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from another state. Furthermore, on numerous occasions when the actual operations test has been applied, the courts have pointed out that their acceptance of the actual operations test is not a rejection of the applicability of the nerve center test under appropriate circumstances—when the activities of the corporation are scattered among many states.[39] Thus considering the manner in which the courts have applied the bankruptcy tests so far, it is arguable that when the corporation is concentrated in one state, the actual operations test will be applied, but in cases in which the corporate assets are dispersed among many states, the home office or nerve center test will be invoked.

It is still too soon, however, to ascertain whether this preliminary test will continue to be utilized to determine which of the bankruptcy tests will be applied. It is hoped that through continual development of this preliminary test, some degree of certainty will be introduced into the method of determining a corporation's principal place of business.

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Federal Jurisdiction—Political Question—Non-Justiciability of State Reapportionments

In a recent decision,[1] the United States Supreme Court once again declined to consider a voting right case under the equal protection clause of the fourteenth amendment. In this case, however, the Court invoked its jurisdiction under the fifteenth amendment. The petitioners, all Negroes, alleged that an act of the Alabama legislature[2] was a device to disenfranchise Negro citizens in the Tuskegee, Alabama municipal elections and that enforcement of this act would deny to them their rights guaranteed under the equal protection clause of the fourteenth amendment and their right to vote under the fifteenth amendment.[3] The district court dismissed the action for lack of jurisdiction, stating that the question presented was of a political nature and thus not justiciable. This was affirmed by the court of appeals, but the Supreme Court reversed.

[39] *E.g.*, Gilardi v. Atchison, T. & S. F. Ry. 189 F. Supp. 82 (N.D. Ill. 1960); Webster v. Wilke, *supra* note 38.

[1] Gomillion v. Lightfoot, 364 U.S. 339 (1960).

[2] Ala. Acts 1957, No. 140.

[3] The petitioners alleged that the act changed the originally square shaped municipal boundary into a twenty-eight sided figure that was designed to and in fact did, eliminate all but three or four of the Negro voters from the town.

At first glance, this case would seem to be a direct reversal of a long standing rule, *i.e.,* federal courts have generally refused to consider cases involving gerrymandering.[4] Such cases have been held non-justiciable because they involve "political questions"—questions for determination by the legislature rather than the judiciary. The instant case is not actually a reversal, however, although it may represent a trend in the direction of enlarging the area considered justiciable. To perceive this clearly it is necessary to examine the language used by the Court in rendering its decision.

The Court supported its decision by saying that since the state's legislative power had been subjugated to the constitutional protection of the obligation of contracts,[5] it would seem that the federal constitution would also override the state's legislative power when its action conflicted with the provisions of the fifteenth amendment. This case was distinguished from other "political question" cases, however, on the grounds that the act in question was enacted clearly against the Negroes alone, and that it was the removal of an entire voting right.[6] Its applicability as judicial precedent, therefore, seems to be severely limited.

[4] South v. Peters, 339 U.S. 276 (1950); Colegrove v. Green, 328 U.S. 549 (1946); Radford v. Gary, 145 F. Supp. 541 (W.D. Okla. 1956); Perry v. Folsom, 144 F. Supp. 874 (N.D. Ala. 1956); Remmy v. Smith, 102 F. Supp. 708 (E.D. Pa. 1951). *But see* Smiley v. Holm, 285 U.S. 355 (1932), where redistricting acts were held invalid and mandamus issued ordering that the redistricting acts be disregarded and that the representatives be elected at large. See generally Notes, 29 N.C.L. REV. 72 (1950); 62 HARV. L. REV. 659 (1949). See also OHIO CONST. art. 11, §§ 1-11, which provides that reapportionment shall be made every ten years by a board composed of the Governor, Auditor of State and Secretary of State, thus giving the board no discretion. In State *ex rel.* Herbert v. Bricker, 139 Ohio St. 499, 41 N.E.2d 377 (1942), mandamus was issued compelling the board to reapportion as directed. See also Dyer v. Abe, 138 F. Supp. 220 (Hawaii 1956), which was distinguished on the grounds that it involved the Hawaii Organic Act.

[5] Graham v. Folsom, 200 U.S. 248 (1906); Shapleigh v. San Angelo, 167 U.S. 646 (1894); Mobile v. Watson, 116 U.S. 289 (1886); Mt. Pleasant v. Beckwith, 100 U.S. 514 (1879); Broughton v. Pensacola, 93 U.S. 266 (1876).

[6] In Lane v. Wilson, 307 U.S. 268 (1939), the Court held that if a person was denied the right to vote on the grounds of racial discrimination he had a cause of action for *damages.* This action was based on the fifteenth amendment and the Civil Rights Act, REV. STAT. § 1979 (1875), 42 U.S.C. § 1983 (1958). It must be noted that no mention was made here of an equitable remedy as was granted in the principal case. The general rule is that equitable remedies will be granted when there is no adequate remedy available at law. See MCCLINTOCK, EQUITY § 60 (1948). It would seem that the dimunition of a vote would be far more susceptible to an equitable remedy than a legal redress.

In a concurring opinion Mr. Justice Whitaker, supported by Justices Stewart and Douglas, stated that the decision should have been based on the fourteenth amendment. He contended that the Court had warped the clear meaning of the fifteenth amendment, which was intended simply to protect minorities from being denied the right to vote. In this case, he stated, there had been no denial of the right to vote. What had been denied was equal protection under the law which was protected by the fourteenth amendment.

Despite the limitation which seems to have been placed on this case by the majority, it takes on further meaning when considering its possible applications in future cases of unfair or unequal election districts. To appreciate the full ramifications, it is necessary to consider the historical background of the "political question" cases.

The first mention of the doctrine of a "political question" is found in the very early Supreme Court case of *Luther v. Borden.*[7] There it was held that for the Court to decide which of two governments was in force in the state of Rhode Island at a particular time, would result in the Court's entering into a matter solely within the domain of the legislative and executive branches of the government. This was held notwithstanding one of the governments in question was republican in form and the other was not, and even though the United States Constitution provided that a republican form of government was guaranteed to the people of the United States.[8] Another strong pronouncement of this policy is found in *Pacific States Tel. & Tel. Co. v. Oregon.*[9] In this instance the Court refused to rule on the manner in which a tax statute, which was extremely burdensome to the petitioner, was enacted, implying that the Court had no power to question the sovereign will of the people.[10]

The theory intrinsic in the doctrine of the non-justiciable political questions is necessarily intertwined with the doctrine of "separation of powers." If the courts were to assume jurisdiction over matters

[7] 48 U.S. (7 How.) 1 (1849).

[8] U.S. CONST. art. IV, § 4: "The United States shall guarantee to every state in this union a republican form of government. . . ."

[9] 223 U.S. 118 (1912).

[10] *Id.* at 123. The petitioner attacked the statute on the ground that it was passed by a state government that was not republican in form, *i.e.,* that the actions of initiative and referendum violated the constitutional guarantee of a republican government as set out in U.S. CONST. art. IV, § 4. The Court held that where it is alleged that an act of a state legislature deprives a person of property, not because it deprives him of due process of law, but because the government is not republican in form, the question is one of a purely political nature.

solely within the policy-making power of the legislature, they would be removing from the citizens their right to self-government through elected representatives. The courts, however, do possess the power, through judicial review, to examine legislative acts and determine whether they violate any of the fundamental rights guaranteed to the citizens.[11]

Standing alone, the fact that a state allows an unfair or unequally proportioned electoral system to exist would be beyond the bounds of judicial review.[12] In most of the states, however, there is a constitutional provision directing the periodic reapportionment of electoral districts.[13] Thus, despite the requirement of periodic reapportionment of election districts, the refusal of the courts to take judicial cognizance of the inaction of a state legislature after an initial apportionment results in a situation in which some people have greater voting power than others and the people possessing the lesser voting power not being given an equal opportunity to participate in self-government. In contrast, the courts have not failed to act in cases where the power of a state legislature has been *actively* used to produce an inequality in voting matters.[14]

Colegrove v. Green,[15] *MacDougall v. Green*,[16] and *South v. Peters*[17] are three cases which have been strongly relied upon by the courts in classifying reapportionment as a non-justiciable matter.[18] For this reason a brief summary of the facts and holdings in these cases is merited.

In *Colegrove*, the petitioners were asking that the officers of the state of Illinois be restrained from arranging for an election in which members of Congress were to be chosen pursuant to provisions of an Illinois law of 1901 governing congressional districts. They alleged

[11] Massachusetts v. Mellon, 262 U.S. 447, 448 (1923); United States v. Butler, 297 U.S. 1, 62 (1936).

[12] Snowden v. Hughes, 321 U.S. 1 (1943); Wood v. Broom, 287 U.S. 1 (1932); Radford v. Gary, 145 F. Supp. 541 (W.D. Okla. 1956); Perry v. Folsom, 144 F. Supp. 874 (N.D. Ala. 1951).

[13] *E.g.*, N.C. CONST. art. 2, §§ 4-5; S.C. CONST. art. 3, §§ 3-4; VA. CONST. art. 4, § 43.

[14] Carroll v. Becker, 285 U.S. 380 (1932); Koenig v. Flynn, 285 U.S. 375 (1932); Smiley v. Holm, 285 U.S. 355 (1932).

[15] 328 U.S. 549 (1946).

[16] 335 U.S. 281 (1948).

[17] 339 U.S. 276 (1950).

[18] See, *e.g.*, South v. Peters, 339 U.S. 276 (1950); Radford v. Gary, 145 F. Supp. 541, 544 (W.D. Okla. 1956); Perry v. Folsom, 144 F. Supp. 874, 876 (N.D. Ala. 1951); Remmey v. Smith, 102 F. Supp. 708, 710 (E.D. Pa. 1951).

that this was in conflict with the federal constitution and Illinois state law. In this case only seven Justices were sitting. Three called the matter non-justiciable because it was a political question. Three Justices were in favor of granting the petitioners' request for redistricting. In casting his tie-breaking vote, Mr. Justice Rutledge implied that he sided with the petitioners on the basic issue but thought that equitable discretion demanded leaving the problem to the legislature.[19]

In *MacDougall,* the petitioners were protesting a state law requiring a person who wanted to get his name on the ballot for state office to get a minimum number of signatures on his petition for nomination from a majority of the election districts. This was required even though eighty-seven per cent of the population was in less than half of the districts. Without discussing jurisdiction, the Court expressly decided the case on the merits for the defendants.[20]

In the *South* case the complaint was directed against the Georgia unit system which gives the residents of Fulton County an absurdly small voting power. The Court affirmed the dismissal of the action, stating that the "federal courts consistently refuse to exercise their equity powers in cases posing political issues arising from a state's geographical distribution of electoral strength among its political subdivisions."[21]

The *Colegrove* case should be inapposite as a precedent for classifying reapportionment as a non-justiciable matter since only three members of the Court felt that it presented a political question. Mr. Justice Rutledge's tie-breaking vote was not an endorsement of the opinion that a political question was presented; rather he voted for dismissal on the ground of equitable discretion and implied that a justiciable issue was presented. Moreover, the Court in *MacDougall* apparently ignored the jurisdictional question and rendered a decision on the merits of the case. As to the *South* case, Georgia has no provision calling for legislative action in relation to reapportionment.[22] Since the Constitution gives each state the power

[19] 328 U.S. at 564 (1946).
[20] 335 U.S. at 285 (1948).
[21] 339 U.S. at 277 (1950).
[22] The Georgia unit system provides that after each census the original apportionment shall be *automatically* changed to give the six counties having the largest population three representatives each; the twenty-six counties having the next largest population two representatives each; and the rest of the counties one representative each. The result of this system is that a county with 5,000 people has one representative and a county with 100,000 people has only three representatives.

to design its electoral system, there is no way to compare the Georgia situation with that which exists in the majority of states. It must be remembered that the courts have no power to make a law for a state in this area, but merely to see that the action of the law in practice does not deny individuals constitutionally guaranteed rights.[23]

It is submitted that the dissents of Justices Black in the *Colegrove* case, Douglas in the *South* case and Whitaker in the principal case are the better view. Mr. Justice Black stated that the condition which gave rise to the *Colegrove* case, *i.e.*, the refusal of the legislature to redistrict in the face of a mandate to do so, promoted a wholly indefensible discrimination against the petitioners in that case and all other voters in densely populated areas of that state.[24] Mr. Justice Douglas stated that the condition giving rise to the *South* case was a clear reduction of the right of a selective group of citizens to vote equally with the remainder of the electorate.[25] It is further submitted that the following line of cases supports the view of the dissenters.

In *Strauder v. West Virginia*[26] the question presented was whether Negroes could be systematically excluded from juries in the courts of that state. The Supreme Court held that a state was not required to give any rights to its citizens under the Constitution but that once a right was given, all citizens were to be given that right equally unless it could be removed from individuals for adequate reasons. It would seem that the voting power which is unconditionally guaranteed should be protected in the same manner. In *Nixon v. Herndon*[27] the right to vote in a primary was held to come under protection of the equal protection clause of the fourteenth amendment. In *United States v. Saylor*[28] active dilution of a citizen's vote was held to be a federal crime. In other words, one cannot stand by a ballot box and put in a vote for *X* every time somebody votes for *Y*. In an area where the voting districts are unfairly drawn, the same end is reached by giving a district of 100,000 the same number of electoral votes as a district of 10,000.

[23] See generally Comment, *Reapportionment: Is it Really A Political Question?*, 17 LA. L. REV. 593 (1956).
[24] Colegrove v. Green, 328 U.S. 549, 569 (1946) (dissent).
[25] South v. Peters, 339 U.S. 276, 278 (1950) (dissent).
[26] 100 U.S. 303 (1879).
[27] 273 U.S. 536 (1927).
[28] 322 U.S. 385 (1944).

Mr. Justice Frankfurter has condemned "sophisticated as well as simple-minded modes of discrimination."[29]

In *United States v. Mosely*[30] and *United States v. Classic*[31] it was held that the right to vote included the right to have the ballot counted. It would seem to be a logical extension of this to say that that protection should also cover the right to have one vote counted as much as the next. The Court has said that the fourteenth amendment "merely requires that all persons subjected to [state] legislation . . . be treated alike, under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed"[32] and that the fourteenth amendment "was designed to prevent any person or class of persons from being singled out as a special subject for discriminating and hostile legislation."[33]

Thus it would seem obvious that the passage of new legislation or continued enforcement of an old law effect the same result on a group of people within the meaning of the fourteenth amendment. It seems contradictory to say that the remedy for denial of equality in voting power is the assertion of a diluted voting power in the next election. It may be admitted that mere failure to reapportion election districts is non-justiciable. Nevertheless the enforcement of an outdated, unfair act should be subject to review for it clearly deprives the person affected of equal protection under the law. A thorough, straightforward look at the situation was presented by Judge McLaughlin:

> The time has come, and the Supreme Court has marked the way, when serious consideration should be given to a reversal of traditional reluctance of judicial intervention in legislative reapportionment. The whole thrust of today's legal climate is to end unconstitutional discrimination. It is ludicrous to preclude judicial relief when a mainspring of representative government is impaired. Legislators have no immunity from the Constitution. The legislatures of our land should be made as responsive to the Constitution of the United States as are the citizens who elect the legislators.[34]

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[29] Lane v. Wilson, 307 U.S. 299, 302 (1939).
[30] 238 U.S. 383 (1915).
[31] 313 U.S. 299 (1941).
[32] Hayes v. Missouri, 120 U.S. 68, 71 (1886).
[33] Pembina Mining Co. v. Pennsylvania, 125 U.S. 181, 188 (1888).
[34] Dyer v. Abe, 138 F. Supp. 220, 236 (Hawaii 1956).

The ills effectuated by the refusal of state legislatures to apportion when justice demands it are very similar to the ills which have been repeatedly redressed by the courts in the individual rights cases. It is possible that the Court has at last started to consider gerrymander cases in the light of the individual right decisions. It is submitted that the *Gomillion* case may well mean that the Court has decided that justice demands the granting of equitable remedies in these instances.[35]

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Insurance—Burden of Proof in Insurance Exception Clauses—Pleading

In *Muncie v. Travelers Ins. Co.*,[1] the plaintiff was injured while riding in the automobile of the insured. Eight months after the accident, the insured gave notice to the insurance company. The insurer denied liability under the policy due to the insured's failure to comply with a policy requirement for notification of loss within a reasonable time. The policy designated compliance with this requirement as a condition precedent to recovery. The plaintiff sued the insured and received a default judgment. The insurer knew of this suit but was not a party thereto. In the suit by the plaintiff against the insurer, the trial court instructed the jury that the burden of proof was on the insurer to show that notice had not been given within a reasonable time. This instruction was held error on appeal, the court holding that the notice requirement was a condition precedent to recovery by the insured, thereby placing the burden of proof of compliance with this requirement on the plaintiff.[2]

In reaching this result, the court distinguished the present case from *MacClure v. Accident & Cas. Ins. Co.*,[3] which indicated that noncompliance with a cooperation requirement in an insurance

[35] If the result of a judicial order enjoining the further operation of an archaic electoral district would be slight disorganization by the use of an "at large" electoral system in the next election, it must be answered that necessity will soon generate a newer, fairer and more workable system.

[1] 253 N.C. 74, 116 S.E.2d 474 (1960).

[2] In *Muncie* the plaintiff was the insured's judgment creditor. The court stated that as such he could have no greater right to recover from the insurer than the insured himself would have. *Id.* at 81, 116 S.E.2d at 479.

[3] 229 N.C. 305, 49 S.E.2d 742 (1948).