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Dragon in the Thicket: A Perusal of Gomillion v. Lightfoot

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At this date it should go without saying that there is no realm of action in which a state legislature is free to ignore the requirements of the Constitution of the United States. In the recent case of *Gomillion v. Lightfoot*,[1] however, the Supreme Court had to say it again. *Gomillion* was one of the more recent battles in the complex racial conflict for political control of Macon County, Alabama, and its county seat, the city of Tuskeegee. Macon County is located in east-central Alabama, midway between Montgomery and the Georgia state line. Its population of 27,654[2] is approximately seven-eighths Negro. Prior to the acts complained of in *Gomillion*, Tuskeegee was square in shape, with a population of 6,707 (5,397 Negroes and 1,310 whites). White voter registration in the city exceeded Negro registration by 200 (600 white and 400 Negro); it may be inferred that this proportion was at least partially attrib-

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[1] 364 U.S. 339 (1960).

[2] Record, p. 5. *Gomillion* was dismissed by the district court for failure to state a claim upon which relief could be granted. 167 F. Supp. 405 (M.D. Ala. 1958). The Supreme Court, therefore, accepted as true the allegations of the complaint. Unless otherwise noted, the population figures used herein are those stated in the complaint, where they are referred to as "approximate."

utable to varied segregationist tactics on the part of local election officials.[3] Legal measures to compel more expeditious registration of Negro voters were under way, however, and eventual Negro political hegemony seemed probable.[4]

In the 1957 session of the Alabama legislature, the state senator from Macon County introduced a bill to redefine the geographical boundaries of the City of Tuskeegee. This bill, which was enacted into law as Act 140, contained no preamble. It read simply: "The boundaries of the City of Tuskeegee in Macon County are hereby altered, rearranged and redefined so as to include within the corporate limits of said municipality all of the territory lying within the following described boundaries, and to exclude all territory lying outside such boundaries. . . ."[5] A description of the new boundaries by metes and bounds followed. The areas of the city to the west and northeast, including the site of Tuskeegee Institute, where

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[3] See REPORT OF THE UNITED STATES CIVIL RIGHTS COMMISSION 40–68 (1959). For a "human interest" account of the trials and tribulations of Negroes in their quest for the franchise in Macon County, Alabama, see The New Yorker, June 10, 1961, p. 37 *et seq.*

[4] See United States v. Alabama, 192 F. Supp. 677 (M.D. Ala. 1961). This case was originally brought against the Board of Registration in Macon County and two alleged members of the Board in order to enjoin their interference with the right to vote because of race or color. By the time the cause was heard, the members of the Board had resigned and accepted other employment. The State of Alabama had in the meanwhile been joined as a defendant. The district court dismissed the suit because: (1) the individual defendants no longer members of the board were improper parties, (2) the board, having no separate legal existence, could not be sued, and (3) the State was not a person within the meaning of the Civil Rights Acts, 16 Stat. 140 (1870), 42 U.S.C. §§ 1970, 1970(c) (1958). United States v. Alabama, 171 F. Supp. 720 (M.D. Ala. 1958). The decision of the district court was affirmed by the Court of Appeals for the Fifth Circuit. United States v. Alabama, 267 F.2d 808 (5th Cir. 1959). Between the date of the decision in the court of appeals and the hearing in the Supreme Court on certiorari, the Civil Rights Act of 1960, 74 Stat. 86 (1960), was enacted. Section 601 (b) of that Act expressly authorized actions against the state. 74 Stat. 90, 42 U.S.C. § 1971 (c). The Supreme Court held that § 601 (b) was applicable and remanded the cause for trial. United States v. Alabama, 362 U.S. 602 (1960). On remand, the district court made a specific finding that sixty-four Negro citizens, named in an appendix to its opinion, were qualified by law at the time of their respective applications for registration and that failure to register them was in violation of the Constitution and laws of the United States, and so decreed, but declined "for the time being" the request of the United States that it appoint voting referees for Macon County. 192 F. Supp. at 682–83.

[5] Ala. Acts 1957, No. 140, at 185.

there were heavy concentrations of Negroes, were thus excluded from the city limits. The new city was shaped, as Mr. Justice Frankfurter said, in the form of "an uncouth twenty-eight sided figure";[6] the petitioners described it as resembling a sea dragon. The new city had a population of 1,750, seventy-five per cent of which was white. Of the 400 registered Negro voters within the original city limits, only four or five remained in the newly defined city. No white voter or resident lived in the detached area.[7]

Gomillion, the petitioner, was one of the Negro citizens who lived in the area cut off from the city. On behalf of himself and approximately 5,000 persons similarly situated, he filed a class suit in the federal district court, asking for a declaration that Act 140 was unconstitutional as a violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment, and of the Fifteenth Amendment. He asked for an injunction prohibiting the enforcement of the Act by the city officials. The district court dismissed the suit on motion by the defendants on the ground that the complaint failed to state a claim on which relief could be granted, and for want of jurisdiction.[8] The Court of Appeals affirmed, one judge dissenting.[9]

In dismissing, the district court relied upon *Laramie County v. Albany County*,[10] *Town of Mount Pleasant v. Beckwith*,[11] and *Hunter v. Pittsburgh*[12] to establish that political power existed in the legislature to change the boundaries of its subdivisions without the consent of the inhabitants, and upon *Doyle v. Continental Insurance Co.*,[13] for the proposition that where such power is shown to exist, courts may not inquire into the motives of the legislature in its exercise. The court of appeals affirmed the decision to dismiss but tempered to some extent the reliance upon the sweeping language of the *Hunter* case. It held that, absent any[14]

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[6] 364 U.S. at 340.

[7] *Id.* at 341.

[8] 167 F. Supp. 405 (M.D. Ala. 1958).

[9] 270 F.2d 594 (5th Cir. 1959).

[10] 92 U.S. 307 (1875).

[11] 100 U.S. 514 (1879).

[12] 207 U.S. 161 (1907).

[13] 94 U.S. 535 (1876). See also Shuttlesworth v. Birmingham Board of Education, 162 F. Supp. 372 (N.D. Ala. 1958), *aff'd*, 358 U.S. 101 (1958).

[14] 270 F.2d at 598.

> racial or class discrimination appearing on the fact of the statute, the courts will not hold an act, which decreases the area of a municipality by changing its boundaries, to be invalid as violative of the Fourteenth and Fifteenth Amendments to the United States Constitution although it is alleged that the enactment was made for the purpose, not appearing in the Act, and with the effect of excluding or removing Negroes from the City and depriving them of the privileges and benefits of municipal membership, including the right to vote in City elections.

In a concurring opinion, Judge Wisdom asserted that the case, like *Colegrove v. Green*[15] and *South v. Peters*,[16] was one in which courts should refrain from using their equity powers because no effective relief could be given. The only result that could flow from a declaration that Act 140 was unconstitutional, Judge Wisdom suggested, would be a series of subsequent statutes and cases increasing the tensions between nation and state.[17] There was a vigorous dissent by Judge Brown. He saw in Act 140 a clear legislative purpose to deprive Negroes and only Negroes of "vote and village"[18] and in the majority holding a blindness to obvious facts and reliance upon extravagant dicta.[19]

The Supreme Court granted certiorari[20] and, in an opinion by Mr. Justice Frankfurter, reversed the court of appeals and district cout, holding that the averments of the complaint adequately spelled out a violation of the Fifteenth Amendment. Mr. Justice Whittaker concurred in the result but disagreed as to the proper ground. Characterizing the case as one of "fencing Negroes out" of municipal membership, he saw a violation of the Equal Protection Clause of the Fourteenth Amendment. He was of the opinion that the right to vote guaranteed by the Fifteenth Amendment is limited to a right to vote in whatever political unit one finds one's self. Although Mr. Justice Douglas joined the Court's opinion, he took the opportunity to state that he adhered to the dissents in *Colegrove v. Green* and *South v. Peters*.

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

[16] 339 U.S. 276 (1950).

[17] 270 F.2d at 611.

[18] *Id.* at 599.

[19] *Ibid.* The reference to extravagant dicta was to the language in the Court's opinion in *Hunter*.

[20] 362 U.S. 916 (1960).

I. The Gomillion Case and the Fifteenth Amendment

The Fifteenth Amendment provides that a citizen's right to vote may not be denied or abridged on the basis of his race or color.[21] To establish a violation, therefore, it must be shown that: (1) he had a right to vote; (2) it was denied or abridged; and (3) the denial or abridgment was on account of his race or color. The complaint in *Gomillion* was carefully framed to make the best possible case under the Fifteenth Amendment. Though census figures are given on the racial composition of the City of Tuskeegee before the effective date of Act 140, no racial composition figures are given for the new city. The population of the old city was 5,397 Negroes and 1,310 whites, a total of 6,707. It is alleged that no white resident was excluded, so it may be inferred that the 1,310 whites remained inside the city limits. Since census figures list the new city as having a population of 1,750, it may be inferred that unless there has been an influx of whites, the city population is now approximately one-quarter Negro. Though this percentage is somewhat below the average for the state at large, it is still a substantial proportion. The before-and-after figures set out in the complaint relate exclusively to voters. Before the redefinition of the city limits, there were 400 registered Negro voters in the city. After redistricting, there were only five or six.

When these before-and-after figures on Negro voters are placed in combination with the fact that the city's shape was changed from a square to "an uncouth twenty-eight sided figure" resembling a sea dragon, they clearly lead to the conclusion that the drafters of Act 140 carefully sought out the residences of Negro voters in order to detach them from the body politic:[22]

> According to the allegations here made, the Alabama Legislature has not merely redrawn the Tuskeegee city limits with incidental inconvenience to the petitioners; it is more accurate to say that it has deprived the petitioners of the municipal franchise and consequent rights and to that end it has inciden-

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[21] "Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude. Section 2. The Congress shall have power to enforce this article by appropriate legislation."

[22] 364 U.S. at 347.

> tally changed the city's boundaries. While in form this is merely an act redefining metes and bounds, if the allegations are established, the inescapable human effect of this essay in geometry and geography is to despoil colored citizens, and only colored citizens, of their theretofore enjoyed voting rights.

Viewed in this way, the facts make a very strong case for the race-oriented nature of the change in boundaries. They add nothing, however, to the definition of the "right . . . to vote" as that term is employed in the Fifteenth Amendment. The Court is surprisingly silent on this question. Mr. Justice Whittaker is satisfied with the unadorned assertion that the expression "right to vote" means a right to vote in any governmental unit in which the citizen finds himself. Mr. Justice Frankfurter, ignoring the concurring opinion, leaves only a trail of phrases, such as "pre-existing,"[23] "municipal franchise,"[24] and "theretofore enjoyed."[25] In appraising the two positions, it may be useful to review the earlier authorities in the Supreme Court dealing with the Fifteenth Amendment.

A. THE FIFTEENTH AMENDMENT CASES

1. *The first thirty years.* At the close of the War between the States there was considerable difference of opinion on the subject of Negro suffrage in the states that had not seceded. None of them with any appreciable Negro popnlation permitted Negroes to vote. But it was generally conceded that Negro suffrage in the South was necessary to the aims of the Reconstruction program.[26] The compromise worked out at that time was to omit from the Fourteenth Amendment any limitations upon the traditional power of the states to fix the franchise requirements, and to force the southern states to adopt state constitutional provisions guaranteeing the Negro the right to vote.[27] The seceding states' constitutional provisions on suffrage were protected against amendment by Act of

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[23] *Id.* at 341.

[24] *Id.* at 347.

[25] *Ibid.*

[26] See MATHEWS, LEGISLATIVE AND JUDICIAL HISTORY OF THE FIFTEENTH AMENDMENT 13 (1909). Between 1857 and 1867 Negro suffrage amendments were submitted to the voters in New York, Connecticut, Ohio, Wisconsin, Minnesota, and Kansas and in each instance defeated.

[27] *Id.* at 18.

Congress,[28] in some cases by the wording of the amendment clauses in the state constitutions, and by the fact that any amendment would have to be ratified by a voting population that included large numbers of Negroes,[29] whose political power had been heightened by the disfranchisement of an appreciable number of whites, including many political leaders of the area. Faith in the permanence of these provisions was shaky, however, and before the southern states were permitted to resume their representation in Congress, the northern differences were ironed out and the Fifteenth Amendment was proposed.[30] For three states its ratification was made a condition precedent to the resumption of Congressional representation.[31]

In the early days after the ratification of the Amendment, therefore, Negro suffrage was a legal, if not a practical, reality, being guaranteed by both federal and state constitutions. The earliest cases dealing with the reach and meaning of the Fifteenth Amendment tested the powers of Congress to control intimidation, bribery, and maladministration. During the first thirty years of the Amendment's existence only two cases reached the Supreme Court challenging the constitutionality of state constitutional or statutory provisions. In the first of these the contention was treated as frivolous;[32] the second was dismissed as moot.[33]

In *Neal v. Delaware*,[34] however, the self-executing character of the Amendment was established *obiter*. *Neal* was an attack upon a guilty verdict in a criminal case on the ground that Negroes had been systematically excluded from the petit jury. It was argued in the alternative: either Delaware law excluded Negroes from jury service, or, contrary to the law, they were systematically excluded.

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28 Acts of June 22, 25, 1868, 15 Stat. 72–74.

29 See, *e.g.*, tabulation of votes in the election held in 1869 for the ratification of the Virginia Constitution contained in the historical synopsis at p. 28 of the 1873 Virginia Code. There were 149,781 whites registered to vote, and 120,103 Negroes In actual votes cast, there were 125,114 whites and 97,205 Negroes.

30 MATHEWS, *op. cit. supra* note 26, at 22 *et seq.*

31 *Id.* at 75.

32 McPherson v. Blacker, 146 U.S. 1 (1892).

33 Mills v. Green, 159 U.S. 651 (1895).

34 103 U.S. 370 (1880).

In either event, it was argued, the defendant had been denied due process of law under the Fourteenth Amendment. The first contention rested upon the fact that the Delaware Constitution limited suffrage to white males. Since the statutes limited jury service to those "qualified to vote," it was argued that Negroes were not eligible. In upholding the conviction, the Supreme Court of Delaware observed that the effect of the Fifteenth Amendment was to make invalid the state constitutional color limitation on the franchise, and therefore the statute did not so limit jury service. The Supreme Court, per Mr. Justice Harlan, affirmed this construction but held for the defendant on the alternative ground. The fact that, although Negroes constituted 26,000 of the state population of 150,000, none had ever been summoned for jury service was held to make out a *prima facie* case of discrimination.

2. *The grandfather clauses.* It can be said without fear of cavil that southern white Democrats did not enjoy their experience with Negro suffrage under the reconstruction constitutions. By the turn of the century, however, they had regained sufficient political power to repudiate the reconstruction suffrage provisions. The result was a series of constitutional conventions throughout the southern states which framed new constitutions to test the limits of the Fifteenth Amendment.[35] These constitutions were designed to

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[35] "During the dark days of reconstruction, before the passions engendered by the war had cooled, another convention assembled in this city and framed a constitution under which we now live—with some modifications. That convention was composed of aliens to the Commonwealth, and newly emancipated slaves. Virginians to the manner born, who owned the property and paid the taxes, and who represented the virtue and intelligence of the Commonwealth, were placed under the ban of proscription and excluded from its halls. The Constitution was proposed as a condition precedent to the readmission of the State into the Union, and to its representation in Congress....

"The people have submitted patiently to this Constitution, unsuited, in many respects, to present conditions . . . and now, after waiting patiently for thirty odd years, they have called this Convention.

". . . But here to-day we are confronted with some difficulties. When the era of good feeling shall be entirely restored between the sections and all of the hates growing out of the unhappy fratricidal strife shall be forever 'in the deep bosom of the ocean buried,' it may be that our northern fellow-citizens for the good of our own common country, and for the elevation of American citizenship, may consent to the repeal of [the Fifteenth] amendment, but until that auspicious day shall come, we are bound in honor and in good faith to observe it and to obey it because it is a part of the supreme law of this land." President Goode addressing the Virginia Con-

eliminate from the voter rolls as many of the uneducated and unlanded Negroes as possible without eliminating the equally uneducated and unlanded whites. One of the devices employed was the so-called "grandfather clause." Though their language varied, basically these clauses imposed literacy and property qualifications with exemptions for persons, and the descendants of persons, who had been eligible to vote prior to Negro suffrage.

The first such clause to reach the Supreme Court was that of the Alabama Constitution of 1901.[36] It set up two classes of voters: (1) those who had registered to vote by December 20, 1902, and (2) those who had registered after that date. The first class included two subclasses: (1) persons who had served in the armed forces of the United States in the War of 1812, the war with Mexico, any of the wars with the Indians, in the Confederate forces or in the Alabama armed forces in the War between the States, as well as the descendants of all these and the descendants of persons who served in the Revolution; and (2) all others of good moral character who understood the duties and responsibilities of republican government. Persons qualifying as electors under those provisions remained electors for life. Persons seeking to register after December 20, 1902, were required to meet literacy or property qualifications that would disqualify most Alabamans of the day, white or Negro.[37]

These provisions were challenged in two cases that reached the Supreme Court in 1903 and 1904. The first, *Giles v. Harris*,[38] was brought by a Negro who was not in the veteran or descendant class and who, for reasons that do not appear, had not registered prior to December 20, 1902. Since he did not meet the literacy or property requirement, the registration board had refused to register him. He

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stitutional Convention of 1901. DEBATES OF THE VIRGINIA CONSTITUTIONAL CONVENTION, 1901–1902 19, 20 (1906). President Goode went on to discuss possible stop-gap methods such as poll taxes, property qualifications, and literacy requirements.

[36] ALA. CONST. art. 8, §§ 180, 181, 183–88 (1901).

[37] The requirements were in the alternative. Either one must have owned, or be the husband of a woman who owned, forty acres of land in the State, on which he lived, or have been able to read and write any article of the Constitution of the United States and have been regularly engaged in some lawful employment for the major portion of the year preceding his registration. *Id.* at § 181.

[38] 189 U.S. 475 (1903).

sued to compel the board to do so. On appeal from an adverse decision in the United States circuit court, the Supreme Court held, per Mr. Justice Holmes, that the circuit court was correct in refusing to compel the registration of the appellant. Two reasons were given. The first was a technical, legal one. The suit was predicated upon an allegation that the whole registration scheme provided for in the Alabama Constitution was a fraud on the Constitution of the United States and therefore void. If this were so, said Mr. Justice Holmes, the Court could not grant the relief sought and thereby require the board to add another voter to its "fraudulent lists." On the other hand, if the Court were to take the scheme to be legal, the appellant would not be entitled to the relief sought. The second reason stemmed from the Court's practical judgment about the limits of possible relief under equity decrees. Reading the allegations of the complaint as charging a conspiracy of the white population of a whole state to keep Negroes from voting, the Court was of the opinion that "a name on a piece of paper will not defeat them." Unless the Court were prepared to supervise the voting in Alabama through its officers, all the plaintiff could get from equity would be an empty form. Justices Brewer,[39] Brown,[40] and Harlan dissented.[41]

Meanwhile, back in Alabama, Giles filed an action in the state courts seeking a writ of mandamus to force the board to register him, as well as an action for money damages for its failure to do so. In the action for damages, the Supreme Court of Alabama took a position not unlike that of Holmes in *Giles v. Harris*. If the scheme were unconstitutional, said the Alabama court, then the board had no power to register the plaintiff, and its failure to do what it had no power to do could not be made the predicate for a recovery against it. On the other hand, if the contested sections of the Alabama Constitution did empower the board to register the plaintiffs, its refusal to do so was a determination that the plaintiffs lacked the requisite qualifications of an elector. Since such a determination is judicial in nature, the board was not liable in damages.[42] The same Scylla- and Charybdis-like fate met the bringing of the mandamus action. Since the sections of the constitution that were assailed also

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[39] *Id.* at 488.

[40] *Id.* at 493, without opinion.

[41] *Ibid.*

[42] Giles v. Teasley, 136 Ala. 164 (1903).

created the board of registrars, fixed tenure of its members, and defined their duties, a declaration that these sections were void would leave no board to exercise those very duties which the mandamus was sought to compel.[43] In an opinion written by Mr. Justice Day, the Supreme Court dismissed the writs of error in both cases on the ground that the Alabama court had decided them on adequate state grounds.[44] Mr. Justice McKenna concurred in the result and Mr. Justice Harlan dissented, both without opinion.

Those who took the *Giles* cases as pointing a way to a solution of the franchise problem were to be disappointed eleven years later when similar clauses in the Oklahoma Constitution and the special act of the Maryland legislature governing the City of Annapolis were challenged in two cases brought under the enforcement acts as amended. In *Guinn v. United States*[45] the Court upheld a criminal conviction of two Oklahoma election officials for failure to register Negroes, and in *Myers v. Anderson*[46] affirmed verdicts awarded by a jury in an action for damages brought against election officials by Negroes denied the right to register under the Maryland statute.

In both cases the question of the validity of the "grandfather clauses" was squarely raised and decided. The Maryland and Oklahoma provisions were even more thinly disguised than the Alabama classifications. The former gave automatic eligibility for registration to "citizens who . . . prior to January 1, 1868, were entitled to vote in this state or any other state of the United States at a state election, and the lawful male descendants of such persons."[47] The Oklahoma provision was in substance the same.[48] While in Alabama only the existing—not the future—white population was covered in, the distinction would be maintained indefinitely under these two provisions. The Court had no trouble finding

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[43] Giles v. Teasley, 136 Ala. 228 (1903).

[44] Giles v. Teasley, 193 U.S. 146 (1904). The cases were heard together in the Supreme Court. See ROBERTSON & KIRKHAM, JURISDICTION OF THE SUPREME COURT § 298 n. 3 (Wolfson & Kurland ed. 1951).

[45] 238 U.S. 347 (1915).

[46] 238 U.S. 368 (1915).

[47] Md. Laws 1908, ch. 525, at 347.

[48] OKLA. CONST. art. III, § 4a (1910).

these provisions in violation of the Fifteenth Amendment. In *Guinn*, Mr. Justice White stated, in one of his typical sentences:[49]

> Indeed, there seems no escape from the conclusion that to hold that there was even possibility for dispute on the subject would be but to declare that the Fifteenth Amendment not only had not the self-executing power which it has been recognized to have from the beginning, but that its provisions were wholly inoperative because susceptible of being rendered inapplicable by mere forms of expression embodying no exercise of judgment and resting upon no discernible reason other than the purpose to disregard the prohibitions of the Amendment by creating a standard which on its face was in substance but a revitalization of conditions which when they prevailed in the past had been destroyed by the self-operative force of the Amendment.

In the *Myers* case it was argued that the Fifteenth Amendment did not apply to limit the power of the state to establish voting qualifications for electors in municipal elections, and that it was beyond the amending power to do so. This contention received not so much as a nod from the Court.

As a sequel to the *Guinn* case, the Oklahoma legislature was called into "emergency session," and enacted a statutory substitute for the constitutional provisions invalidated by the Court. The substitute excused all persons who had registered under the invalidated provisions from re-registration. All others were given seven days from the effective date of the Act to register. Those failing to register within the prescribed seven-day period lost their eligibility forever.[50] *Lane v. Wilson*[51] held this substitute unconstitutional. In an opinion by Mr. Justice Frankfurter, the Court ruled that it made no difference that there was no technical denial of the right to vote. Racial discrimination in matters counected with the franchise was enough.

3. *The white primary cases.* Unsuccessful in their attempts to neutralize the provisions of the Fifteenth Amendment by periphrasis, southern Democratic party leaders retreated to efforts to preserve white-voter solidarity within the party by excluding Negroes from the nominating processes. While the "grandfather

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[49] 238 U.S. at 363–64.

[50] Okla. Laws 1916, ch. 24, § 4.

[51] 307 U.S. 268 (1938).

clause" cases tested the reach of the constitutional language "on account of race," the white primary cases explored the terms "right to vote" and "by any state." No circumlocution was involved. Negroes were specifically excluded. The argument for validity rested upon the contention that participation in primary elections is not encompassed within the term "right to vote" as employed in the Fifteenth Amendment. The first of these cases to reach the Court was *Love v. Griffith*.[52] In *Love*, since the exclusion was accomplished by a rule adopted by the Democratic executive committee of Houston, the question of "state action" was also presented. The rule in question was adopted for a single election, and by the time the case reached the Court that election had already been held. The Court avoided all the issues by holding that the cause was moot.

In 1923 the Houston exclusion rule was incorporated into the statutes of Texas: "[I]n no event shall a Negro be eligible to participate in a Democratic party primary election held in the State of Texas."[53] Here was no problem of definitions: Negroes were called Negroes. Here was no problem of the limits of private action: the rule was incorporated in a statute of the state. Instead, the statute presented the naked problem whether "right to vote" includes the right to vote in party primaries. Even so, the Court did not find it necessary to rule on the matter. Mr. Justice Holmes stated in *Nixon v. Herndon*[54] that the statute was so patent a violation of the Equal Protection Clause of the Fourteenth Amendment that the Court need not consider whether or not it deprived the plaintiffs in error of their right to vote: "States may do a good bit of classifying that it is difficult to believe rational, but there are limits, and it is too clear for extended argument that color cannot be made the basis of a statutory classification affecting the right set up in this case."

This holding shifted the southern Democrats' probe for soft spots in the Fifteenth Amendment from the term "the right to vote" to the term "by any state." The offending provisions of the Texas laws governing primary elections were repealed; in their stead the legislature adopted a provision that left to the executive committee of the party the adoption of rules governing eligibility

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[52] 266 U.S. 32 (1924).

[53] TEXAS CODE, art. 3093a (1923).

[54] 273 U.S. 536, 541 (1927).

to participate in the primaries. Exclusionary regulations adopted under this statute were upset in *Nixon v. Condon*[55] by a decision of five to four. For the majority Mr. Justice Cardozo noted that Texas had repealed none of its detailed regulations governing primary elections. In viewing the system as one in which the state had delegated to the party executive committee a rule-making power, he held that the discharge of such delegated authority coustituted "state action" under the Fourteenth Amendment. *Herndon* was deemed controlling and no mention was made of the Fifteenth Amendment, though the case, like *Gomillion*, raised questions under both the Fourteenth and Fifteenth Amendments. Mr. Justice McReynolds, for the dissenters, rested his opinion on the absence of "state action," taking the Fourteenth and Fifteenth Amendments alike to require discrimination by the state.[56]

The Fifteenth Amendment was not squarely considered until *Grovey v. Townsend*[57] in 1934. *Grovey* involved the same protracted dispute that had been before the Court in *Herndon* and *Condon*, testing a third state effort to effect a constitutional exclusion of Negroes from participation in the party primaries. This third effort consisted in repealing all legislation on the subject and leaving the matter to the party. For a unanimous Court, Mr. Justice Roberts held that, absent the delegation found in *Condon*, exclusion under a party rule was not "state action" and did not offend either the Fourteenth or Fifteenth Amendments.

Nine years later, in *Smith v. Allwright*,[58] the Court reversed *Grovey v. Townsend* and held for the first time that the right to participate in the party primary elections is encompassed within the "right to vote" as used in the Fifteenth Amendment, and that, in national elections, the "right to vote" is a privilege or immunity of citizens of the United States. "State action" was found in the fact that since the decision in *Grovey*, the Court had recognized in *United States v. Classic*[59] that primary elections are a part of the machinery for the selection of candidates, and as such are fused with the general election into one constitutionally protected

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[55] 286 U.S. 73 (1932).

[56] *Id.* at 89.

[57] 295 U.S. 45 (1935).

[58] 321 U.S. 649 (1944).

[59] 313 U.S. 299 (1941). See Dunham, *Mr. Chief Justice Stone*, in MR. JUSTICE 51–53 (Dunham & Kurland ed. 1956).

process. In *Terry v. Adams*,[60] eleven years later, the doctrine of *Smith v. Allwright* was extended to cover a preprimary election held without sanction of statute and financed by assessing the candidates. The Court split three ways over the ground for characterizing such an activity as "state action," but eight of the nine justices so characterized it.

4. *Miscellaneous classifications.* In the "grandfather clause" cases, it has been noted, the invalidity was predicated upon the application to Negroes of standards not equally applied to whites. The validity of the standards themselves was not litigated in those cases, but it was generally assumed that, absent discriminatory application, they would be sustained, even though statistically they might have the effect of excluding more Negroes than whites. Among these provisions were poll taxes as a prerequisite to voting, property qualifications, literacy requirements, and disqualification upon conviction of specified crimes.[61]

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[60] 345 U.S. 461 (1953).

[61] The poll tax as a prerequisite to voting, disqualification for conviction of listed crimes, and a requirement that an applicant for registration should be able to read any section of the Constitution or be able to understand the same or give a reasonable interpretation thereof, were upheld in Williams v. Mississippi, 170 U.S. 213 (1898). The appellant attempted to show evil intention by quoting from the opinion of the Mississippi Supreme Court in Ratliff v. Beale, 74 Miss. 247 (1896): "Within the field of permissible action under the limitations imposed by the Federal Constitution, the convention swept the field of expedients, to obstruct the exercise of suffrage by the negro race. . . . By reason of its previous condition of servitude and dependencies, this race had acquired or accentuated certain peculiarities of habit, of temperament, and of character, which clearly distinguished it as a race from the whites. . . . Restrained by the Federal Constitution from discriminating against the negro race, the convention discriminates against its characteristics and the offenses to which its criminal members are prone." For a unanimous Court, Mr. Justice McKenna said: "But nothing tangible can be deduced from this. If weakness were to be taken advantage of, it was to be done 'within the field of permissible action under the limitations imposed by the Federal Constitution,' and the means of it were the alleged characteristics of the negro race, not the administration of the law by the officers of the State. Besides, the operation of the constitution and laws is not limited by their language or effects to one race. They reach weak and vicious white men as well as weak and vicious black men, and whatever is sinister in their intention, if anything, can be prevented by both races by the exertion of that duty which voluntarily pays taxes and refrains from crime." 170 U.S. at 222.

The *Williams* case was mentioned by President Goode in this address to the Virginia Constitutional Convention of 1901 in commending to the attention of the convention the Mississippi and South Carolina provisions, see *supra* note 35, and no doubt was in the mind of the late Carter Glass when, speaking before the same con-

The educational requirements have been successful except where their terms and legislative history have indicated that they were designed for discriminatory application,[62] or where discriminatory administration has been demonstrated.[63] The property qualifications have never been squarely before the Court. Once it became apparent that they could not be applied to Negroes without also being applied to whites, these provisions rapidly disappeared in the South.

B. THE GOMILLION CASE

The Fifteenth Amendment, then, is self-executing and automatically invalidates provisions in state constitutions and state statutes which violate its terms. It applies to legislative and administrative action alike.[64] It applies to all levels of government, federal, state, and local. It prohibits indirect as well as direct exclusions. Indeed, there need be no exclusion at all; the Amendment prohibits "discrimination on account of race in matters affecting the franchise,"[65] and is not restricted to situations in which there is a technical denial of the right to vote. It prohibits exclusion of citizens on the basis of their race from participation in the elective process at all stages. It prohibits willful failure to count the ballots from certain precincts chosen because of the racial composition of their voters.[66]

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vention, he observed: "By fraud, no; by discrimination, yes. But it will be discrimination within the letter of the law. . . . Discrimination! Why that is precisely what we propose; that, exactly, is what this convention was elected for—to discriminate to the very extremity of permissible action under the limitations of the Federal Constitution, with a view to the elimination of every Negro voter who can be gotten rid of, legally, without materially impairing the numerical strength of the white electorate. . . . It is a fine discrimination, indeed, that we have practiced in this plan." Quoted in LEVINSON, RACE, CLASS AND PARTY 85–86 (1932), and in KEY, POLITICAL PARTIES AND PRESSURE GROUPS 535–36 (1946).

[62] Compare Davis v. Schnell, 81 F. Supp. 872 (S.D. Ala. 1944), *aff'd*, 336 U.S. 933 (1949), with Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45 (1959).

[63] In *Williams*, *supra* note 61, at 224–25, the Court noted that under Yick Wo v. Hopkins, 118 U.S. 356 (1886), a showing of actual discrimination in administration would suffice to bring such a law within the prohibition of the Constitution.

[64] United States v. Mosley, 238 U.S. 383 (1915).

[65] Lane v. Wilson, 307 U.S. 268, 274 (1938).

[66] United States v. Mosley, 238 U.S. 383 (1915).

Comprehensive as these principles are in their coverage of situations in which whites seek to limit Negro participation in the elective process, they all derive from cases in which the effect of the challenged provisions or individual acts was to deny to the moving party, or to limit, his right to participate in the processes by which were chosen officers in a unit of government with power over his life, liberty, or property. They do not cover the right to be within the governmental units themselves. In this regard, the *Gomillion* case is one of novel impression.

The "vested" vote—an arithmetic solution. Before the changes in the boundaries of the City of Tuskeegee, Negroes who were qualified electors and resided within the city limits were entitled to vote in national, state, county, and city elections. Though efforts to hold down Negro registration had been effective in the past, they were clearly illegal and subject to judicial correction. After the Tuskeegee gerrymander, those who lived in the area detached from the city could still vote in national, state, and county elections. By ignoring the question raised by Mr. Justice Whittaker and simply asserting that the petitioners were deprived of their "theretofore enjoyed" voting rights, the Court left the inference that the question was a matter of simple arithmetic. Petitioners were entitled to four votes; now they are entitled to three. Four minus three equals one. They have lost a vote.

There are several difficulties with this approach to the question. The first is factual. The Negroes excluded from Tuskeegee could have incorporated their own city. The Alabama statutes provide that any area inhabited by seventy-five persons or more, which is contiguous and forms a homogeneous settlement or community, may incorporate as a city or town by presenting to the probate judge of the county a petition signed by twenty-five inhabitants.[67] In such a community the petitioners, representing a clear majority of the registered voters, could choose the form of government under which they wish to be governed, would be free from the obligations which the old city might have incurred, would not be subject to the minority control to which they had been subject in the past,

[67] ALA. CODE tit. 37, art. 6 (1958).

and, in any event, would have four votes.[68] Any arithmetic loss of vote would then be ephemeral. What would be lost would be the "right" to be included in the general-function local government unit that remained within the Tuskeegee city limits.

The second difficulty is doctrinal. Since the right to vote in Tuskeegee is not a right that in the nature of things can be shared by all Alabamans, the problem arises: where did these particular citizens get the right "heretofore enjoyed?" The City of Tuskeegee did not exist in a state of nature. It was created under the laws of Alabama. It was made square by the laws of Alabama.[69] Its powers were delegated by the Alabama legislature. To say that a change in the boundaries deprives the persons resident in the detached area of their vote carries with it the necessary inference that the legal act of the state in creating a city vests in its inhabitants rights to continued exercise of the powers granted under the charter; the right to vote in the affairs of a municipal corporation is simply appendent to the powers conferred under the charter or by general law. The Contract Clause cases cited by the Court as demonstrating that the powers to alter municipal boundaries is not absolute,[70] do not suggest that the residents of a municipality acquire any rights to the

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[68] At the time of the passage of Act 140, there was widespread discussion of this possibility. Legislation was proposed to forestall it, but it failed of passage. See generally HALL, BIBLIOGRAPHY OF THE TUSKEEGEE GERRYMANDER PROTEST (1960).

[69] Boundaries of municipal corporations are not a natural phenomeuon. In the session of the Alabama legislature which enacted Act 140, forty-nine other Acts were passed fixing such boundaries. Mr. Justice Frankfurter observed that Act 140 was not an act "merely describing metes and bounds." Of course it was not; neither is any other such act. The fixing of boundaries of this sort is a process of maneuvering and bargaining for inclusion and exclusion and results very often in shapes as strange as that of the new city of Tuskeegee. In Alabama, Birmingham has over a hundred sides, including some very fancy jigs and jogs, while Jacksonville, being completely round, has only one. In Chicago this year, the city council will carve the city into fifty wards and in the process it can be assumed that half a dozen racial, national, and religious groups will fight to preserve or increase their influence in the city's affairs. Though there may be differences between the fixing of representation boundaries and general-function boundaries (see pp. 234-39 *infra*), the shape of the average American city suggests that there is about as much politics involved in one as the other.

[70] Graham v. Folsom, 200 U.S. 248 (1906); Shapleigh v. San Angelo, 167 U.S. 646 (1897); Mobile v. Watson, 116 U.S. 289 (1886); Mt. Pleasant v. Beckwith, 100 U.S. 514 (1879); Broughton v. Pensacola, 93 U.S. 260 (1876).

continued exercise of the powers delegated to the corporation, either in substance or in geographical extent. Under *Brown v. Board of Education*[71] Negroes may not be systematically segregated for educational purposes. It may follow that the power of the state to fix school district boundaries does not permit the accomplishment of such systematic segregation through gerrymandering. This is not to say, however, that a Negro child transferred from one public school to another—absent a showing of segregation—is deprived of his right to attend the first public school. The evil to be eliminated is the segregation, not the move from one school to another.

The loss-of-vote analysis is wanting in a third way. Not only is it factually and doctrinally difficult to spell out a loss of the right to vote in the *Gomillion* case, but clearly the desired objective could have been obtained without "a loss of vote" even in the strained sense in which it can be found in the detachment case. The municipal charter conld have been forfeited, thereby occasioning a loss of municipal vote to Negro and white alike and answering the charge of racial discrimination. Then, under the general law, the same twenty-eight-sided city conld have been incorporated.[72] If it be said that the Court would penetrate the underlying rationale of this sequence of events and strike this method down as artifice, the residents of "uncouth" new Tuskeegee could detach their area from the city. Here the white population, not the Negro, would suffer any temporary loss of vote involved. Then they could petition the county probate court to decree their incorporation. This latter method would not only have the effect of accomplishing the same separation accomplished temporarily by the Tuskeegee gerrymander, but it would also have the further effect of saddling the Negro community with the outstanding obligations of the old city.[73] Had the very statute held unconstitutional in *Gomillion* been enacted in Virginia instead of in Alabama, the Court could not have spelled out any loss of vote in the arithmetic sense, for in Virginia the cities are independent political entities, not governed

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[71] 347 U.S. 483 (1954).

[72] See pp. 236–37 *infra*.

[73] See, *e.g.*, Laramie County v. Albany County, 92 U.S. 307 (1875).

by the counties in which they are geographically located.[74] Detachment of a portion of the City of Charlottesville, for instance, would occasion no loss in the number of votes cast by persons in the area detached. They would no longer vote for the Charlottesville councilmen, but instead would vote for members of the Albemarle County Board.

Thus *Gomillion* invites speculation as to why the Court put its decision on the ground that there was an unequivocal loss of a vote. The easiest answer lies in the way the complaint was framed. The Court seems to have taken at face value the allegations of facinorous motive, characterizing the case as one in which the authors of the new boundaries carefully identified the Negro voters and carved their homes out of the city. If the case depends upon this characterization, the result is understandable. The characterization itself, however, may very well depend upon the failure of the petitioners to provide before-and-after figures on Negro residence as well as Negro voter residence. If, as has been suggested, there were some 400-odd Negroes left in the new city, and among them there were four or five qualified electors, while 5,400-odd Negroes were excluded, among whose number there were 395-odd qualified electors, the ratio of voters to gross number is still close enough to suggest that no such detailed excision occurred and that what happened was an exclusion, willy-nilly, of the vast percentage of Negroes, voters and non-voters.

Another distinct possibility is that the decison covers up disagreements on the validity of the non-justiciability doctrine espoused by Mr. Justice Frankfurter and two other members of the Court in *Colegrove v. Green*.[75] Some credence is lent to this view by the fact that, without mentioning *South v. Peters*,[76] the Court distinguished the apportionment cases as involving mere dilution. Furthermore, it would account for Mr. Justice Douglas' felt necessity to note that he still adheres to the views of the dissents in *Colegrove* and *South*.

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[74] See Bain, *Terms and Condition of Annexation under the 1952 Statute*, 41 VA. L. REV. 1130 (1955).

[75] 328 U.S. 549 (1946). This case is considered at length in the next part of this article.

[76] 339 U.S. 276 (1950). This case, too, is subject to extended treatment below.

The essential problem left open is whether there can ever be a violation of the Fifteenth Amendment that is not also a violation of the Equal Protection Clause of the Fourteenth Amendment. Whatever great need for specifically protecting the franchise may have existed at the time of the adoption of the Fifteenth Amendment, is it not now clear, as the Equal Protection Clause has been construed, that classification in terms of race or color cannot provide a valid basis for state action with regard to any of the rights or privileges that a state may otherwise regulate? Was the *Gomillion* case, because of its specific content, rested on the Fifteenth Amendment which more clearly controlled the issue than the generalities of the Fourteenth to provide a narrower precedent than might have otherwise resulted?

II. The Gomillion Case and the Fourteenth Amendment

The Constitution of the United States confers no powers on territorial units smaller than a state. It vests certain powers in the national government and reserves the balance "to the states" and "to the people."[77] The Court has said that a state could operate with no subdivisions at all, managing its affairs and discharging its duties completely through state officers.[78] While such a hypothetical monolithic state might not offend the Constitution, there has never been one in the history of this nation. The first English colonists had been ashore no more than a dozen years before they were electing representatives to a popular assembly from townships and boroughs,[79] and by 1634, the colony was divided into eight connties, "to be governed as the shires in England."[80] Within another twenty years one of these counties was given a measure of self-government.[81] It can be said, then, that by the middle of the seventeenth century geographical subdivisions were in use in America for purposes of: (1) representation in the governing body of the larger political order; (2) local administration of state policy; and (3) the exercise of delegated powers of self-government.

Properly viewed, geographical subdivision is not a matter of sub-

[77] U. S. Const. amend. X.

[78] See Hunter v. Pittsburgh, 94 U.S. 535 (1876).

[79] See 1 Laws of Virginia 121 (Hening 1619).

[80] *Id.* at 223 (1634). [81] *Id.* at 391 (1655).

stantive power, but rather a method of accomplishing diverse governmental objectives; hence its limits may be expected to vary with the substantive power in the exercise of which it is employed. To place *Gomillion* in this context, it is useful to examine the substantive constitutional rights to equality of representation, equality in opportunities for local self-government, and equality in government services.

A. GEOGRAPHIC BOUNDARIES AND REPRESENTATION

In a sort of Kinsey Report appended to his opinion in *Colegrove v. Green*,[82] Mr. Justice Frankfurter demonstrated that apportionment, like sex, is an arena of American life with a chasm between ethic and action. Forty-two of fifty state constitutions require census apportionment,[83] but most go sinfully on with representation districts in gross disproportion to population. Sin is seldom free from strain, however, and the political battles over reapportionment have been among our most strenuous. Political losers yearn to go to law, and courts at both the state and the national level have from time to time been asked to intervene.

1. *Federal elections.* The cases brought before the national courts have been of two classes. The first consists of those dealing with the use of districts in the apportionment of representatives in the Congress, and with the election of senators and presidential electors. The distribution of representatives is a product of two apportionments. The Congress is required by the Constitution to apportion House membership among the states "according to their respective numbers,"[84] and during most of our history Congress has required that each state apportion its delegation among election districts.[85] Though there have been periods during which Congress refused or neglected to reapportion among the states,[86] the courts

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[82] 328 U.S. 539 (1946).

[83] See Lewis, *Legislative Apportionment and the Federal Courts*, 71 HARV. L. REV. 1057 (1958).

[84] U.S. CONST. art. I, § 4; Amend. XIV, § 2.

[85] See Colegrove v. Green, 328 U.S. 549, 555 (1946).

[86] *Ibid.* See also Chafee, *Congressional Reapportionment*, 42 HARV. L. REV. 1015 (1929).

have never been asked to require it to do so,[87] nor has any act of Congress apportioning representatives been challenged for failure to comply with the Constitution.[88]

For the first century and a quarter of our history under the Constitution, the legality of a state law providing for the apportionment of congressional districts was not challenged in federal courts. The first case, in 1932, was *Wood v. Broom*,[89] in which a bill was brought before a three-judge district court to declare unconstitutional and void an act of the Mississippi legislature dividing the state into districts for the purpose of selecting the Mississippi congressional delegation for that year. It was alleged that the districts created by the statute were not compact and contiguous and of reasonably equal population, as required by the Constitution and the applicable Acts of Congress.

The district court held, one judge dissenting, that the Act of 1911[90] required that congressional districts be compact and contiguous and reasonably equal in population, that the districts created by the Mississippi statute did not comply, that the voters had a constitutional right to vote for members of Congress, that the constitutional right to vote is a right to vote at a legal election, and that an election held under a void statute is not a legal election. It proceeded to enjoin the holding of the election.

On appeal to the Supreme Court, the decision of the district court was reversed and the bill was ordered dismissed. The Court was unanimous in its judgment but disagreed as to the appropriate rationale. For the majority, Mr. Chief Justice Hughes held that the requirements of the Act of Congress of 1911 that districts be compact and contiguous and of equal population, had expired with the election they were enacted to govern,[91] had been omitted from the

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[87] No such apportionment was made between the censuses of 1911 and 1930. See Chafee, *supra* note 86, at 1017.

[88] In *Colegrove*, Mr. Justice Frankfurter said: "It never occurred to anyone that this Court could issue mandamus to compel Congress to perform its mandatory duty to apportion." 328 U.S. at 555.

[89] 287 U.S. 1 (1932).

[90] Act of Aug. 8, 1911, ch. 5, § 3, 37 Stat. 13.

[91] The title to the Act of 1911 read; "For the apportionment of Representatives in Congress among the several States under the Thirteenth Census." The Court held that the Act was limited in its application to that particular census. 287 U.S. at 6.

Reapportionment Act of 1929,[92] and were no longer in force. The Court reserved judgment on the question whether, were these provisions still in force, the issue would be justiciable or whether there was equity in the bill. Justices Brandeis, Stone, Roberts, and Cardozo were of the opinion that, because the parties and the district court had all operated under the assumption that the 1911 statute applied, the Court should not have ruled upon its applicability but should have reversed the decree and ordered the bill dismissed for want of equity.[93]

It is interesting to speculate about the scope of the decision in *Wood v. Broom* and about the relationship between the majority and concurring opinions. If the issue before the Court is taken as limited to the propriety of the ground upon which injunctive relief was granted by the district court, it can be said that the decision goes no further than to hold that the provisions of §3 of the Reapportionment Act of 1911 expired with the specific apportionment those provisions were enacted to govern. On this point the record is somewhat confusing. The question whether §3 of the Act of 1911 was still in force had been expressly reserved the year before in *Smiley v. Holm.*[94] In the meanwhile, the Supreme Court of Illinois[95] and the District Court for the Eastern District of Kentucky[96] had held that the 1911 Act was still effective. It was natural, then, to place heavy emphasis upon the requirements of the statute. Reading the record, however, it is difficult to draw the conclusion that the constitutional question was not specifically raised and argued. The appellee's brief alleged that the Mississippi Act was "void and invalid, as being in violation of Art. 1, sec. 4 of the Constitution, the Fourteenth Amendment thereof, and the Act of Congress of August 8, 1911. . . ."[97] The statement of facts concludes:[98] "On these facts the complainant and appellee seeks protection in the Federal Court of the right of equal representation guaranteed to him by the Constitution of the United States and the

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[92] Act of June 18, 1929, ch. 28, 46 Stat. 21, 16, 27.

[93] 287 U.S. at 8.

[94] 285 U.S. 355 (1932).

[95] Moran v. Bowley, 347 Ill. 148 (1932).

[96] Hume v. Mahan, 1 F. Supp. 142 (E. D. Ky. 1932), *rev'd sub nom.* Mahan v. Hume, 287 U.S. 575 (1932), as moot and on the authority of *Wood v. Broom.*

[97] Brief for Appellee, p. 4.

[98] *Id.* at 6.

Act of Congress hereinbefore quoted." In his discussion of equity jurisprudence, the appellee asserted:[99] "The question involved in this case is not only the equal right of the appellee to vote in a legal Congressional Election but his right to equal representation in Congress. . . . Our Constitution provides that every citizen is entitled to equal protection of the laws." Later, in the same section:[100] "Therefore the questions whether or not the power was exercised by the 'legislature' within the meaning of Art. I, Sec. 4 (U.S. Const.) and whether the exercise of the power is within, or complies with, such federal constitutional provisions and statutory laws, are *federal questions*. . . . This court has stated that when essential to the enforcement of rights asserted under the federal Constitution, it will review the decision of a state court. . . . It must necessarily follow that the right of the appellee to participate in the election of a congressman from the State of Mississippi is a right to flow to him out of the Constitution of the U.S. . . . ."It may be conceded that the grounds for relief are in places logically intertwined and difficult of separation. Nowhere does the appellee concede *arguendo* the inapplicability of § 3 of the Act of 1911. It could be argued that his references to Article I, § 4 of the Constitution, and the general references to the Fourteenth Amendment, point to the power of Congress to require compactness and equal population in congressional election districts. This interpretation, however, cannot be extended to cover the reference to the Equal Protection Clause, since that provision is inapplicable to acts of Congress.[101]

The majority opinion noted that Article I, § 4 of the Constitution and the Fourteenth Amendment, as well as the statutory provisions, were alleged to be grounds for invalidity.[102] Since the district court decree was reversed and the bill ordered dismissed, it might be assumed that the decision held that, absent congressional statute, there is no constitutional right to compel the election of congressmen from districts that are compact and contiguous and of reasonably equal population. Under this interpretation the questions of justiciability and equity that were reserved could only arise in the event that compactness, contiguity, and equality were

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[99] *Id.* at 16, 17.

[100] *Id.* at 18, 19.

[101] But *cf.* Bolling v. Sharpe, 347 U.S. 497 (1954).

[102] 287 U.S. at 4.

required by statutes enacted by the Congress pursuant to the powers conferred under the Constitution.

The reach and purpose of the concurring opinion is also ambiguous. The concurring justices may have doubted the merits of the Court's holding on the expiration of the Act of 1911, and desired to postpone a decision on that question until it should arise in a case in which it was contested and argued in the lower court. Lending credence to this view is the fact that such a case, *Mahan v. Hume*,[103] had been filed just before *Wood v. Broom* was decided. The defendant in the *Wood* case had not urged the inapplicability of the statute in the district court and did not raise it in the Supreme Court. The plaintiff, of course, asserted the statute was applicable and argued its applicability in his brief.[104] The only contrary argument was made in a brief *amicus* filed by the Attorney General of Virginia.[105] The interest of the Commonwealth of Virginia in *Broom* grew out of a decision of the Virginia Supreme Court of Appeals holding a Virginia reapportionment statute unconstitutional under the Virginia Constitution and invalid under the provisions of the Act of Congress of 1911.[106] The Virginia brief was filed on October 12. Five days later the appeal in *Mahan v. Hume*[107] was filed. In the *Mahan* case, the applicability of the statute, as well as its constitutionality, had been directly decided in the affirmative. The concurring Justices may have thought that it made more sense to reach the merits after argument in a case in which the point was contested and decided than to do so at the instance of an *amicus curiae*, who, in effect, was asking review of a decision of a state court that could not be appealed because it was supported by a sufficient and independent state ground.[108]

Contemporaneous comment on *Wood v. Broom* does not add greatly to understanding. Its impact was neatly summed up in a law

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[103] 287 U.S. 575 (1932).

[104] Brief for Appellee, p. 22.

[105] 287 U.S. at 4.

[106] Brown v. Sanders, 139 Va. 28 (1932). Though the Virginia Court noted the decisions holding that the provisions of the Act of 1911 were still in force, it held that since those provisions and the requirements of the Constitution of Virginia were the same, it did not have to pass on the statutory question.

[107] 287 U.S. 96 (1932).

[108] See ROBERTSON & KIRKHAM, *op. cit. supra* note 24, at § 98.

review note:[109] "It seems that the courts have encountered great difficulty in answering the question as to the individual's right to invoke the power of courts to protect his constitutional rights, and that the law as to the requirements for constitutional redistricting is in an unsatisfactory uncertain state." And so it was. And so it has remained. Attack on unequal districts, unsuccessful in the federal courts, shifted back to the state courts and, by and large, unequal districts grew more unequal. During the period between 1932 and 1946, *Wood v. Broom* was cited only once, by the Supreme Court of Illinois.[110] The Illinois court interpreted the *Wood* case to hold that there are no requirements of equal population in the design of congressional districts, either under the Fourteenth Amendment or under the Act of 1929.

Such was the state of the law at the time *Colegrove v. Green*[111] reached the Court. Immediately after the census of 1930, the Illinois legislature enacted its first reapportionment statute since 1901.[112] The act was attacked in the Illinois courts as failing to comply with the requirements of compactness and equal population found in the Act of Congress of 1911. The Illinois Supreme Court invalidated the 1931 statute but held that the result was to leave in force the Act of 1901.[113] The 1901 statute was then attacked on the same ground but in the meantime the Supreme Court's decision in *Wood v. Broom* had been handed down. The Illinois Supreme Court held that the Act of 1901 met the requirements of the Constitution of the United States and those of the Act of 1929 as those requirements were explained in the *Wood* case.[114]

Colegrove was a suit brought in the federal district court for a declaratory judgment that the Illinois Apportionment Act of 1901 was unconstitutional and in violation of the requirements set out in various acts of Congress, and for an injunction prohibiting holding the Illinois congressional elections for 1946 under the provisions of the Act of 1901. The effect of such an injunction would have been

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109 Note, 17 MINN. L. REV. 322 (1933).

110 Daly v. Madison County, 378 Ill. 357 (1941). See Brief and Argument for Appellants, pp. 20–22, Colegrove v. Green, 328 U.S. 549 (1946).

111 328 U.S. 549 (1946).

112 Ill. Acts. 1931, at 545.

113 Ill. Acts 1901, at 3.

114 Daly v. Madison County, 378 Ill. 357 (1941).

to require election of Illinois' twenty-six congressmen-at-large until such time as the General Assembly should enact a constitutional apportionment act. The plaintiffs elaborately argued the requirements of Article I, § 2, the Due Process Clause, the Equal Protection Clause, the Privileges and Immunities Clause, and the Preamble to the Constitution of the United States.[115] They also argued that, while it might be taken as settled that §3 of the Act of 1911 had expired,[116] the statutory requirement of equality of population in congressional districts could be found in §23 of the Revised Statutes of 1878.[117] It was argued that in printing the United States Code of 1925, § 23 of the Revised Statutes had been inadvertently left out, and the language of "the obviously temporary Act of 1911" had been substituted.[118] They also urged on the Court the Northwest Ordinance,[119] the Act of 1818 admitting Illinois to the Union,[120] and the original and current Illinois Constitutions.[121]

The cause was heard by a three-judge district court which dismissed on the authority of *Wood v. Broom.* In dismissing, the court emphasized its disagreement with the holding in the *Wood* case and said that but for that decision it would have no hesitation in granting the relief sought, since it would have supposed that the right to equal voice in the selection of the state's congressmen was vouchsafed by the Constitution. It took *Wood v. Broom* as governing the case on the constitutional ground—the same interpretation that had been placed upon *Wood* by the Illinois Supreme Court.[122]

When *Colegrove v. Green* reached the Supreme Court, ouly one Justice who had sat in *Wood v. Broom* was still on the Court, a fact

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[115] See also Brief of Better Government Association, as *amicus curiae,* p. 32; Lewis, *supra* note 83, at 1071 *et seq.*, where Article I, § 2 is also used to buttress arguments for the existence of a constitutionally protected right to equal influence in elections.

[116] This was conceded in view of the flat ruling on the point in *Wood v. Broom,* but the appellants attached as an appendix to the brief excerpts from the congressional debate on the Apportionment Act of 1929, purporting to show that no one thought it had the effect of deleting the 1911 requirement of equal population among districts. Brief and Argument for Appellants, Appendix, p. 22.

[117] *Id.* at 105.

[118] *Id.* at 109.

[119] *Id.* at 113.

[120] *Id.* at 116.

[121] *Id.* at 117, 122.

[122] Daly v. Madison County, 378 Ill. 357 (1941).

adverted to in the opinion of the district court. This was Mr. Chief Justice Stone, and he died between the argument and the decision. Since Mr. Justice Jackson did not participate in the case, it was decided by a seven-judge Court. The Court voted four to three to affirm the district court's dismissal of the bill. There were three opinions.

Mr. Justice Frankfurter spoke for himself and Justices Burton and Reed, a majority of those voting to affirm. He characterized the case as one alleging, as grounds for invalidity of the Illinois statute of 1901, "various provisions of the United States Constitution and § 3 of the Reapportionment Act of August 8, 1911."[123] He went on to say that the Court could dispose of the case on the authority of *Wood v. Broom*, which had settled the legal merits of the controversy inasmuch as it had held that § 3 of the Act of 1911 had expired and that the Act of 1929 did not contain any requirement of equality of population among districts.[124] This can be taken as adopting the view of the Illinois Supreme Court and of the district court in the *Colegrove* case, that *Wood v. Broom* held that no guaranty of equal congressional districts flows directly from Article I, § 4 or from the Fourteenth Amendment. Mr. Justice Frankfurter did not stop there. He called attention to the fact that in *Wood v. Broom* four Justices were of the opinion that the bill in that case should have been dismissed for want of equity. Recognizing the intricacies of party flights and local geographical bargaining, he was of the opinion that the Court was well out of that "political thicket."[125] This opinion was shared by Mr. Justice Rutledge, who said that initially he should have thought that the holding on the absence of justiciable constitutional rights was also correct, inasmuch as §§ 4 and 5 of Article I apparently set out an exclusive method of correcting such abuses, but that he took *Smiley v. Holm*[126] to hold the contrary. Therefore he concurred in the result, agreeing that the bill should be dismissed for want of equity; he thought the question otherwise justiciable and expressed no opinion on the merits of the constitutional issue.[127]

Mr. Justice Black, joined by Justices Douglas and Murphy, dis-

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123 328 U.S. at 550.

124 *Id.* at 551.

125 *Id.* at 556.

126 285 U.S. 355 (1932).

127 328 U.S. at 564.

sented.[128] He took the creation of unequal districts to violate the Equal Protection Clause and saw no difficulty in enforcement of a decree through a requirement that congressional elections be held at large until such time as the Illinois General Assembly should pass a valid reapportionment statute. This method might not be ideal, he conceded, but it had the virtue of being constitutional.[129]

The difference in treatment of *Wood v. Broom* as a precedent in the Frankfurter and Black opinions is of interest. It has been suggested above that the case can be taken as ruling that there are no constitutionally protected rights to equal congressional districts. Mr. Chief Justice Hughes was careful, however, to preserve the issue whether illegality in the creation of such districts is a justiciable matter. Apparently Mr. Justice Frankfurter was willing to answer in the negative, leaving the inference that, should Congress require by statute that congressional districts be of equal population, the Court would not intervene and the matter would be left for Congress to handle through its contested-election machinery. This is the point on which Mr. Justice Rutledge parted company with the other Justices who voted to affirm. It must be said with Mr. Justice Rutledge that it is very difficult, indeed, to reconcile the Frankfurter position with the holding in *Smiley v. Holm.*

Mr. Justice Black took the narrowest possible view of *Wood v. Broom.* Ignoring the fact that the constitutional point was raised, argned, and stated by the Court as among the grounds urged for invalidating the Mississippi statute, and though the holding is completely inconsistent with the theory that the constitutional question was not decided, he stated:[130] "There this Court simply held that the State Apportionment Act did not violate the Congressional Reapportionment Act of 1929, 46 Stat. 21, 26, 27 since that Act did not require election districts of equal population. The Court expressly reserved the question of 'the right of complainant to relief in equity.' " The difficulty with this statement is that so often attendent on quotation of incomplete sentences. What the Court had said was that it was not necessary to consider "the right of the complainant to relief in equity upon the allegations of the bill of complaint, or as to justiciability of the controversy, *if it were assumed that the requirements invoked by the complainant are still in*

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[128] *Id.* at 566. [129] *Id.* at 574. [130] *Id.* at 573.

effect."[131] Thus what was reserved was a decision on the willingness of the Court to intervene to enforce a statutory as distingnished from a constitutional requirement of election from districts of equal population.

The Frankfurter opinion in *Colegrove*, representing a minority of the Court, is technically not a precedent. On the issue of constitutional entitlement to vote at an election of congressmen from districts of equal population, the Court was split three to three, with Mr. Justice Rutledge expressing no opinion. On the justiciability issue, Mr. Justice Frankfurter's opinion was a minority view, the Court expressing its opinion four to three for the contrary position.

The constitutional requirements for equality in the election of congressmen have been before the Court only once since *Colegrove v. Green.* In 1946, they were pleaded in an attempt to upset the Georgia unit voting system. In *Cook v. Fortson*,[132] it was alleged that in a Democratic primary election for congressman for the fifth Georgia Congressional District, composed of Fulton (Atlanta), DeKalb, and Rockdale Counties, one candidate had received a majority of the votes cast in the election, but that another candidate, having received a majority of the votes cast in two of the three counties embraced by the district, had been certified as the Democratic candidate. In denying equitable relief, the district court took the case to be controlled by *Colegrove.* In the Supreme Court the appeal was dismissed, and the district court ordered to dismiss the bill, on the authority of *United States v. Anchor Coal Co.*, apparently on the ground of mootness.[133] Justices Black and Murphy were of the opinion that jurisdiction should have been noted. Mr. Justice Rutledge favored postponing decision until the case was heard on the merits. He noted the relevance of *Colegrove* but indicated that he did not think the issues were identical.[134]

Though *Cook v. Fortson* was the last case to reach the Supreme Court raising the requirements of Article I, § 4, the requirements of the Due Process and Equal Protection Clauses have been the sub-

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131 287 U.S. at 8. (Emphasis added.) 132 329 U.S. 675 (1946).

133 279 U.S. 812 (1929). See ROBERTSON & KIRKHAM, *op. cit supra* note 44, at § 273 n. 2.

134 Mr. Justice Rutledge wanted the petition for rehearing in *Colegrove* granted, and *Colegrove* and *Cook v. Fortson* set down for argument together. 329 U.S. at 678.

ject of much subsequent litigation. Without referring to the *Wood* case, Mr. Justice Rutledge said in *Cook* that a majority of the Court in *Colegrove* had refused to find that there was a want of jurisdiction and that in his opinion the issues "whether of jurisdiction, discretion in exercising it, or of substantive right . . . , have not been conclusively adjudicated by prior decisions of this Court."[135]

In the election of 1948, those issues were back before the Court in *MacDougal v. Green*.[136] Illinois law provided that before any new party could have its candidates put on the official ballot, it must submit a petition signed by 25,000 voters:[137] "Provided, that included in the aggregate total of Twenty-five thousand (25,000) signatures are the signatures of two hundred (200) qualified voters from at least fifty (50) counties within the state." The Progressive Party in Illinois sought to run candidates for President, Vice-President, senator, and a variety of state offices. Party organizers presented a petition with the required 25,000 signatures. The state electoral board found that the petition did not meet the requirement that there be signatures of 200 qualified voters from each of at least 50 counties and denied it. The plaintiffs sought an injunction against the enforcement of this requirement. The district court dismissed for want of jurisdiction. It cited no precedents.

On appeal to the Supreme Court, the judgment of the district court was affirmed by a vote of six to three. The *per curiam* opinion was signed by five members of the Court:[138]

> To assume that political power is a function exclusively of numbers, is to disregard the practicalities of government. Thus, the Constitution protects the interest of the smaller against the greater by giving in the Senate entirely unequal representation to populations. 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. The Constitution—a practical instrument of government—makes no such demands on the states.

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135 *Ibid.*

136 335 U.S. 281 (1948).

137 ILL. REV. STAT. ch. 46, § 10-2 (1959).

138 335 U.S. at 283.

Mr. Justice Douglas, joined by Justices Black and Murphy, dissented. He saw in the Illinois statute "the same inherent infirmity as that which some of us saw in *Colegrove v. Green.*"[139] He was of the opinion that the Illinois statute violated the Equal Protection Clause; Article II, § 1, governing the voting for electors; Article I, § 2, conferring the right of the people to choose their representatives in Congress; and the Seventeenth Amendment, providing for the direct election of senators. Each of these provisions, according to the dissenters, vests important political rights, and discrimination against any group of citizens in the exercise of these rights is a denial of equal protection.

Mr. Justice Rutledge voted to affirm the district court's denial of equitable relief but stated again his opinion that in such cases denial of relief should be placed upon the exercise of discretion, reserving the substantive constitutional issues.

Cited as authority in *MacDougal v. Green* were *Colegrove v. Green* and *Colegrove v. Barrett.*[140] Since the substantive issues were resolved, it can hardly be said that *MacDougal* was disposed of on the ground that the issues involved were non-justiciable. The decision went squarely to the absence of any constitutional requirement that political power in the states be evenly distributed per poll without regard to geography. This is precisely the proposition implicit in *Wood v. Broom,* and in the statement by Mr. Justice Frankfurter in *Colegrove v. Green* to the effect that the merits of that controversy had been settled in *Wood v. Broom.*

Two years later, the Court decided *South v. Peters.*[141] The same Georgia unit voting system that had been unsuccessfully attacked in *Cook v. Fortson* was back before the Court. Under the system, a number of units was assigned to each county, ranging from six for each of the eight most populous counties, including Fulton (Atlanta), to two for most counties. In the primary elections for state officers and for United States senator, the voters in each county voted for the candidates of their choice and the candidate receiving the largest number of votes in each county received the number of

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139 *Id.* at 289.

140 330 U.S. 804 (1947). *Barrett* was a companion case to *Green* and was dismissed for want of a substantial federal question.

141 339 U.S. 276 (1950).

units allotted to that county. The very large vote in Atlanta counted as six units and the vote in the least populous county in the state counted as two, giving a single Atlanta vote one one-hundred-and-twentieth of the influence on the outcome that a single vote in the least populous county had, and one-tenth of the statewide average. In a suit seeking to enjoin the operation of a Georgia statute providing for the application of the unit system in the counting of votes in primary elections, the district court dismissed the complaint. On appeal, the judgment was affirmed *per curiam* on authority of *MacDougal v. Green*, *Colegrove v. Green*, and *Wood v. Broom*. The opinion contained a somewhat cryptic comment to the effect that, "Federal Courts consistently refuse to exercise their equity powers in cases . . . arising from a state's geographical distribution of electoral strength among its political subdivisions,"[142] but it is difficult to view *South* as other than a decision on the merits.

South v. Peters raised for the first time the question of the use of the power to define representation district boundaries to impose discriminations against Negroes in violation of the Fifteenth Amendment. In his dissent, Mr. Justice Douglas took the position that the incorporation of the unit voting system into the Georgia law was for the purpose of sapping the influence of Negro voters by diluting the vote in cities, where Negroes had been able to achieve suffrage in appreciable numbers, and overcounting the vote in rural areas, where Negroes had been prevented from voting by violence and chicanery. This contention was ignored by the majority. The case was not one brought by or on behalf of Negroes as a class; if it is true that Atlanta Negroes were hurt by the operation of the unit system, it was a hurt that they shared with a very large group of whites. Since the system had been in use in Georgia primaries before Georgia had Negro suffrage, it could hardly be characterized as invented for purposes of racial discrimination.

2. *State elections.* The second class of cases deals with the distribution of political power within the framework of state government. The states have been no quicker to reapportion their own representative districts than they have to reapportion congressional districts. Indeed, in some instances the districts are the same. This was true at the time when *Colegrove v. Green* and a companion

142 *Id.* at 277.

case, *Colegrove v. Barrett*[143] were brought in Illinois to challenge the validity of the Illinois reapportionment act of 1901. *Colegrove v. Green* dealt with congressional districts; *Colegrove v. Barrett* attacked the same state statute as unconstitutional because it created state senate districts unequal in population, allegedly in violation of the Due Process and Equal Protections Clauses of the Fourteenth Amendment. The district court dismissed without opinion. The appeal to the Supreme Court was dismissed for want of a substantial federal question. Mr. Justice Rutledge concurred, but indicated doubt by placing his vote on the ground that the Court had refused reconsideration of *Colegrove v. Green* and had dismissed the Georgia unit-system cases. In five other attempts to challenge state reapportionment statutes,[144] and in one subsequent attempt to bring into question the Georgia unit system,[145] the Court has affirmed denials of equitable relief. In each instance the case has been disposed of by *per curiam* memorandum decisions.

The constitutional issues involved in the federal election cases and those raised in attacks on apportionment for state election purposes have a common ground, but are not precisely the same. Which is the stronger case depends upon the interpretation placed upon the precedents. If they are read to hold that under Article I, § 4, these matters are committed exclusively to Congress and the failure of the states to meet the requirements of the Constitution must therefore be resolved by election contests under Article I, § 5 (and presumably the Twelfth Amendment), the state cases are stronger. No congressional power of revision over state election districting is provided by the Constitution. There is, therefore, no

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143 330 U.S. 804 (1947).

144 Matthews v. Hanley 361 U.S. 127 (1959); Radford v. Gary, 352 U.S. 991 (1957); Kidd v. McCanless, 352 U.S. 920 (1956); Anderson v. Jordan, 343 U.S. 912 (1952); Remmey v. Smith, 342 U.S. 916 (1952).

145 Hartsfield v. Sloan, 357 U.S. 916 (1958). The *Hartsfield* case was filed in the United States District Court for the Northern District of Georgia, and the district judge refused to convene a three-judge court to hear the case. Motion for leave to file a petition for a writ of mandamus to force the district court to convene the panel was filed in the United States Supreme Court. The motion for leave to file the petition was denied *per curiam*. The Chief Justice and Justices Black, Douglas, and Brennan were of the opinion that a rule to show cause should issue.

question of lack of jurisdiction based on the doctrine of separation of powers. The Equal Protection Clause is self-executing, and though Congress is given power to implement its provisions, the courts have had no hesitation in invalidating state legislation that transgresses them. Nor can it be said that the subject matter is a political question in the sense that the guaranty of republican form of government has been held to be.[146] The Equal Protection Clause has been invoked to protect voting rights of citizens.

If, as has been suggested here, the congressional apportionment cases, taken together, have disposed of the substantive constitutional question on a ground other than that of separation of powers, then the state apportionment cases in which no more is alleged than geographical inequality in representation fall *a fortiori* within those dealing with federal elections. In the latter class of cases, the structure of government provided for in the Constitution is set out in some detail in the instrument itself. Geographical disproportion is provided for in the Senate to protect geographical minorities. It can be argued with some force that equal representation in the House was desigued as an egalitarian balance. In the states, by contrast, there has been tremendous variety in form and design both of institutions of government and of representation schemes.

These varied in the colonies.[147] They varied under the early state constitutions.[148] They varied at the time of the adoption of the Fourteenth Amendment.[149] They vary now. Not only have old schemes of representation, which were based upon geography and gave some areas an influence disproportionate to their population, survived to this day, but the most recent constitutional changes in

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[146] See Pacific States Telephone & Telegraph Co. v. Oregon, 223 U.S. 118 (1912). See also Chafee, *supra* note 86.

[147] See 1 Laws of Virginia 112, 299, 300 (Hening 1621); Fundamental Orders of Connecticut, No. 8 (1638), in 1 POORE, FEDERAL AND STATE CONSTITUTIONS 195 (1878) (hereinafter "POORE"); Charter of Connecticut (1662), in 1 POORE 253.

[148] See CONN. CONST. art. III, § 4 (1818), in 1 POORE 260; DEL. CONST. arts. 3 & 4 (1776), in 1 POORE 273–74; N.H. CONST. part II, §§ 2 & 3 (1784), in 2 POORE 1284, 1286; MASS. CONST. ch. 1, § 1 (1780), in 1 POORE 961; S.C. CONST. art. XV (1778), in 2 POORE 1623; S.C. CONST. §§ 3 & 7 (1790), in 2 POORE 1628, 1629, 1634; PA. CONST. § 17 (1776), in 2 POORE 1544; N.Y. CONST. arts. IV & V (1777), in 2 POORE 1333.

[149] DEL. CONST. art. II, §§ 2 & 3 (1831), in 1 POORE 290–91; GA. CONST. art. III, §§ 2 & 3 (1868), in 1 POORE 415–16; VT. CONST. art. IV (1836), in 2 POORE 1883.

representational scheme have abandoned equal representation in the upper house.[150]

But history has neither dimmed the hopes of the franchise reformers nor dampened their energy. Cases continue to come. In one, as in *Colegrove v. Green*, litigation may have provided an effective nudge to a reluctant state legislature. In *Magraw v. Donovan*,[151] plaintiff sought a declaration that the Minnesota Reapportionment Act of 1913 was invalid as a violation of the Due Process and Equal Protection Clauses, because population changes had made it operate to deny to voters in the more populous counties equal representation in the state legislature. Whether by fortune or design, the case was heard while the Minnesota legislature was in session. Without adverting to any of the Supreme Court cases dealing with failure to reapportion, the district court refused to grant the relief sought on the ground that a state remedy was available, but retained jurisdiction until the legislature should have had an opportunity to act. The legislature did act, and the case was dismissed on motion of the plaintiffs.

The October Term, 1961, of the Supreme Court will find two new apportionment cases on the Court's docket: *Baker v. Carr*,[152] from the United States District Court for the Middle District of Tennessee, and *Scholle v. Secretary of State*,[153] from the Supreme Court of Michigan. The *Baker* case raises once again the question of the availability of federal court remedies for failure of a state legislature to reapportion state legislative districts in accordance with the requirements of the state constitution. There the failure to act allegedly resulted in holding elections under an act providing for districts that have become grossly disproportionate in population because of the passage of time and shifts in population. The facts and allegations in *Baker* are substantially the same as those in *Colegrove v. Barrett* and in the state apportionment cases that followed it. In fact, the very statute attacked as unconstitutional in

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150 *E.g.*, CALIF. CONST. art. IV, § 6, as amended November 3, 1942; MICH. CONST. art. 5, § 2 (1900), as amended by Proposition No. 3 at the general election of November, 1952.

151 177 F. Supp. 803 (D. Minn. 1959), dismissing for mootness 163 F. Supp. 184 (D. Minn. 1958).

152 179 F. Supp. 824 (M.D. Tenn. 1959). 153 360 Mich. 1 (1960).

Baker v. Carr was before the Court in *Kidd v. McCanless*,[154] in which the refusal of the Michigan Supreme Court to interfere was affirmed *per curiam*. In the *Baker* case a three-judge court dismissed the complaint but observed that the failure of the legislature to reapportion resulted in a denial of the equal protection of the laws guaranteed by the Fourteenth Amendment. It read all the cases starting with *Colegrove v. Green* as enunciating a non-intervention rule, "whether from a lack of jurisdiction or from the inappropriateness of the subject matter for judicial consideration."[155]

The *Scholle* case contests the validity under the Due Process and Equal Protection Clauses of a 1952 amendment to the Constitution of the State of Michigan, fixing permanently a geographical scheme for the apportionment of state senators. In a five-to-three decision, the Supreme Court of Michigan dismissed the petition. There were five opinions.

3. *The apportionment cases and Gomillion.* The apportionment cases are relevant to *Gomillion* because of the language in Mr. Justice Frankfurter's opinion in *Colegrove v. Green* to the effect that the apportionment of representation among geographic areas within the state is a political question beyond the cognizance of the courts, and that even where constitutionally protected rights to equal treatment are trenched upon, these rights must be vindicated in the legislative forum. However, this ground was unnecessary to the decision of *Colegrove*, even in the Frankfurter opinion; was rejected by a majority of the seven Justices who heard the case; and is irreconcilable with *Smiley v. Holm*[156] decided before *Colegrove*, and with *MacDougal v. Green*, decided after *Colegrove*.

The apportionment cases can easily be distinguished from *Gomillion*. Those cases hold that the Due Process and Equal Protection Clauses of the Fourteenth Amendment do not interdict apportionment schemes that give disproportionate representation to thinly settled areas. It does not follow that the Fifteenth Amendment does not interdict apportionment schemes that single out Negroes for discriminatory treatment. The Constitution does not in its language require equal representation, but it does prohibit the abridgment as well as the denial of the right to vote which is based

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[154] 352 U.S. 920 (1956). [155] 179 F. Supp. at 826. [156] 285 U.S. 355 (1931).

upon racial differences. Even were there no Fifteenth Amendment, the same result might be justified.[157]

While the apportionment cases thus contribute little or nothing to the solution of the *Gomillion* case, the latter did afford the Court an excellent opportunity to clarify the former. This opportunity was not taken. Instead, the Court proceeded to make unintelligible that which had been merely obscure. "In no case involving unequal weight in voting distribution that has come before the Court did the decision sanction a differentiation on racial lines where approval was given to unequivocal withdrawal of the vote solely from colored citizens."[158] This statement was enough to dispose of all the apportionment cases, but Mr. Justice Frankfurter was unwilling to leave it there. Singling out *Colegrove v. Green* from among the apportionment cases cited by the respondents, he stated that it was decided "on the ground that it presented a subject not meet for adjudication."[159] He then characterized the controlling facts of *Colegrove*:[160] "That case involved a complaint of discriminatory apportionment of congressional districts. The appellants in *Colegrove* complained only of a dilution of their votes as a result of legislative inaction over a course of many years." He contrasted that case with the "decisive facts" alleged and "taken to be proved" in *Gomillion*:[161] "The petitioners here complain that affirmative legislative action deprives them of their votes and the consequent advantages that the ballot affords." This is bringing mud to the Mississippi. Were *Colegrove v. Green* considered in isolation, perhaps it could be said that it governed only the malapportionment of congressional districts. It cannot be viewed in isolation, however. Its companion case, *Colegrove v. Barrett*, was dismissed on its authority, and *Colegrove v. Barrett* challenged the

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157 See, *e.g.*, Nixon v. Herndon, 272 U.S. 536 (1927). Though it has been said that *Minor v. Happerset*, 21 Wall. 162 (1811), was limited to the ground alleged (the Privileges and Immunities Clause of the Fourteenth Amendment) and does not stand in the way of an interpretation of the Equal Protection Clause to forbid racial discrimination in suffrage matters, it seems clear that the Equal Protection Clause was not so construed at the time. The Fourteenth Amendment contains a reduction of representation clause that was substituted for a direct suffrage provision rejected by the Congress. See MATHEWS, *op. cit. supra* note 26, at 11–14.

158 364 U.S. at 346.

159 *Ibid.*

160 *Ibid.*

161 *Ibid.*

equality of apportionment for the state senate. Furthermore, *McDougal v. Green*[162] dealt with the selection of presidential and vice-presidential electors, *Turman v. Duckworth*[163] with the selection of a governor, *South v. Peters*[164] with United States senators, and *Hartsfield v. Sloan*[165] with a variety of state officers.

Nor is it possible to say that the decision in *Colegrove* hinged upon the fact that the passage of time had accentuated the rural bias of the Illinois Reapportionment Act of 1901. In the first place, the appellant in *Colegrove* was careful to argue that the Act of 1901 was unconstitutional when it was passed. In the second place, having said that *Colegrove* was governed by *Wood v. Broom*, it is completely inconsistent to say that the disposition of *Colegrove* hinged upon the fact that the inequality there considered was the product of the passage of time. In the *Wood* case, the Governor's ink was hardly dry on the statute. In the third place, in neither *MacDougal v. Green*, nor *South v. Peters* was the alleged inequality the product of population shifts over a period of years.

In a vain effort to fit the distinction between *Colegrove* and *Gomillion* into the parlance of justiciability, Mr. Justice Frankfurter said that "these considerations lift this controversy out of the so-called 'political' arena and into the conventional sphere of constitutional litigation."[166] Certainly the fact that *Colegrove* dealt with relative factors that in the nature of things could never be precisely equal, while *Gomillion* was characterized by the Court as showing an unequivocal denial of the right to vote, is a point of distinction. It is hardly a controlling one. The Fifteenth Amendment prohibits abridgment on racial grounds as well as denial. Suppose that the City of Tuskeegee had been cut along the same "uncouth" lines, and the white portion of the city cut in two parts, along with the provision that, in electing the state senator or representative (under a unit system like the one upheld in *South v. Peters*), each of the three portions of the city should have one unit. Is it possible that such "mere dilution" would survive judicial scrutiny? Be this as it may, the distinction between the apportionment cases and *Gomillion* properly goes to the scope of constitutional

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[162] 335 U.S. 281 (1948).

[163] 329 U.S. 675 (1946).

[164] 339 U.S. 276 (1950).

[165] 357 U.S. 916 (1958).

[166] 364 U.S. at 346–47.

protection, not to the question of justiciability. The racial character of the discrimination alleged in *Gomillion* is pertinent to the definition of citizen's rights, even in the "political thicket."

B. GEOGRAPHICAL BOUNDARIES AND LOCAL GOVERNMENT

The apportionment cases came into consideration in *Gomillion* at the court of appeals level. In the district court they were not mentioned at all. This is not surprising in view of the fact that *Gomillion* did not involve any inequalities in the design of representation districts. The allegations charged discrimination in fixing boundaries of a general-function unit of local government.

The district court placed special emphasis upon the case of *Hunter v. Pittsburgh*.[167] In *Hunter*, citizens of Allegheny, Pennsylvania, sought to reverse a decree directing the consolidation of the City of Allegheny with the City of Pittsburgh. The consolidation had been effected under an act of the Pennsylvania legislature that provided that a vote should be taken in the area encompassed by both cities and that if the vote favored consolidation, consolidation should be decreed. The vote was taken and favored consolidation, but the majority of the Allegheny voters had voted against it. They contended that the extinguishment of Allegheny by consolidation was a violation of the Contract Clause, because an implied contract between the citizens of Allegheny and the city guaranteed that their tax monies would be spent only for the benefit of Allegheny. They charged a violation of the Due Process Clause because Allegheny had already provided its citizens with numerous public improvements and paid for them out of its citizens' pockets, while Pittsburgh was not only heavily in debt but about to contract more debts which consolidation would inflict on the more cautious citizens of Allegheny. The gist of the complaint was that valuable assets belonging to the citizens of Allegheny were being sequestered for the use of the Pittsburghers, while all that Pittsburgh brought to the union was a heavy debt. In rejecting the contention of the plaintiffs in error, Mr. Justice Moody, for a unanimous Court, made the classic statement on the relationship between municipal corporations and their creators:[168]

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[167] 207 U.S. 161 (1907).

[168] *Id.* at 178.

> It would be unnecessary and unprofitable to analyze these decisions or quote from the opinions rendered. We think the following principles have been established by them and have become settled doctrines of this Court, to be acted upon wherever they are applicable. Municipal corporations are political subdivisions of the State, created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them. For the purpose of executing these powers properly and efficiently they usually are given the power to acquire, hold, and manage personal and real property. The number, nature, and duration of the powers conferred upon these corporations and the territory over which they shall be exercised rests in the absolute discretion of the State. Neither their charters, nor any law conferring governmental powers, or vesting in them property, or exempting them from taxation upon it, constitutes a contract with the State within the meaning of the Federal Constitution. The State, therefore, at its pleasure may modify or withdraw all such powers, may take without compensation such property, hold it itself, or vest it in other agencies, expand or contract the territorial area, unite the whole or a part of it with another municipality, repeal the charter and destroy the corporation. All this may be done, conditionally or unconditionally, with or without the consent of the citizens, or even against their protest. In all these respects the state is supreme, and its legislative body, conforming its acts to the state constitution, may do as it will, uurestrained by any provision of the Constitution of the United States. Although the inhabitants and property owners may by such changes suffer inconvenience, and their property may be lessened in value by the burden of increased taxation, or for any other reason, they have no right by contract or otherwise in the unaltered or continued existence of the corporation or its powers, and there is nothing in the Federal Constitution which protects them from these injurious consequences. The power is in the State and those who legislate for the State are alone responsible for any unjust or oppressive exercise of it.

The district court undoubtedly felt that, with *Hunter* to sustain its judgment, the second string of *Colegrove* was unnecessary. *Hunter* suggests that the creation, alteration, and dissolution of municipal corporations has every element of non-justiciability and every element requiring judicial restraint present in the representative-district cases. From the earliest cases, however, the Court has shown

no reluctance to state simply on the merits that the Constitution of the United States presents no inhibition to the exercise of free legislative discretion in fixing general-function boundaries. In distinguishing those cases from *Gomillion*, Mr. Justice Frankfurter showed why this is so. In the general-function district cases, the underlying rights allegedly infringed have been the rights to equal tax treatment and to continued exercise of delegated powers or management of public property. The cases hold that no such rights are given by the Constitution of the United States. The *Hunter* case presents no inhibition of judicial scrutiny of legislative acts fixing municipal boundaries and defining municipal powers or dealing with their property. As a decision on the merits, it deals with the scope of protection under the Constitution.

In demonstrating that *Hunter* stated no absolutes, Mr. Justice Frankfurter referred to the long series of cases in which the Court has applied the Contract Clause to state efforts to rescue hard-pressed communities from the results of their foolishness during the great railroad boom. In many states enabling legislation had been passed to permit counties, cities, and towns to issue bonds to raise money for stock-subscription in railroad companies planning to build lines through the locality. In some instances, the railroads were never built. In many others the expected growth that the coming of the railroad promised never took place. A new generation of taxpayers, faced with the burden of paying these bonds, launched a series of efforts to evade responsibility for the sins of their fathers.

The first line of defense was the doctrine of *ultra vires*. After this had been rendered difficult by the development in the federal courts of the counter-doctrine of estoppel by recital,[169] the taxpayers went to the legislatures. The first legislative relief came in the form of tax limitations. In *Von Hoffman v. Quincy*,[170] it was held that the application of tax limitations enacted after the issuance of bonds cannot be used to defeat an action for mandamus to levy the tax called for by bonds. Withdrawal of the power to raise the money to pay the bonds was held to be a violation of the Contract

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[169] Knox County v. Aspinwall, 21 How. 539 (1858); see 2 DILLON, MUNICIPAL CORPORATIONS 1424 (5th ed. 1911).

[170] 4 Wall. 535 (1866).

Clause. The third round in this aftermath of expansive municipal activity saw the legislative reorganization of municipalities, and the contention on the part of the new entities that they were not liable for the debts of the old. Such cases were *Broughton v. Pensacola*,[171] *Mt. Pleasant v. Beckwith*,[172] *Mobile v. Watson*,[173] and *Shapleigh v. San Angelo*.[174] All of them involved efforts to collect from "successor corporations" the obligations of the predecessor. In each of these cases a valid debt was established, and the Court decided that the facts justified holding the defendant to be the original debtor's successor. In *Graham v. Folsom*,[175] however, there was a final extinguishment of a township. The Court held that there were county officers who could levy the taxes required to pay the township debt, and that mandamus would issue to require them to do so.

Mr. Justice Frankfurter used these cases under the Contract Clause to show that the powers spoken of in such broad terms as in *Hunter v. Pittsburgh* have limitations. He quoted from *Graham v. Folsom*:[176] "[S]uch power, extensive though it is, is met and overcome by the provision of the Constitution of the United States which forbids a State from passing any law impairing the obligation of contracts." Mr. Justice Frankfurter continued, "If all this is so in regard to the constitutional protection of contracts, it should be equally true that, to paraphrase, such power, extensive though it is, is met and overcome by the Fifteenth Amendment to the Constitution of the United States, which forbids a state from passing any law which deprives a citizen of his vote because of his race."[177]

In his concurring opinion, Mr. Justice Whittaker suggested that the case was properly characterized as one in which Negroes were "fenced out" of municipal benefits. This, he said, constituted a violation of the Equal Protection Clause. The Court's opinion rested solely on the fact that in the course of thus being "fenced out," the petitioners lost a vote hitherto enjoyed in municipal affairs. Had Mr. Justice Whittaker's view of the case mustered a

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[171] 93 U.S. 266 (1876).

[172] 100 U.S. 514 (1879).

[173] 116 U.S. 289 (1886).

[174] 167 U.S. 646 (1897).

[175] 200 U.S. 248 (1906).

[176] 364 U.S. at 345.

[177] *Ibid.*

majority, the precedent value of *Hunter* and cognate cases would have been materially weakened, for though the Fourteenth Amendment was enacted primarily for the protection of racial minorities, its langnage is general and its history has paralleled Kipling's lines from *The Ladies:* "[T]he things you will learn from the yellow and brown, they'll 'elp you a lot with the white."[178] By placing the result on the Fifteenth Amendment, the majority limited the immediate precedent value of *Gomillion* to cases of racial discrimination in matters of franchise, leaving intact for the time being the ruling in *Hunter* that the Fourteenth Amendment does not grant, nor is there vested under the Contract Clause, a general right to retain municipal boundaries.[179]

In what may have amounted to no more than rhetoric, the majority opinion did resurrect the dictum in the *Hunter* case to the effect that property of a municipality held in its proprietary, as distinguished from its governmental, capacity might be afforded different protection under the Fourteenth Amendment.[180] After full discussion, this dictum was rejected in *Trenton v. New Jersey*[181] and *Newark v. New Jersey*.[182] It is a thoroughly unworkable distinction and it is probable that Mr. Justice Frankfurter was sim-

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178 This despite the doubts of Mr. Justice Miller that "any action of a State not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision." The Slaughter House Cases, 16 Wall. 36, 81 (1872). See the comment of Professors Currie and Schreter on the limitations of Mr. Justice Miller as a prophet, in *Unconstitutional Discrimination in the Conflict of Laws: Equal Protection*, 28 U. CHI. L. REV. 1 (1960).

179 See Texas *ex rel.* Pan American Production Co. v. Texas City, 355 U.S. 603 (1958). The production company was the owner of mineral leases on submerged lands. It sued to prevent annexation by the city, claiming that the land could not be benefited by city services and the only purpose of the annexation was to enhance the city revenues. The Texas Supreme Court held that under Texas law annexation is a political question not subject to review. On appeal, the Supreme Court dismissed *per curiam* for want of a substantial federal question. No authorities were cited. See Comment, *Per Curiam Decisions of the Supreme Court: 1957 Term*, 26 U. CHI. L. REV. 279, 315 (1959).

180 "It will be observed that in describing the absolute power of the State over property of municipal corporations we have not extended it beyond the property held and used for governmental purposes." Hunter v. Pittsburgh, 207 U.S. 161, 179 (1907).

181 262 U.S. 182, 191–92 (1923) (Due Process and Contract Clauses).

182 262 U.S. 192 (1923) (Equal Protection Clause).

ply setting the broad dictum of the *Hunter* case in its proper perspective, rather than suggesting that the governmental-proprietary distinction can be applied in such cases.

C. GEOGRAPHICAL BOUNDARIES AND SERVICES

For a variety of reasons many of the service functions of government are often split off from the general-function political unit. School districts, sanitary districts, park districts, drainage districts, and the like, are common in American communities.[183] Some are financed by revenue bonds and service charges. Others levy their own taxes. In some cases they are under the control of the general-function district; in others they are completely independent corporations. For the purposes of the Fourteenth and Fifteenth Amendments, they are public agencies and their action is "state action."

The alignment of boundaries of service districts is important in two respects. It determines who gets the service; it may also determine the allocation of cost. Redistribution of income through imposing a disproportionate tax burden on some, or through disproportionate service to others, is not unknown to American government. No one cavils at taxing the property of bachelors for the education of the community's children or at taxing the property of the cripple for the construction of tennis courts. In the spending of the tax dollar all that is required is that the object of expenditure serve some legitimate public purpose, and even here the Supreme Court has said that the determination of what is a public purpose is primarily a matter of legislative discretion.

Some government activities, though serving a legitimate public purpose, confer a direct benefit upon particular parcels of real estate. Where this is so, as in the case of so-called local improvements, such as sidewalks, curbs, and gutters, it has been held that the government may depart from general tax equality principles and levy a special tax, or special assessment, on the property receiving special benefits. The power to levy special assessments is limited to cases in which there is an actual benefit conferred upon

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183 See, *e.g.*, LYON, GOVERNMENTAL PROBLEMS IN THE CHICAGO METROPOLITAN AREA 9 (1957). The number of local governments in the Chicago metropolitan area is 960.

the property assessed. The Court has held that, absent such benefit, the assessment constitutes a violation of the Due Process Clause.[184]

What can be accomplished by varying the charges made by a general-function district can also be done by the creation of special improvement, special service, or special tax districts, with or without separate corporate existence. Where such districts are financed by service charges, problems of equality usually do not arise, since the charge will vary with the actual use made of the service. Where a special improvement district is financed by taxation of real property *ad valorem*, determination of the costs allocated to a given piece of property will depend upon whether, in fixing the district boundaries, it is included or excluded. The drawing of the geographical boundary in such cases is the method employed in levying the tax. In *Myles Salt Co. v. Iberia Drainage Dist.*,[185] the Supreme Court held that property of the salt company located upon an island in the center of a swampy area could not be included in a drainage district. The Court found that the island property already had more drainage than it could use and suffered from rapid run-off of water. Since there could be no benefit to the property, it could not be included. The Court cited the cases dealing with special assessments as controlling, demonstrating again that the fixing of geographical boundaries is simply method and cannot have the effect of relieving government of the constitutional limitations on its power.

Where general tax funds are used to provide services, the Equal Protection Clause has been held to require that differences in their level be rationally justified. The influence of geography in the context of equality is a complex one. Physical facilities must be located somewhere, and cannot be built and replaced all at the same time. Thus children whose parents' property is assessed at the same figure and taxed at the same rate may walk different distances to schools of varying age and splendor. Where the differences are outside the constitutionally permitted variations, however, there is every reason

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[184] Norwood v. Baker, 172 U.S. 269 (1898). The Court has shown some reluctance to intervene except in plain cases. *Cf.* French v. Barber Asphalt Co., 181 U.S. 324 (1900).

[185] 239 U.S. 478 (1916); see also Houck v. Little River Drainage District, 239 U.S. 254 (1915).

to suppose that the Court would intervene, regardless of whether the discrimination is effected by a geographical device or by some other. In *Brown v. Board of Education*,[186] the Court held that simple systematic separation of the races in the public school system is a denial of equal protection of the laws. It is obvious that a taxing unit charged with the administration of schools is not free to employ the gerrymander to accomplish the separation forbidden by the Court. It follows that a state cannot carve itself into non-contiguous school districts that follow no lines save those of ethnology and be protected against judicial intervention. To date no case involving an allegation of gerrymandering of service districts along racial lines has reached the Supreme Court. The matter has been considered at the district court level. In Charlottesville, Virginia, the school board was ordered to submit a plan for desegregation of the city schools and warned bluntly by the district judge that the problem could not be avoided by ingenious carving of districts. In New Rochelle, New York, the district court has acted to prevent the continued operation of a neighborhood school system that, it was alleged, was originally desigued to accomplish a racially separate school.[187]

The principles applicable to the employment of the geographical device for effecting discrimination among classes of citizens in the character or level of services provided are somewhat different in cases in which the units are separate taxing districts. Here the separation is generally designed to enable localities to provide from their own pockets services that the general treasury will not support. When the citizen complains that the schools are better in one community than they are in another, the answer can be straightforward and simple. It is within the power of either to raise the tax rate and improve the schools. It has long been recognized that differences based upon local choice are not inequalities that run afoul of the Equal Protection Clause, of similar provisions in the

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[186] 347 U.S. 483 (1954).

[187] Taylor v. Board of Education 191 F. Supp. 181 (S.D. N.Y. 1961). *Gomillion v. Lightfoot* was cited twice, first as enjoining caution on the court in applying cases out of context and again in connection with the principle that gerrymandered districts do not meet the requirements of the *Brown* case. Judge Kaufman noted that the fact that "a few" Negroes were left within the city limits in *Gomillion* did not save the redistricting.

state constitutions, or of state constitutional requirements of tax equality. If the state should carve itself into school districts according to ethnology, however, there is no reason to believe that such a system would escape judicial condemnation merely by virtue of the fact that each would pay for its own. The objection that the tax burden is unequally distributed would be unavailing, but the forbidden racial separation would be as plain as if the classification were free from circumlocution.

Undoubtedly the problems that face the Court in the enforcement of its decision in the *Brown* case loom large behind the *Gomillion* decision. Though schools and other services are frequently operated by special function units, they need not be. If the states were free to gerrymander the boundaries of cities, counties, and towns, without regard to contiguity or compactness, and were also free from judicial scrutiny, the *Brown* decision could be made utterly meaningless. White Tuskeegee and black Macon could be made to mean white school and black school, white golf course and black golf course, white swimming pool and black swimming pool, white park and black park. Given the decision in *Brown*, the Court had to preserve its power to inquire into geographical boundaries or it would have lost the battle for elimination of segregated living, and in this connection a distinction could not be drawn between special-function and general-function districts.

While it was necessary to make the point that the Court is free to scrutinize the fixing of municipal boundaries, the facts of the *Gomillion* case do not present an ideal case for intervention. Tuskeegee was not made a white city, but a city in which, presumably, every fourth person was a Negro. Were the schools in the city to be operated on a non-segregated basis, the number of Negro children attending a nonsegregated school would exceed the number presently attending such schools in the entire State of Alabama and perhaps approximate the number in the Deep South. No apartheid was involved here—only the preservation of local white political control in an area surrounded by a large Negro population. It could be said that the maintenance of white political control in the City of Tuskeegee would postpone the day of desegregation of municipal services, because the ballot is one method of attack upon such discrimination. One the other hand, the Supreme Court's disposition of the *Brown* case gave specific recognition to the need for some gradualism in the accomplishment of the objective of the decision.

It is undoubtedly true that desegregation of services is much more difficult of accomplishment in a unit in which Negroes greatly outnumber whites, because in such areas the consequences of desegregation include much greater practical difficulties in the administration of services.

III. A Dragon in the Thicket

Gomillion v. Lightfoot serves notice on the South that the power of a state to determine the powers and boundaries of its internal political subdivisions is not absolute and cannot be used to defy or ignore the positive requirements of the Constitution of the United States. To those who have read the Constitution this should come as no surprise. It flows directly from the language of the Supremacy Clause. Nor is it inconsistent with previous decisions. Rattling Calhoun's bones may stir Southern blood; it has never frightened the Court. Thickets entail thorns, and the Court has not been disposed to undertake a general pruning. When there are dragons to slay and distressed maidens to save, however, the Court will rise to the occasion.

The key to the riddle of *Gomillion* lies in balancing the hazards of a sortie into the thicket against the identity and need for protection of the maiden. There are hints in the decision that the latter was given controlling weight. The Court characterized the facts as an unequivocal denial of the right to vote. They need not be so characterized. The petitioners were qualified electors, highly organized, well directed, and tending toward obtaining local political control. At the state level, however, they were in a minority. The situation was one in which a minority political group threatens the control of the statewide majority in an area in which they can expect to muster a local majority. As majorities will do, the whites acted to rearrange the boundaries to preserve their control. This was to be done in two ways. On the representational level, the county was to be split up and appended to neighboring counties. On the local government level the problem was complicated by the fact that the whites lived in the core of the city and the Negroes on the periphery. Had the Tuskeegee living pattern been that of most urban communities, the assurance of continued white control could have been effected by annexation of the suburbs. Because that was impossible here, they resorted to shrinking the corporate limits to a unit in which the statewide majority group could also

muster a local majority. In short, the objective of the gerrymander was to permit an enclave of the statewide majority to live in a political unit in which they would also represent a local majority—perhaps not so evil a motive after all. Though the Court had never before considered a detachment case in which it was the detached who complained, it is difficult to distinguish detachment from other manipulations to make the most of a majority. The Court's seizure of the loss-of-vote rationale, and the care with which it placed the result on the Fifteenth Amendment, suggest that its purpose was not to slay the gerrymander dragon, nor to excise the thorns that are a normal concomitant of life in the political thicket, but simply to throw its protective shield around the particularly innocent and helpless maiden.

As this is being written, the use made of the *Gomillion* case as a precedent has been limited to racial discrimination cases, though not to cases involving the right to vote. It was cited by the federal district court in New York as supporting the proposition that school districts may not legally be gerrymandered to effect a racially separate school.[188] It was argued as supporting an investigation into the motives of a condemnation proceeding where it was alleged that the true purpose was to prevent the construction of interracial housing.[189] It was relied upon in a case abolishing a school board[190] and in another case that substituted the attorney general of the state for the school board counsel.[191] It was pleaded as invalidating a statute permitting the governor to make interim appointments of school board members, but this contention was rejected.[192] It is quite possible, however, that in the 1961 Term, when *Baker v. Carr* and *Scholle v. Secretary of State*[193] force a reexamination of the Court's refusal to undertake the general job of pruning, the Justices will remember the thorns they encountered in the thicket of the Tuskeegee dragon hunt.

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188 *Ibid.*

189 Deerfield Park District v. Progress Development Corporation, 20 Ill.2d 132 (1961). The Illinois court distinguished *Gomillion* as a case in which the Court found an "inescapable illegal purpose from the Act itself." No such purpose, of course, is apparent in the condemnation of property for a park.

190 Bush v. Orleans Parish School Bd., 188 F. Supp. 916 (E. D. La. 1960).

191 Bush v. Orleans Parish School Bd., 190 F. Supp. 861 (E. D. La. 1960).

192 Singelmann v. Davis, 240 La. 929 (1960). 193 See text *supra*, at notes 152–53.