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Municipal Bonds and Tax Levies—Referendum—Application of the "One Person, One Vote" Principle—Lance v. Board of Educ.

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available as an effective means of eliminating or reducing the use of threats of cancellation to prevent testimony in a malpractice action.

Thus, the decision in *L'Orange* may be considered significant only in the sense that it provides relief for a doctor whose malpractice insurance has been cancelled because of his willingness to testify. The case may also deter an insurance company's unrestrained use of cancellation, and may be useful in the obtaining of an injunction. It does not, however, provide a clear and effective means of eliminating such attempts to suppress evidence on the part of insurance companies.

The scope of this problem and the apparent inability of the courts to devise adequate solutions indicate the need for either administrative or legislative action. Although malpractice insurance companies must have some discretion in cancelling the policies of competent physicians,[50] certain basic measures should be adopted to prevent insurance companies from threatening potential doctor-witnesses. The use of broad provisions allowing the insurer to cancel at any time during the term of the policy must be modified. This could be accomplished either by specifying grounds for cancellation, or by including a provision stating that cancellation or the threat of cancellation to prevent the insured doctor from testifying shall be deemed a breach of the contract on the part of the insurer; liquidated damages for the breach also should be stipulated. Premiums should be regulated so that the threat of rate increases will not be substituted for the threat of cancellation. A practicing physician should be able to buy adequate liability insurance at a reasonable rate, and insurance companies are entitled to reasonable profits, but discriminatory rate increases to prevent testimony should be eliminated.

The increase in malpractice litigation, arising out of the ever-expanding demand for medical services, and the difficulty experienced by plaintiffs in securing expert testimony demand thorough investigation of malpractice insurance practices. The enactment of comprehensive regulatory legislation would help to insure the continued vitality of medical practice and the integrity of the judicial process in malpractice suits.

EDWARD P. DOHERTY

Municipal Bonds and Tax Levies—Referendum—Application of the "One Person, One Vote" Principle—*Lance v. Board of Educ.*[1] At a special election called by the Board of Education of Roane County, West Virginia, more than 51 percent of those voting approved proposals calling for the issuance of municipal bonds and the levy of additional taxes to finance school repairs and other neces-

[50] See Sanders, Money Well Spent, Trial, Feb.-Mar., 1970, at 16, where the author stated: "One insurance executive stated recently that nationally 22 companies have withdrawn from writing medical malpractice insurance because of excessive losses."

[1] — W. Va. —, 170 S.E.2d 783 (1969).

sary capital expenditures.[2] However, the West Virginia Constitution requires that such bond proposals be approved by more than 60 percent of the participating voters for passage and, therefore, the proposals were defeated.[3] On appeal from an action for declaratory judgment brought by voters in the unsuccessful majority, the Supreme Court of West Virginia HELD: the 60 percent requirement of the state constitution is in violation of the equal protection clause of the fourteenth amendment of the United States Constitution.[4] By requiring approval of three-fifths of the persons voting, the votes of the majority were diluted and debased, because two negative votes had the same effect on the outcome of the election as did three positive votes.

The Supreme Court of the United States has stated that not only does a citizen have the right to vote,[5] but that this right includes the

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[2] The bonds, in the amount of $1,830,000, were to be issued for the purposes of alleviating overcrowded classrooms and school facilities, removing fire hazards, providing more adequate and modern vocational and educational facilities, and meeting the needs of disadvantaged children. Id. at —, 170 S.E.2d at 785.

[3] W. Va. Const. art. 10, § 1 states:

> Subject to the exceptions in this section contained, taxation shall be uniform throughout the State, and all property, both real and personal, shall be taxed in proportion to its value to be ascertained as directed by law. . . . [T]he 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 per cent of the qualified voters shall favor such increase. . . .

W. Va. Const. art. 10, § 8 states:

> No county, city, school district, or municipal corporation, except in cases where such corporations have already authorized their bonds to be issued, shall hereinafter 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. . . . [N]o 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. § 11-8-16 (1966) states:

> 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 per cent of the voters cast their ballots in favor of the additional levy, the local levying body may impose the additional levy. . . .

W. Va. Code Ann. § 13-1-4 (1966) states:

> 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 (1966) states:

> 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] Lance v. Board of Educ., — W. Va. —, 170 S.E.2d 783, 791 (1969).

[5] Ex parte Yarbrough, 110 U.S. 651 (1884). This decision held that there is a federally protected right to vote in congressional elections, based upon art I, § 4 of the

right to have that vote counted.[6] The Court has also held that this right cannot be denied or diluted,[7] either by alteration of ballots[8] or by "stuffing" the ballot box with fictitious ballots.[9] The rule that every vote must be counted equally, and that votes of citizens who reside in one area cannot be given more weight than those from another area, has become known as the "one person, one vote" doctrine. This doctrine was developed in a series of cases dealing with election of government representatives and the apportionment of election districts. The *Lance* decision extends the doctrine by applying it to tax and bond referenda. However, since the cases in which the "one person, one vote" doctrine was developed are distinguishable on several grounds from the present case, *Lance* is an unwarranted extension of this principle.

The "one person, one vote" doctrine was originally developed in response to the problem of equality of apportionment of congressional districts. In *Baker v. Carr*[10] the Court determined that the apportionment of such districts may be challenged in federal court on the basis that it results in the dilution of votes. This principle was applied in *Wesberry v. Sanders*,[11] where the Court held that congressional districts had to be drawn so as to represent equal numbers of persons to ensure equality of voting power throughout the state. Other decisions have applied the same principle to election districts of state legislators[12] as well as for local government officials such as county board members.[13]

The "one person, one vote" rule also means that a "unit" system for compiling votes cannot be used to defeat equality of voting power. In *Gray v. Sanders*[14] the Court focused its attention upon a primary election for United States Senator. To determine the winning candidate, each county was given one vote, regardless of the size of its population. The Court held that as the counties were not composed of equal numbers of voters, this method denied the individual voter the right to have his vote counted equally with all other votes cast, and that the total state-wide vote, and not the outcome in each county, should have been the determining factor in the election. The Court stated:

> Once the geographical unit for which a *representative* is to be chosen is designated, all who participate in the elec-

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Constitution of the United States. In Reynolds v. Sims, 377 U.S. 533, 554 (1964), the Supreme Court stated that there is also a constitutionally protected right to vote in state elections.

6 United States v. Mosley, 238 U.S. 383 (1915).

7 Guinn v. United States, 238 U.S. 347 (1915).

8 United States v. Classic, 313 U.S. 299 (1941).

9 United States v. Saylor, 322 U.S. 385 (1944).

10 369 U.S. 186 (1962).

11 376 U.S. 1 (1964).

12 Reynolds v. Sims, 377 U.S. 533 (1964).

13 Avery v. Midland County, 390 U.S. 474 (1968).

14 372 U.S. 368 (1963).

> tion 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 geographic unit. This is required by the Equal Protection Clause of the Fourteenth Amendment.[15] (Emphasis added.)

While these decisions appear to support the basic rationale of the *Lance* decision, that votes of equally situated persons may not be diluted so that they have unequal effect on the outcome of an election, there are two fundamental bases of distinction. First, *Baker, Wesberry,* and *Gray* involved dilution of voting strength resulting from the voters' residence in unequally constituted sub-units of a larger geographic unit. The essence of the holdings in these cases is that equal representation of voters cannot be avoided by dividing a larger unit into unequally populated smaller units, each to elect one representative. Thus, the Court in *Reynolds v. Sims* stated:

> [I]f a State should provide that the votes of citizens in *one part of the State* should be given two times, or five times, or 10 times the weight of votes of citizens in another part of the State, it could hardly be contended that the right to vote of those *residing in the disfavored areas* had not been effectively diluted . . . . Of course, the effect of . . . legislative districting schemes which give the same number of representatives to unequal numbers of constituents is identical . . . . *Weighting the votes of citizens differently,* by any method or means, *merely because of where they happen to reside, hardly seems justifiable.*[16] (Emphasis added.)

In *Lance,* dilution by residence as defined in the earlier decisions was not at issue, as all qualified voters within one individual county were eligible to vote, and there was no combination or comparison of these votes with votes from other counties. Thus, the site of the voters' residence did not in itself determine the weight given to a particular vote.

The second basis upon which the *Lance* decision can be distinguished is that each of the earlier cases involved the election of governmental representatives. *Lance,* however, involved a completely different type of election, a referendum. The court, not recognizing this distinction, interpreted the word "representation" to include both types of election in its attempt to reconcile its decision with the prior cases. It is submitted, however, that this was incorrect, as a referendum election differs fundamentally from a general election of governmental representatives.

If citizens do not have the opportunity to participate directly in government but, rather, participate through elected representatives,

[15] Id. at 379.

[16] 377 U.S. at 562-63.

then the "one person, one vote" cases hold that it is a denial of equal protection to permit one representative to speak for fewer persons than does another. Thus, in this initial phase of policy making every voter must have the opportunity to participate equally with all other voters.

The "one person, one vote" doctrine, however, has never been applied to the second level of the representative process, that is, the level at which the elected representatives make the actual decisions effecting government policy. While each representative has one vote, some measures may require the approval of more than 50 percent of the representatives. No provision of the United States Constitution has ever been held to bar such requirements. It is this second level process, in which representatives participate directly in governmental decisions, that is comparable to decision making by referendum. In the latter, voters have a direct voice in the decision to be made.

The *Lance* court, however, erroneously equated the act of electing representatives to make governmental decisions with the act of voting in a referendum. In reaching its result, the court relied upon that portion of Article 2, Section 4 of the West Virginia Constitution which states: "Every citizen shall be entitled to *equal representation* in the government . . . ."[17] (Emphasis added.) On the basis of this clause the court observed:

> The West Virginia constitutional . . . provisions for the holding of elections by which voters may determine whether bonds shall be issued and whether extra levies of taxes shall be made represent some of the very few instances in which *the individual voter is permitted to have a direct and wholly effective voice in government.*[18] (Emphasis added.)

However, article 2, section 4 was, to some extent, misconstrued by the court, for taken in its entirety the section deals not with equality of direct participation in policy making, but rather with equal representation in the legislature. In full the section states: "Every citizen shall be entitled to equal representation in the government, and, in all apportionments of representation, equality of numbers of those entitled thereto, shall as far as practicable, be preserved."[19] It is submitted that the language of this section cannot be reasonably construed to require that in a direct referendum every vote must be counted so that a simple majority will determine the outcome. The section is intended to apply only to the initial election of representatives, and not to the question whether there should be complete equality on the part of voters directly participating in policy making.

The *Lance* court relied in part upon a case that involved a referendum rather than an election of representatives. However, that

[17] — W. Va. at —, 170 S.E.2d at 786.

[18] Id. at —, 170 S.E.2d at 787.

[19] W. Va. Const. art. 2, § 4.

decision, *State ex rel. Witt v. State Canvassing Bd.*[20] does not support the holding in *Lance* because the circumstances of the case make it more analogous to the "residence" aspect of the "one person, one vote" cases than to the direct referendum in *Lance*.

The *Witt* case involved the constitutionality of a provision that adoption of an amendment to the state constitution required the approval of two-thirds of the participating voters of each county.[21] The Supreme Court of New Mexico held that this provision violated the equal protection clause of the fourteenth amendment of the United States Constitution. The decision was based upon the reapportionment cases, all of which dealt with voting for legislative representatives. Recognizing this as a possible basis for distinguishing the earlier cases and thus as a source of potential criticism of its decision, the court stated: "We can see no rational basis to distinguish between voting on representatives in the legislature, and voting on constitutional amendments. One is no more a necessary ingredient of our democratic process than the other."[22] However, this decision is merely an extension of the earlier reapportionment cases in that it invalidates a provision designed to grant equal influence on the outcome of an election to geographical districts composed of unequal numbers of people. As has been shown, this principle is distinguishable from the one at issue in *Lance*, thus, the decision would seem to be inapplicable to the case.

In addition to the invalidated provision, the New Mexico Constitution required approval by three-fourths of the voters of the entire state for passage of the proposed amendment. The *Witt* case held that this meant 75 percent of those voting on the particular proposal. Because more than 81 percent of those voters approved the amendment, the constitutionality of the provision was not challenged. However, this requirement is directly analogous to the 60 percent requirement in *Lance* as both demanded approval by more than a simple majority throughout the geographic area involved. Commenting upon the three-fourths requirement the court stated: "No serious attack is made on the constitutionality of this provision."[23] This may be interpreted as indicating that such a requirement was not viewed by the court to be in conflict with the "one person, one vote" principle.

In support of its position that the "one person, one vote" doctrine is generally applicable to referendum elections, the *Lance* court cited two recent United States Supreme Court decisions, *Kramer v. Union Free School Dist. No. 15*[24] and *Cipriano v. City of Houma*.[25] *Kramer* involved the constitutionality of a state law limiting the

[20] 78 N.M. 682, 437 P.2d 143 (1968).

[21] The two-thirds requirement applied only to amendments affecting provisions as to the elective franchise or education. The proposed amendment at issue here provided for absentee voting. Id. at 685, 437 P.2d at 146.

[22] Id. at 689-90, 437 P.2d at 150-51.

[23] Id. at 690, 437 P.2d at 151.

[24] 395 U.S. 621 (1969).

[25] 395 U.S. 701 (1969).

franchise in elections dealing with school affairs in certain school districts to parents or guardians of school children, and to owners or lessees of taxable property and their spouses. The state alleged it could limit the franchise to those "primarily interested" in the outcome of such elections.[26] In *Cipriano* the statute in question permitted only taxpayers owning property to vote in elections called to determine whether municipal bonds should be issued. Both restrictions were held to be unconstitutional as a denial of voting rights to particular classes of individuals on the basis of interest in the outcome of the election.[27] These decisions involving voter qualifications or exclusions, however, are distinguishable from the situation in *Lance*, which involved the percentage of qualified votes required for passage of a referendum. That is, all voters otherwise qualified to vote in federal, state, and county elections could vote in the special election in *Lance*; the issue was whether the weight of the votes cast had to be equal.

Although the *Kramer* and *Cipriano* decisions may be distinguished from *Lance*, they both refer to the idea that a "compelling state interest" must be demonstrated to sustain the exclusion of otherwise qualified voters.[28] Applying such a test[29] to the 60 percent requirement at issue in *Lance*, the West Virginia court might have discerned reasons for upholding the election and statutes, and thus for finding that the requirement did not violate the equal protection clause.

In requiring approval by 60 percent of the voters, the West Virginia legislature appears to have desired to protect municipalities and counties from undertaking additional financial burdens without first determining that more than a majority of its taxpayers, the persons to bear the additional burden, approved the proposal. The seriousness of undertaking such burdens and the need for the state to protect itself and its political subdivisions from financial overextension could be precisely the type of "compelling interest" that a state would have to demonstrate in order to avoid violating the equal protection rights of voters. That is, the nature of the issues involved in levying additional taxes might be such as requires some form of protection for taxpayers as is embodied in the constitutional provisions requiring 60 percent approval. However, the court apparently took a contrary view, stating: "We are unwilling to concede that a determination of issues such as those involved in this case cannot be safely entrusted to a majority of the voters."[30]

If the "compelling state interest" theory is correct, it would not be reasonable to assert, as did the *Lance* court, that equal protection of voters is absolute and must be applied to all situations. The statement in *Gray v. Sanders* that "once the class of voters is chosen and

[26] 395 U.S. 621, 631.

[27] Id. at 632; 395 U.S. 701, 706.

[28] 395 U.S. 621, 627; 395 U.S. 701, 704.

[29] The *Kramer* and *Cipriano* cases do not define what constitutes a "compelling state interest," so there is no guideline for applying the doctrine in the present situation.

[30] — W. Va. at —, 170 S.E.2d at 791.

their qualifications specified, we see no constitutional way by which equality of voting power may be evaded,"[31] was interpreted as meaning that nothing other than a simple majority can be required for passage of a proposal put before qualified voters at a general or special election, particularly when a referendum is involved.

While equal protection of voting rights has been extended beyond the initial protection against discrimination when voting in a federal election, the *Lance* situation presents, for the reasons expressed above, an unwarranted extension of the "one person, one vote" doctrine. The West Virginia court, seemingly anxious to validate the appropriation of funds for badly needed school repairs, was willing to accept the principles of a line of cases only superficially analogous, without demonstrating concern for the possible consequences that could arise from its broad pronouncements. If carried to its logical conclusion, the *Lance* decision would result in applying the "one person, one vote" doctrine to invalidate all but majority rule in all types of elections, a result which the "one person, one vote" cases do not require.

SUSAN J. SELVERN

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[31] 372 U.S. at 381.