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CONSTITUTIONAL LAW-EQUAL PROTECTION CLAUSE-COUNTY UNIT VOTE

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CONSTITUTIONAL LAW—EQUAL PROTECTION CLAUSE—COUNTY UNIT VOTE—Plaintiffs brought an action against defendants, Chairman of the Georgia State Democratic Executive Committee and others, to restrain adherence to a state statute[1] providing that the County Unit Vote shall determine the outcome of a primary election. Under the statute each county is alloted a number of unit votes. The candidate receiving the highest popular vote in the county is awarded

[1] Ga. Code Ann. (1936) §34-3212 et seq.

the unit votes of that county. Plaintiffs, residents of the most populous county in the state, alleged that their votes had on an average but one-tenth the weight of those in the other counties in the state. From a judgment of the district court dismissing the petition, the plaintiffs appealed to the United States Supreme Court. In a per curiam opinion, *held*, affirmed, Justices Douglas and Black dissenting. Federal courts 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. *South v. Peters*, 339 U.S. 276, 70 S.Ct. 641 (1950).

The Georgia County Unit System of primary voting is a form of geographical discrimination which confers disproportionately greater political influence on voters in non-urban areas. In the extreme instance, the system so operates as to require 120 votes in one county in order to offset a single contrary vote in another.[2] In the past the Court has shown little hesitancy in striking down state voting classifications designed to perpetuate the political ascendancy of one race over another.[3] But where, as in the principal case, the controversy has been one of sectional influence or representation, the attitude of the Court has been most cautious.[4] *Colegrove v. Green*[5] was a suit to restrain state officials from proceeding to an election pursuant to a state law which marked out Congressional districts of grossly unequal population. There the dismissal of the complaint was affirmed on various grounds, including the doctrine of political questions, exclusive Congressional power to afford a remedy, and a want of equity. However, two years later in *MacDougall v. Green*,[6] where the plaintiffs sought to enjoin the enforcement of a state statute giving to voters in favored geographical areas a greater control over the initiation of new political parties, the Court entertained the case *on the merits*—in that respect running counter to its position in the *Colegrove* case—and ruled that the granting of preferred rights of initiative to thinly populated counties was allowable state policy in view of the greater practical opportunities available to urban counties in "exerting their political weight at the polls."[7] In that case the Court relied on the example of the disproportionate representation in the United States Senate to substantiate its conclusion that it was error to suppose that "political power is a function exclusively of numbers."[8] Thus, the *MacDougall* case, in approving judicially a method of dis-

[2] Principal case at 278.

[3] The cases are collected and discussed in "Negro Disenfranchisement—A Challenge to the Constitution," 47 COL. L. REV. 76 (1947), and comment, 15 UNIV. CHI. L. REV. 756 (1948).

[4] Although the County Unit System presents primarily an issue of sectional political influence, the racial aspect is also present. The dissenting justices noted that there is a heavy Negro population in urban centers and that only there have they been able to vote in important numbers. Principal case at 278.

[5] 328 U.S. 549, 66 S.Ct. 1198 (1946).

[6] 335 U.S. 281, 69 S.Ct. 1 (1948).

[7] Id. at 284. The suggestion has been made that the Court presumably had reference to the organizational advantages available to party leaders in urban areas. For comment and criticism, see note in 16 UNIV. CHI. L. REV. 499, 517 (1949).

[8] MacDougall v. Green, supra note 6 at 283.

tributing political strength on a geographical basis, to some degree drew this type of controversy within the competence of the Court. It is submitted that under the precedent of the *MacDougall* case the Court would have been on sound constitutional ground had it chosen to invalidate the Georgia statute in the principal case. A review of the County Unit Rule on its merits would indicate that citizens of the more populous counties of Georgia are subjected to an impairment of political rights of a nature similar to those proscribed in racial cases decided under the equal protection clause of the Fourteenth Amendment.[9] In both instances a dominant political element seeks by legislation, or other state action, to stem the tide of popular rule. It is true that had the principal case been considered on the merits, champions of the County Unit Rule might have found support in the rationale of the *MacDougall* decision. However, the basis of that decision would seem to warrant reexamination, for a democratic system of government presupposes that political power is indeed a function of numbers, except insofar as the Federal Constitution authorizes a departure in deference to state-federal relations.[10] Counties within a state are clearly inappropriate units for the application of non-numerical rule.[11] The Supreme Court, in refusing to exercise its power under the Fourteenth Amendment, has in effect instructed the plaintiffs that they must seek relief through the very political channels whose substantial foreclosure to them was the gravamen of their complaint.[12]

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[9] Supra note 3. Because the County Unit System is used in nominating Representatives and Senators for federal office, the system is also open to challenge under Art. I, § 2, and the Seventeenth Amendment of the Federal Constitution. See United States v. Classic, 313 U.S. 299, 61 S.Ct. 1031 (1941). If the majority of the Court in the principal case had been persuaded that the County Unit Rule was a telling device for racial discrimination, supra note 4, the appeal might have succeeded under the Fifteenth Amendment, which covers "sophisticated as well as simple-minded modes of discrimination." Lane v. Wilson, 307 U.S. 268 at 275, 59 S.Ct. 872 (1939).

[10] "The equal vote allowed in the Senate is . . . a constitutional recognition of the sovereignty remaining in the States and an instrument for the preservation of it." 1 STORY, COMMENTARIES ON THE CONSTITUTION, 5th ed., p. 519 (1905). See also THE FEDERALIST, No. 62 (Hamilton ed., 1864).

For strong judicial espousal of the principle that a state vote should not suffer dilution by reason of the locality in which it is cast, see Atty Gen. v. Suffolk County Apportionment Commissioners, 224 Mass. 598, 113 N.E. 581 (1916).

[11] Counties can lay no claim to sovereignty; they are merely political subdivisions created for administrative convenience within the state. Dineen v. City and County of San Francisco, 38 Cal. App. (2d) 486, 101 P. (2d) 736 (1940).

[12] A discussion of other cases in which the Georgia County Unit System has been questioned may be found in a note in 47 COL. L. REV. 284 (1947).