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MUNICIPAL GERRYMANDERING, STATE GERRYMANDERING, AND POLITICAL POWER

*Howard D. Hamilton**

In the recent, widely publicized Tuskegee, Alabama, gerrymander case, the Supreme Court struck down a state statute which had redrawn the Tuskegee city limits in a capricious fashion so as to exclude virtually all Negro voters from the municipal corporation.[1] In addition to its drama, the decision is significant in two ways: in its intrinsic bearing on Negro suffrage and political power, and in its possible implications for gerrymandering of state legislatures.[2]

The suit was another of the legal skirmishes resulting from the rising tide of Negro political consciousness, supported by national public opinion and recent legislation, and the various Supreme Court and lower court decisions which have swept away the white primary and most of the other legal barriers to Negro suffrage. While Congress was enacting the Civil Rights Act of 1957 to facilitate Negro suffrage by the active assistance of the Department of Justice and the federal courts, the Alabama legislature was acting to nullify its effects in Tuskegee by altering its shape from a square to a 28-sided monstrosity which removed from the city all but four or five of its 400 registered Negro voters. (A federal system is wonderful!) Subsequently the Alabama constitution was amended to authorize the legislature to perform similar surgery, including the power of abolition, on surrounding Macon County.

The Court of Appeals for the Fifth Circuit had rejected petitioner's challenge of the statute as an invasion of civil rights,[3] on the thesis that a state has virtually unlimited authority over the constitution of its municipal corporations, citing the old impairment-of-contract cases.[4] That thesis was properly squelched by the Supreme Court. Conceding that a state has plenary authority over its municipal corporation, and that normally the exercise of state discretion is insulated from federal judicial review, nevertheless this power is subject to the limitations of the federal Constitution and may not be an instrument for a flagrant deprivation of constitutional rights.

A second line of defense of the Alabama statute was advanced by a concurring opinion in the circuit court, using the historic precedent of *Colegrove v. Green,* in which the Supreme Court declined to disturb an Illinois congressional districting law, challenged as a denial of due process because of the extreme population inequalities between districts (nine to one).[5]

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1 Gomillion v. Lightfoot, 364 U.S. 339 (1960). Technically, the statute was not overturned; the case was remanded with instructions to consider the petitioner's evidence on the alleged unconstitutional discrimination. But the Court's opinion leaves the lower court with no discretion.

2 Counsel for the National Association for the Advancement of Colored People termed the decision the most notable civil rights decision since the school segregation cases of 1954. 68 CRISIS 34 (1960).

3 270 F.2d 594 (5th Cir. 1959).

4 *E.g.,* Hunter v. Pittsburgh, 207 U.S. 161 (1907), cited at 364 U.S. 339, 342 (1960).

5 328 U.S. 549 (1946).

> I can see no difference between partially disfranchising negroes and partially disfranchising Republicans, Democrats . . . urban citizens, or other groups . . . by gerrymander or malapportionment. I can see no difference between depriving negroes of the right to vote in municipal elections in Tuskegee and not counting at their full value votes cast in certain districts in Illinois in a congressional election. . . .[6]

The Supreme Court, by Justice Frankfurter, who wrote the *Colegrove* opinion, avoided a re-examination of the *Colegrove* doctrine by resting the Tuskegee decision, not on the equal protection clause of the 14th amendment, but on the 15th (the Negro franchise) amendment. "When a legislature thus singles out a readily isolated segment of a racial minority for special discriminatory treatment, it violates the 15th amendment."[7] He distinguished *Colegrove* in three ways: this is not an ordinary geographic redistricting, even within familiar abuses of gerrymandering; *Colegrove* did not involve racial discrimination; and *Colegrove* and related cases involved only a dilution of appellants' voting power as a result of legislative inaction, rather than this total deprivation of voting rights by a positive enactment.[8]

Although the broad and explosive issue of equality of representation in state legislatures and Congress was not reopened in the Tuskegee case, a week later the Court noted probable jurisdiction of a Tennessee suit challenging an archaic state legislative apportionment as a denial of equal protection.[9] This is a controversy which refuses to die. Since 1946, the Court has had eight occasions to reject, by memorandum references to *Colegrove*, challenges of maldistricting as a denial of equal protection,[10] and there have been other efforts in district and state courts.[11]

Some recent litigation suggests a line of attack which might force the court to revisit *Colegrove*. A current suit in Maryland argues that the state court should hold malapportionment a violation of the 14th amendment in spite of *Colegrove*.[12] The argument runs that *Colegrove* did not decide the substantive question but merely classified the issue as a political question, *i.e.*, one not to be made by the judiciary. The "political question" doctrine is only

6 270 F.2d 594, 612-13 (5th Cir. 1959).

7 364 U.S. 339, 346 (1960).

8 Mr. Justice Whittaker reasoned that the 15th amendment was inappropriate, because he felt that it guarantees only the same right to vote as it enjoyed by all others within the same electoral unit. The petitioners would possess the same voting rights as the other residents of Macon County outside the Tuskegee limits. Consequently he would have based the decision on the equal protection clause of the 14th amendment, as an improper segregation of the races — a rationale which would also distinguish *Colegrove*. 364 U.S. 339, 349 (1960).

9 Baker v. Carr, 364 U.S. 898 (1960), on appeal from 179 F. Supp. 824 (M.D. Tenn. 1959).

10 The order in which the Court decided the cases: Cook v. Fortson, 329 U.S. 675, *rehearing denied*, 329 U.S. 829 (1946); MacDougal v. Green, 335 U.S. 281 (1948); South v. Peters, 339 U.S. 276 (1950); Remmey v. Smith, 342 U.S. 916 (1952); Anderson v. Jordon, 343 U.S. 912 (1952); Kidd v. McCanless, 352 U.S. 920 (1956); Radford v. Gary, 352 U.S. 991 (1957); Hartfield v. Sloan, 357 U.S. 916 (1958).

11 Asbury Park Press v. Woolley, 33 N.J. 1, 161 A.2d 705 (1960); Scholle v. Hare, 360 Mich. 1, 104 N.W.2d 63 (1960); Matthews v. Handley, 179 F. Supp. 471 (N.D. Ind. 1959).

12 Maryland Committee for Fair Representation v. Tawes, Equity No. 13920 (Circuit Ct., Ann Arundel County, Md.).

a policy of judicial self-restraint (a means of avoiding hot potatoes), in this context perhaps binding on lower federal courts, but not on state courts. A state court is free to adopt its own policy as to what are political questions, and several state courts have held that apportionment controversies are justiciable; numerous state apportionment laws have been invalidated. *Ergo,* a state court is free to examine the matter and to hold an inequitable apportionment a violation of the 14th amendment. Success for this argument would produce a highly anomalous situation to say the least. It may be noted that two courts recently have accepted jurisdiction of such suits, and although they have adverted to the 14th amendment, their jurisdiction was grounded on provisions of state constitutions.[13] Also, three state courts have rejected the 14th amendment argument, feeling bound by *Colegrove.*[14]

Efforts to overturn *Colegrove* in order to secure judicial relief from malapportionment are likely to continue unabated, because all evidence indicates that inequality of representation in our legislatures and Congress remains, and apparently has worsened in recent years.[15] This occurs not only because of legislative default in redistricting, often in defiance of plain mandates in the state constitution, but also because of the adoption in some states of the so-called "federal plan," by which an inequitable districting pattern is frozen into a state constitution. Frankfurter's admonition that partisans in this controversy ought not attempt to involve the courts "in the politics of the people" is likely to go unheeded by proponents of equal representation, because the political remedy usually is futile. It is the old problem of belling the cat. How can the groups who are under-represented in the legislature secure redress there? Where the malrepresentation is frozen into the state constitution, relief is barred both in the legislature and in state courts; hence the resort to the 14th amendment.

It is trite to observe that our most acute domestic problems today are those of metropolitan communities and that state legislatures, dominated by small town members and conservative interests, have been myopic about the problems of metropolitanism. At the bottom of everything is the issue of representation — the distribution of the keys to power.

13 Asbury Park Press v. Woolley, 33 N.J. 1, 161 A.2d 705 (1960); Magraw v. Donovan, 159 F. Supp. 901 (D. Minn. 1958).

14 Kidd v. McCanless, 200 Tenn. 273, 292 S.W.2d 40 (1956), *appeal dismissed,* 352 U.S. 920 (1956); Scholle v. Hare 360 Mich. 1, 104 N.W.2d 63 (1960); Baum v. Newbry, 200 Ore. 576, 267 P.2d 220 (1954).

15 See data in Dauer & Kelsay, *Unrepresentative States,* 44 NATIONAL MUNICIPAL REVIEW 571 (1955).