Brady[48] the Court held that the due process clause of the Fourteenth Amendment does *not* embody "an inexorable command that no trial for any offense or in any court, can be fairly conducted and justice accorded a defendant who is not represented by counsel." Under the rule of that decision due process is afforded to the defendant without supplying counsel for his defense when, in view of all the surrounding circumstances, the denial of counsel does not seriously prejudice his right to a fair hearing.[49] If a case should arise in which the state has fully complied with the federal standard as enunciated in the *Betts* case, yet has failed to comply with its own more rigorous standard, such a situation would provide an appropriate occasion to invoke the equal protection guarantee of the Fourteenth Amendment.[50] The previous extension of the clause to the analogous fact situation in the *Cook* case should prove to be a persuasive factor in inducing the courts to take this step.

The application of the equal protection clause to defects occurring prior to conviction, as in the right to counsel situation, would presumably not be rendered impotent by restrictions on the remedy available in the federal courts, since there can be no serious objection to invalidating a conviction *secured* by denying equality of treatment.

THE GERRYMANDER AND JUDICIAL ABSTENTION—AN IMPORTANT DISTINCTION BETWEEN POLITICAL QUESTIONS AND THE DISCRETIONARY POWER TO DENY EQUITABLE RELIEF

The right to effective participation in the selection of public officials is fundamental to a truly democratic system.[1] Historically, however, various political groups in the United States have succeeded in denying this right to certain elements of the population. This end has been attained chiefly

48. 316 U.S. 455 (1941).

49. *Id.* at 473.

50. Todd v. State, 226 Ind. 496, 81 N.E.2d 530 (1948), is just such a case according to the dissenting judges. See the dissenting opinions at 82 N.E.2d (1948) and 81 N.E.2d 784 (1948).

1. While this right is the foundation of our constitutional system it is qualified in certain respects. The states have the right to define who shall participate by the exercise of the franchise, U.S. CONST. ART. I, § 2, but their definition of the electorate must be in compliance with the Fourteenth and Fifteenth Amendments. Smith v. Allwright, 321 U.S. 649 (1944); Lane v. Wilson, 307 U.S. 268 (1939); Nixon v. Condon, 286 U.S. 73 (1932); Nixon v. Herndon, 273 U.S. 536 (1927). Thus, as stated in Wiley v. Sinkler, 179 U.S. 58, 62 (1900), "The right to vote for members of the Congress of the United States is not derived merely from the Constitution and laws of the State in which they are chosen, but has its foundation in the Constitution of the United States." And when the class who may vote has been defined by the state the members of the class must be treated equally in their exercise of the right. Smith v. Allwright, *supra*. Generally, see Note, *Negro Disenfranchisement—A Challenge to the Constitution*, 47 COL. L. REV. 76 (1947).

through disproportionate geographical distribution of voting strength,[2] which results in just as effective a denial of the ballot as would direct disenfranchisement. And at present there seems to be no remedy for those whose political rights are so obstructed.

The most obvious examples of geographical disparity have resulted from the population shift to urban areas. Any redistribution of political strength by equalizing representation in the legislature in conformance with the population shift would divest the rural elements of considerable political power. And for the most part this group has successfully thwarted attempts in the state and federal legislatures to alleviate the resulting disparity.[3] Failure by the proponents of change to procure legislative action has precipitated a number of attempts to obtain relief in the courts on constitutional grounds.[4] The courts, however, while refusing to find strict compliance with the spirit of the Fourteenth Amendment, frequently have sustained the constitutionality of statutes involving the geographical distribution of political strength within a state.[5] But even when the discrimination is admitted the courts usually have

2. Knowing the political predilictions of each locality, the dominant element may so tailor the districts that adverse votes will constitute ineffective minorities throughout the state or minimize the loss by concentrating unfriendly voters in a few sacrificial districts. The sacrificial district is drawn to include a much greater total population than "safe" districts. This method has been most widely used in congressional districting, with the result that in 26 states the largest district has from 150% to 88% more inhabitants than the smallest. Note, *Constitutional Right to Congressional Districts of Equal Population,* 56 YALE L.J. 127 (1946). See also Colegrove v. Green, 328 U.S. 549, 557-563 (1945); Holm v. Smiley, 184 Minn. 228, 238 N.W. 494 (1931), *rev'd,* 285 U.S. 355 (1932); GRIFFITH, RISE AND DEVELOPMENT OF THE GERRYMANDER (1907); SCHMECKEBIER, CONGRESSIONAL APPORTIONMENT 149-192 (1941).

3. Of the 31 states whose constitutions order periodic redistricting, only 14 have acted within the designated period and in six states no reapportionment has been made in 45 years. FARMER, THE LEGISLATIVE PROCESS IN ALABAMA: LEGISLATIVE APPORTIONMENT 4 (1944); Durfee, *Apportionment of Representation in the Legislature: A Study of State Constitutions,* 43 MICH. L. REV. 1091, 1104 (1945); Walter, *Reapportionment of Districts,* 37 ILL. L. REV. 20, 38 (1942). In Colegrove v. Green, 328 U.S. 549 (1945), complaint was made of an apportionment statute passed in 1901.

4. South v. Peters, 339 U.S. 276 (1950); Mac Dougal v. Green, 335 U.S. 281 (1948); Colegrove v. Green, 328 U.S. 549 (1945); Mahen v. Hume, 287 U.S. 575 (1932); Cook v. Fortson, 68 F. Supp. 624 (N.D. Ga. 1946), *aff'd mem.,* 329 U.S. 675 (1946); Turman v. Duckworth, 68 F. Supp. 744 (N.D. Ga. 1946), *aff'd mem.,* 329 U.S. 675 (1946). *But cf.* Smiley v. Holm, 285 U.S. 355 (1932). *Contra*: Gates v. Long, 172 Tenn. 471, 113 S.W.2d 388 (1938).

5. Illustrative of this is Mac Dougall v. Green, 335 U.S. 281 (1948), where the court stated: "It is clear that the requirement of two hundred signatures from at least fifty counties gives to the voters of the less populous counties of Illinois the power completely to block the nomination of candidates whose support is confined to geographically limited areas. But the State is entitled to deem this power not disproportionate. . . . It would be strange indeed, and doctrinaire for this Court, applying such broad constitutional concepts as due process and equal protection of the laws, to deny a State the power to assure a proper diffusion of political initiative as between its thinly populated counties and those having concentrated masses, in view of the fact that the latter have practical opportunities for exerting their political weight at the polls not available to the former." *Accord*: Grahame v. Special Comm'rs, 306 Mass. 237, 27 N.E.2d 995 (1940); Stenson v. Secretary of State, 308 Mich. 48, 13 N.W.2d 202 (1940) (apportionment of seats in state legisla-

refused to intervene.[6] Two concepts of judicial limitation, one found in the Constitution—the theory of political questions; and the other self-imposed—the discretion to deny equitable relief, have been utilized to sustain this result.

Either or both of these concepts may justify judicial abstention in a proper case, but that is not to say that they may be used interchangeably, for they are similar only in the most superficial respects. By intermixing the two concepts, the most recent decision denying relief where a political distribution statute was challenged threatens to characterize the entire problem as a purely constitutional one.[7] The danger inherent in the confusion is clear: the relatively slim chance that a court may intervene to upset such a statutory system would disappear and with it any check on unfair distribution. In *South v. Peters*,[8] the United States Supreme Court refused to enjoin operation of the Georgia primary system, similar in its operation to the presidential electoral college,[9] with the categorical statement that "[f]ederal courts consistently

---

ture); O'Rourk v. Cohen, 265 N.Y. 318, 192 N.E. 833 (1934) (distribution of signatures on petition for independent nomination); State *ex rel.* Plimmer v. Poston, 58 Ohio St. 620, 51 N.E. 150 (1898) (requirement that a political party poll at least 1% of the total vote cast at the preceding election). *But cf.* People *ex rel.* Hotchkiss v. Smith, 206 N.Y. 231, 99 N.E. 568 (1912) (requirement that 1500 signatures be on petition when only 800 voters were in the district in which petitioner was to be elected); Gates v. Long, 172 Tenn. 471, 113 S.W.2d 388 (1938) (county unit vote in primary based on number of votes cast in preceding primary).

6. This is illustrated by the numerous unsuccessful attempts by Illinois' voters to obtain relief from that state's inequitable congressional apportionment system culminating in Colegrove v. Green, 328 U.S. 549 (1945) (injunction refused). Fergus v. Marks, 321 Ill. 510, 152 N.E. 557 (1926) (judiciary will not mandate the legislature to reapportion); Fergus v. Kinney, 333 Ill. 437, 164 N.E. 665 (1928) (refusal to restrain state auditor from expending funds for the holding of an election under the allegedly unconstitutional statute); Fergus v. Blackwell, 342 Ill. 223, 173 N.E. 750 (1930) (quo warranto against state senators unsuccessful); Daly v. Madison County, 378 Ill. 357, 38 N.E.2d 160 (1942) (holding the even more inequitable 1901 Illinois statute, revived by the decision in Moran v. Bowely, *infra*, to be unassailable). *But cf.* Moran v. Bowley, 347 Ill. 148, 179 N.E. 526 (1932) (relief granted because the state statute did not comply with the Congressional apportionment statute of 1911 and the state constitution).

7. South v. Peters, 339 U.S. 276 (1950), 49 MICH. L. REV. 271 (1950), 26 NOTRE DAME LAW. 122 (1950), 24 TEMP. L.Q. 239 (1950), 36 VA. L. REV. 678 (1950).

8. *Ibid.*

9. GA. CODE ANN. § 34-3212 (1936). The counties stand in a position analogous to the states. Each county is allotted twice the number of unit votes as that county has representatives in the most numerous branch of the state legislature. The eight most populous counties have six unit votes each; the thirty next most populous, four unit votes; and the remaining 121 counties, two unit votes. The candidates receiving a plurality of the popular vote in a county wins that county's entire unit vote. The chairman of the state executive committee then consolidates the unit votes and the candidate receiving a majority of all the county unit votes is declared to be the candidate in the general election. The system is mandatory in primaries to determine candidates for United States Senator, Governor, State House Officers, and State Supreme Court Justices. See note 25 *infra*.

Plaintiffs in South v. Peters, 339 U.S. 276 (1950), were resident voters of Fulton County, the state's most populous county, and alleged that the statute denies equal protection of the laws by preventing them from casting an effective ballot. The combined population of the 67 smallest counties is less than the population of Fulton county, but their combined unit vote is 134 to Fulton's six. The 206 unit votes necessary to win the

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."[10]

The courts' refusal to decide political questions is based on the constitutional separation of powers between the three departments of government. The term was first used to justify judicial abstention in disputes affecting this country's foreign relations. Since the Constitution expressly delegates the power to deal with other sovereignties to the legislative and executive departments,[11] the courts have not intervened where a decision by them might conflict with a decision within the prerogative of those political departments.[12] The constitutional provisions which guarantee the states protection against internal strife and assure them a republican form of government are also held to depend for their enforcement exclusively upon the political

---

candidacy can be obtained from counties having only 26% of the state's population. The greatest single discrepancy pointed out was that one popular vote in Echols County is equal in effect to 122 Fulton County votes. Brief for Appellants, pp. 7-9, South v. Peters, *supra*. The same statute was unsuccessfully attacked in Cook v. Fortson, 68 F. Supp. 624 (N.D. Ga. 1946), *aff'd mem.*, 329 U.S. 675 (1946), and Turman v. Duckworth, 68 F. Supp. 744 (N.D. Ga. 1946), *aff'd mem.*, 329 U.S. 675 (1946), 47 COL. L. REV. 284 (1947).

10. This was the only sentence in the *per curiam* opinion going to a "holding." The cases cited in support of the statement were: Mac Dougall v. Green, 335 U.S. 281 (1948); Colegrove v. Green, 328 U.S. 549 (1946); Wood v. Broom, 287 U.S. 1 (1932); *cf.* Johnson v. Stevenson, 170 F.2d 108 (5th Cir. 1948).

Justices Douglas and Black dissented, stating that the right to vote and to have that vote equally counted is constitutionally protected; the democratic primary is the true election of Georgia and this primary system plainly discriminated against city residents, the predominantly urban negro population of Georgia and the urban laboring class. They distinguished the decision in Colegrove v. Green, *supra*, as based on a "political question" not presented in this case.

11. U.S. CONST. ART. II, § 2. "He [the President] shall have power, by and with the advice and consent of the Senate to make treaties, provided two-thirds of the Senators present concur . . . and . . . shall appoint ambassadors. . . ." § 3 ". . . he shall receive ambassadors and other public ministers. . . ."

12. The main consideration is that while there can be a difference of opinion as to what should be done in foreign relations, yet there must be unity of decision. Other nations could justifiably refuse to deal with negotiators whose decisions could be overthrown by a judicial tribunal. The fear of retaliation by a foreign nation because of an adverse ruling by an American court also militates against the courts dealing with these questions. Issues held to be "political questions" are, *e.g.*, the status of a diplomatic representative, *In re* Baiz, 135 U.S. 403 (1890); *Ex parte* Hitz, 111 U.S. 766 (1884); determination of the valid government of a foreign nation, United States v. Pink, 315 U.S. 203 (1942); Oetjen v. Central Leather Co., 246 U.S. 297 (1918); Jones v. United States, 137 U.S. 202 (1890); commencement or termination of war, Woods v. Miller, 333 U.S. 138 (1948); United States v. Anderson, 9 Wall. 56 (U.S. 1870); interpretation of rights under a treaty, Foster v. Neilson, 2 Pet. 253 (U.S. 1829); but if the treaty confers rights upon private parties the rights conferred may be determined by the courts, De Feoffery v. Riggs, 133 U.S. 258 (1890). Dealings with the Indian tribes are also held to be exclusively within the province of the political departments, United States v. Sandoval, 231 U.S. 28 (1913); The Kansas Indians, 5 Wall. 737 (U.S. 1866); United States v. Hallidy, 3 Wall. 407 (U.S. 1866).

On the general subject see POST, THE SUPREME COURT AND POLITICAL QUESTIONS (1936); Field, *The Doctrine of Political Questions in the Federal Courts*, 8 MINN. L. REV. 485 (1924).

departments.[13] These provisions do not expressly exclude the judiciary, but the possible conflict between judicial and political decision would lead to confusion and would undermine the separation of powers envisaged by the framers of the Constitution.[14] Thus, refusal to determine a political question involves judicial self-limitation in only a limited sense, for the Constitution is considered to give the court no other choice.[15]

The discretionary power of a court to grant equitable relief, however, is much less restrictive in that it is truly self imposed. This concept of self-limitation has no foundation in political theory. It is rooted in practical consideration of the limitations of judicial remedies.[16] It calls for a factual analy-

13. U.S. CONST. ART. IV, § 4. Luther v. Borden, 7 How. 1 (U.S. 1849). To decide the case the Court would have had to decide which of two competing groups was the valid government of Rhode Island. And since the President had sent military assistance to the government under which defendant claimed, the Court felt bound by that decision. The question has arisen in numerous cases since that time, *e.g.*, Ohio *ex rel.* Bryant v. Akron Park District, 281 U.S. 74 (1930), (challenging state constitutional provision requiring a concurrence of all but one of the supreme court justices in order to overthrow a state statute); Ohio *ex rel.* Davis v. Hildebrandt, 241 U.S. 565 (1916); Pacific State's Tel. & Tel. v. Oregon, 223 U.S. 118 (1912) (initiative and referendum provisions of the state constitution questioned); Taylor & Marshall v. Beckham, 178 U.S. 244 (1915) (contested election, plaintiff claiming a decision in favor of defendants will deny a republican form of government); Hile v. City of Cleveland, 107 Ohio St. 144, 141 N.E. 35 (1923) (attack upon the city manager plan of municipal government).

14. Writers have consistently said that the term "political question" defies definition. In this regard *compare* the views of Maurice Finkelstien, *Judicial Self-Limitation,* 37 HARV. L. REV. 338 (1923), *with* M.F. Weston, *Political Questions,* 38 HARV. L. REV. 296 (1924) (written in answer to the article by Finkelstien, *supra*), and Oliver P. Field, *The Doctrine of Political Questions in the Federal Courts,* 8 MINN. L. REV. 485 (1924).

15. Finkelstien,*supra* note 14, takes the position that in certain instances the courts "will shy off and throw the burden of decision on other shoulders" calling it a "political question" because of the adverse effects of deciding the case before the court. That would be self-limitation in its broadest sense. A better, and more restricted view, is that of Weston and Field, *supra* note 14, who state that the Constitution impliedly dictates the court's abstention from decision of not only the case in which the question first arose but any case in which it is pled, for example, that the state is denied a republican form of government. See cases cited in note 13 *supra.*

16. Historically, equity has no jurisdiction to enforce a political right because it does not constitute a property right. Giles v. Harris, 189 U.S. 475 (1902); Mills v. Green, 69 F. 852 (4th Cir. 1895); Chandler v. Neff, 298 F. 515 (W.D. Tex. 1924). Some recent cases have distinguished *political* rights, which refer only to the right to participate in one's government (*e.g.*, the right to hold office or to vote) and *civil* rights which all persons possess (*e.g.*, owning property or to marry) and have enforced only the latter. Johnson v. Stevenson, 170 F.2d 108 (5th Cir. 1948); Caven v. Clark, 78 F. Supp. 295 (W.D. Ark. 1948); Blackman v. Stone, 17 F. Supp. 102 (S.D. Ill. 1936); Cleveland Cliffs Iron Co. v. Village of Kinney, 262 F. 980 (D.C. Minn. 1919). The primary consideration seems to be that to enjoin an election would disenfranchise the entire populous in order to enforce the rights of the single individual before the court. See also 4 POMEROY'S EQUITY JURISPRUDENCE §§ 1753-1755 (4th ed. 1919). Because of this historical background there has been great confusion in the terminology and consequently in the application of the two doctrines sought to be distinguished in this note. See Mr. Justice Brandies, dissenting, in Truax v. Gordon, 257 U.S. 312, 374 (1921). See also Giles v. Harris, 189 U.S. 475, 488 (1902); State v. Albritton, 251 Ala. 422, 37 So.2d 640 (1948); State *ex rel.* Tucker, 236 Ala. 284, 181 So. 761 (1938). *But cf.* Nixon v. Herndon, 273 U.S. 536, 540 (1927), involving a damage action for deprivation of voting rights, where Mr. Justice Holmes stated that,

sis in each case to determine whether the relief sought will put an end to the alleged evil and whether the court can administer and enforce its decree.[17] For example, to protect political rights by enjoining an election that promises to be unfair might leave a state with no election at all or necessitate judicial supervision of a state's electoral procedure. Either alternative may be more undesirable than the unfair system sought to be enjoined.

When the court is dealing with a dilution of political rights arising from disproportionate distribution of political strength the case may involve both concepts. In *Colegrove v. Green*,[18] plaintiffs unsuccessfully sought to invalidate the Illinois congressional apportionment statute as violative of the equal protection clause of the Fourteenth Amendment.[19] Denial of relief was probably justified under either theory.[20] Invalidation of the statute would have left Illinois undistricted, contrary to a congressional decision that representatives shall be elected from geographical districts defined by the state.[21] Thus the Court was presented with a political question because this decision was within Congress' constitutional prerogative.[22] A second and distinct

---

"The objection that the subject matter of the suit is political is little more than a play on words." It seems clear today that in a proper case equity will exercise its powers to enforce political rights if a decree can be formed which is capable of enforcement and which would not have adverse effects upon the holding of an election. Davis v. Schnell, 81 F. Supp. 872 (S.D. Ala. 1949), *aff'd*, 336 U.S. 933 (1949) (injunction granted under facts similar to Giles v. Harris, *supra*); Rice v. Elmore, 165 F.2d 387 (4th Cir. 1947).

17. Mac Dougall v. Green, 335 U.S. 281, 285 (1948) (concurring opinion); Colegrove v. Green, 328 U.S. 549, 566 (1945) (concurring opinion); Hecht v. Bowles, 321 U.S. 321, 329 (1943); Meredith v. Winter Haven, 320 U.S. 228, 235 (1943); Harrisonville v. Dickey Clay Co., 289 U.S. 334, 337-340 (1932); 1 POMEROY'S EQUITY JURISPRUDENCE §§ 67, 109, 111 (5th ed., Symons, 1941).

18. 328 U.S. 549 (1945).

19. The complaint was based upon the great disparity in population between the plaintiffs' congressional district and those having much smaller populations, but equal representation. The plaintiffs were resident voters of Cook County, Ill., which contains the city of Chicago. See notes 2, 3 and 6 *supra*.

20. The three judge majority opinion predicated the denial on the three grounds that Wood v. Broom, 287 U.S. 1 (1932), controlled; congressional apportionment is a political question; and that equity could not afford relief. Mr. Justice Rutledge cast the deciding ballot, but would deny relief on the equity rationale alone, without reaching any constitutional question. Three justices dissented stating that the discrimination was obvious and relief should have been granted.

21. 46 STAT. 21 (1929), 2 U.S.C. § 2(a) (1941) passed pursuant to U.S. CONST. ART. 1, § 2 which provides that "Representatives . . . shall be apportioned among the several states . . . according to their respective Numbers, . . ." and ART. I, § 4, "The times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulation, . . ."

22. "The short of it is that the Constitution has conferred upon Congress exclusive authority to secure fair representation by the States in the popular House. . . . Whether Congress faithfully discharges its duty or not has been committed to the exclusive control of Congress." Colegrove v. Green, 328 U.S. 549, 554 (1945). In a concurring opinion Mr. Justice Rutledge states that the case of Smiley v. Holm, 285 U.S. 355 (1931), rules squarely to the contrary. However, if it be accepted that a "political question" is to be left for the political departments to decide, or if such decision has been made by them the courts are bound, Smiley v. Holm is not in opposition. The court in that case did not

ground for denial was that the serious consequences of disrupting the pending election precluded equitable relief.[23]

The *Colegrove* decision should not be construed to hold that disproportionate distribution of political strength is irremediable, but rather that considerations peculiar to that case rendered judicial intervention inappropriate. A sharp distinction must be made between political *questions* and perfectly justiciable questions involving political *rights*. Assuming that it is proper to deny judicial relief in all cases of political questions, this is by no means true of all cases where political rights are sought to be enforced by equitable remedies.[24] The determination of the question of granting or withholding relief in the latter class of cases should turn on the practical considerations already mentioned. And where relief is denied the basis for denial should be clearly indicated. Then in subsequent cases involving only the doctrine of equitable discretion relief can be granted by factually distinguishing the former cases. Treating the geographical distribution problem in this manner would retain at least a minimum obstacle to the would be disenfranchiser.[25]

Unlike *Colegrove v. Green,* the political question of congressional apportionment was not present in *South v. Peters.*[26] (Indeed, the Court's cursory denial of relief is paradoxical, for while state legislation regulating the right

---

overthrow the state's congressional apportionment because it was inequitable, but for the reason that the apportionment was not done according to the congressional mandate that the states shall, *by law,* reapportion. 46 STAT. 21 (1929), 2 U.S.C. § 2(a) (1941).

23. Colegrove v. Green, 328 U.S. 549, 551 (1945).

24. Rice v. Elmore, 165 F.2d 387 (4th Cir. 1947); Davis v. Schnell, 81 F. Supp. 872 (S.D. Ala. 1949), *aff'd,* 336 U.S. 933 (1949).

25. While the county unit system in Georgia was probably adopted with no discriminatory intent toward the urban group as a whole, or the now predominantly urban negro population of Georgia, yet due to the change in circumstances since its adoption in 1917 it now serves to perpetuate the political futility of those groups. It was not until Nixon v. Herndon, 273 U.S. 536 (1926), that it was definitely established that the primary constituted a state election in which negroes had the right to vote. See note 1 *supra;* KEY, SOUTHERN POLITICS 117-129 (1949); HOLLAND, THE DIRECT PRIMARY IN GEORGIA 44 (1949); The New South, May-June 1949, Vol. 4, Nos. 5 and 6, p. 7; A Long Dark Night for Georgia?, Harpers Magazine, Sept. 1948, Vol. 197, No. 1180, p. 55; Note, *Georgia County Unit Vote,* 47 COL. L. REV. 284 (1947).

26. The only analogy to be drawn between the two cases is that they both involved distribution of political strength. Because effective representation in Congress can only be assured by Congress, does not mean that every time political strength is distributed it carries with it a political question. See Mac Dougall v. Green, 335 U.S. 281 (1948). The *South* case involves only the individual right to cast a ballot, not the right to effective representation. A conceivable result of the clash with the plenary power of Congress over congressional apportionment was that the House might reject a delegation from Illinois elected at large. Colegrove v. Green, 328 U.S. 549, 553 (1945). No such clash would be possible if the Georgia County Unit system were to be overthrown. It has nothing to do with congressional apportionment. See note 9 *supra.* The danger that the "political issue" in South v. Peters may be construed to be a political question is apparent from the treatment of the case in the law reviews, 49 MICH. L. REV. 271 (1950); 26 NOTRE DAME LAW. 122 (1950); 24 TEMP. L.Q. 239 (1950); 36 VA. L. REV. 678 (1950). There was no political question, as here defined, involved in South v. Peters.

to vote is otherwise limited by the Fourteenth Amendment,[27] this decision would seem to render statutes concerning geographical distribution of political strength outside the pale of judicial censure.[28]) The only issue was whether injunctive relief was practicable and wise. A decree enjoining the operation of the county unit system would have impinged upon Georgia's elective process only after all ballots had been cast; it would have required that equal weight be given to each ballot. The popular vote would then have determined the outcome of the election. No embarrassment or difficulty of enforcement is apparent. Since relief might well have been proper, the Court should have justified their denial by analysis of the facts.

LANDOWNER'S LIABILITY FOR INFANT DROWNING IN ARTIFICIAL POND

Since its introduction some seventy years ago, the proposition that a landowner may be liable to trespassing children who are injured by dangerous artificial conditions on the land, under circumstances where an adult could not recover, has had an interesting history. A recent Indiana Supreme Court decision on one of the specific applications of this "attractive nuisance" doctrine—the liability for the drowning of a child trespasser in an artificial body of water—was *Plotzki v. Standard Oil Co. of Indiana.*[1] The complaint for wrongful death alleged that the defendant left unguarded on its land an artificial pond in view of the street in a residential section of Hammond, Indiana. Although the bottom was littered with debris and broken by abrupt drop-offs which were invisible through the murky water, the defendant took no steps to warn the large groups of children known to be attracted there frequently to

27. See note 1 *supra.*

28. In United States v. Carolene Products Co., 304 U.S. 144, 152 n. 4 (1938), it was pointed out that the presumption of validity may have a narrower scope in regard to statutes regulating non-economic rights embraced within the first ten amendments and the Fourteenth Amendment. See also Schneider v. State, 308 U.S. 147, 161 (1939). Mac Dougall v. Green, 335 U.S. 281 (1948) would seem to give this presumption a broader scope where the regulation of non-economic rights embodies the principle that government is not purely a matter of majority rule. See note 5 *supra.* This is understandable and defensible because that principle is embodied in the Federal Constitution, which awards each state equal representation in the Senate regardless of population. U.S. CONST. AMEND. XVIII, § 1; ART. I, §§ 2, 3. However, the analogy is incomplete when it is applied to political subdivisions within the state, because it presupposes the relation between county and state to be similar to that between state and federal government. See note 9 *supra.* It forgets that the Federal Constitution was created to perfect a union of thirteen separate, distinct, and independent sovereignties while the Georgia counties are mere divisions for the more efficient operation of a single state government. GA. CONST. ART. XI, § 1. South v. Peters, 339 U.S. 276 (1950), goes to an extreme in that it does not give effect to the policy of Mac Dougall v. Green, *supra,* nor does it pass upon the constitutionality of the statute in question, but renders it unassailable regardless of its constitutionality.

1. 92 N.E.2d 632 (Ind. 1950); *petition for rehearing denied,* Oct. 4, 1950.