the number in the race) of the total votes cast may be nominated and subsequently elected. In reality, this is minority rule: a candidate who is supported by substantially less than half of the electorate may be placed in office. Viewed from another standpoint, in a three

\textsuperscript{43}W. Va. Code ch. 8, art. 18, § 16 (Michie 1969).
\textsuperscript{44}W. Va. Code ch. 8, art. 19, § 2 (Michie 1969).
\textsuperscript{45}It might be noted that the West Virginia constitution and Code contain more electoral provisions requiring majority approval than approval by two-thirds or three-fifths. The Governor's nomination and a majority vote of the Senate is sufficient to fill a vacancy in non-elective offices. W. Va. Const. art. VII § 9. A new school district will be created if a majority of the voters voting on the question approve. W. Va. Const. art. XII, § 10. The amendment procedure provides that an affirmative vote by a majority of the members of the Legislature or a majority of those voting in a referendum is sufficient to call a constitutional convention and approval by a majority of those voting in a referendum is sufficient to ratify an amendment. W. Va. Const. art. XIV, §§ 1, 2. A majority vote is sufficient to authorize the issuance of bonds for municipal park facilities. W. Va. Code ch. 61, art. 10, § 28 (Michie Supp. 1969).
way race, sixty-six percent of those voting may vote against candidate X and only thirty-four percent for him, yet he is nominated. In effect, it can be argued this system dilutes the "negative" vote and weights the "affirmative" vote in a manner similar to that in a sixty percent requirement election.

Such a situation obviously occurs most frequently in a partisan primary, where three, four and five man races are a regular occurrence. Its impact obviously extends to the general election: returning to the hypothetical three-way race, two candidates nominated by thirty-four percent of the party members voting in the primary run against each other, resulting in the election of a candidate who is at best the second choice of a bare majority of the general electorate.

The "negative" vote would be further diluted by the inclusion of additional candidates in the general election race. The West Virginia Code authorizes the nomination of candidates by citizens having no political party by the filing of a certificate with the Secretary of State. In a multi-candidate general race the possibility of a "minority" officeholder is more apparent. It is unlikely that one candidate would receive a majority. The "affirmative" vote would be weighted in direct mathematical proportion to the number in the race. The run-off election system, which requires a run-

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"The statutory requirement is that a certificate bear signatures equal to at least one percent of the entire vote cast in the last preceding general election for the office in the political subdivision for which the nomination is to be made. W. Va. Code ch. 3, art. 5, § 23 (Michie 1966). W. Va. Code ch. 3, art. 5, § 22 (Michie 1966) provides that any political party which polled less than ten percent of the total vote cast only for governor at the general election immediately preceding may nominate a candidate by party convention.

The Supreme Court has however, demonstrated in Fortson v. Morris, 385 U.S. 291 (1966), its unwillingness to interfere with the method of election of a governor. In a five to four decision, the Court upheld a Georgia constitutional provision which authorized the selection of Georgia's governor from the two candidates receiving the most votes by a majority vote of the Georgia General Assembly, provided no candidate received a majority in the general election.

The Court had previously ruled in Toombs v. Fortson, 384 U.S. 210 (1966), that the Georgia Legislature was malapportioned, but had specified that the Legislature could continue functioning until May 1, 1968. The Court reasoned that in the absence of a federal constitutional provision prescribing how a state must select its governor, the Georgia Legislature, although concededly malapportioned, was authorized to act.

Justice Fortas, although vigorously dissenting from the Court's decision, impliedly upheld the plurality system. "The candidate receiving more votes than any other must receive the office unless he is disqualified on some constitutionally permissible basis, or unless, in a run-off or some type of election, the people properly and regularly, by their votes, decide differently." Fortson v. Morris, 385 U.S. 231, 250 (1966).
off between the top two vote getters if no candidate polls a majority, alleviates the problem to some extent by giving the voters an alternative choice.

These possible applications of the Lance principle occur in West Virginia: obviously these extensions of the rule will profoundly affect the state's electoral processes. The ultimate national effect of the Lance decision will depend on the action taken by the United States Supreme Court in the event of review. However, even if certiorari is denied, it is reasonable to assume that the case will lead to a flood of litigation.

Diana Everett

Constitutional Law—Procedural Due Process Application To Pre-Judgment Garnishment

Christine Sniadach was a mill worker employed at a salary of $63.18 per week. The complainant, Family Finance Corporation of Bay View, alleged a claim of $420 on a promissory note, and instituted an action against her in the Wisconsin courts. Taking advantage of the Wisconsin garnishment laws, Family Finance proceeded to have her wages frozen pending disposition of the suit. Mrs. Sniadach sought to have the pre-judgment proceedings dismissed on the ground that they deprived her of property without satisfying due process requirements of the fourteenth amendment. The county court found, however, that the pre-judgment garnishment procedure satisfied the requirements for due process. After the decision was affirmed by the circuit court and the Supreme Court of Wisconsin, Mrs. Sniadach petitioned the United States Supreme Court for certiorari.


In the Sniadach decision, the Supreme Court emphasized that in extraordinary situations certain summary proce-