IN THE

Supreme Court of the United States

October Term, 1959

No. 668

C. G. GOMILLION, *et al.*,
Petitioners,

v.

PHIL M. LIGHTFOOT, as Mayor of the City of Tuskegee, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above-entitled cause on September 15, 1959.

Opinions Below

The memorandum opinion of the District Court (R. 29-40) is reported at 167 F. Supp. 405. The opinion of the Court of Appeals (R. 48-99), reported at 270 F. 2d 594, is appended hereto, *infra* at page 17.

Jurisdiction

The judgment of the Court of Appeals (R. 100) was entered on September 15, 1959 (and is appended hereto, *infra* at page 61). Application for an extension of time to and until February 1, 1960, in which to file this petition was granted by Mr. Justice Black in an order dated December 4, 1959. The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1).

Question Presented

May a state exclude from an incorporated city substantially all of its Negro residents and voters, *and no other residents or voters,* by the device of a legislative alteration of the boundaries of the municipality without contravening the Fourteenth and Fifteenth Amendments to the Constitution of the United States, where the alteration produces a highly irregular geographic outline, and is not thus far shown or suggested to have been based upon any consideration other than to deprive Negroes of the benefits of residence within the city limits?

Statute Involved

Act No. 140

To alter, re-arrange, and re-define the boundaries of the City of Tuskegee in Macon County.

Be It Enacted by the Legislature of Alabama:

Section 1. The boundaries of the City of Tuskegee in Macon County are hereby altered, re-arranged and re-defined 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:

Beginning at the Northwest Corner of Section 30, Township 17-N, Range 24-E in Macon County, Alabama; thence South 89 degrees 53 minutes East, 1160.3 feet; thence South 37 degrees 34 minutes East, 211.6 feet; thence South 53 degrees 57 minutes West, 545.4 feet; thence South 36 degrees 03 minutes East, 1190.0 feet; thence South 53 degrees 57 minutes West, 675.2 feet; thence South 36 degrees 19 minutes East, 743.4 feet; thence South 33 degrees 50 minutes East, 1597.4 feet; thence North 61 degrees 26 minutes East, 1122.8 feet; thence North 28 degrees 34 minutes West, 50.0 feet; thence North 59 degrees 11 minutes

East, 1049.3 feet; thence South 30 degrees 48 minutes East, 50.0 feet; thence North 50 degrees 08 minutes East, 341.1 feet; thence North 47 degrees 08 minutes East, 1239.4 feet; thence South 42 dgrees 51 minutes East, 300.0 feet; thence South 47 degrees 00 minutes West, 1199.5 feet; thence South 64 degrees 09 minutes East, 1422.0 feet; thence South 24 degrees 13 minutes East, 488.7 feet; thence South 73 degrees 25 minutes West, 370.8 feet; thence North 79 degrees 25 minutes West, 2285.3 feet; thence South 61 degrees 26 minutes West, 1232.6 feet; thence South 41 degrees 03 minutes East, 792.3 feet; thence South 12 degrees 03 minutes East, 842.2 feet; thence North 88 degrees 09 minutes East, 4403.6 feet; thence South 0 degrees 15 minutes West, 6008.2 feet; thence North 89 degrees 59 minutes West, 4140.2 feet; thence North 34 degrees 46 minutes West, 6668.7 feet; North 35 degrees 00 minutes West, 380.4 feet; thence North 16 degrees 55 minutes West, 377.2 feet; thence North 54 degrees 29 minutes East, 497.8 feet; thence North 35 degrees 02 minutes West, 717.5 feet; thence South 54 degrees 03 minutes West, 1241.9 feet; thence North 36 degrees 09 minutes West, 858.4 feet; thence North 44 degrees 28 minutes East, 452.2 feet; thence North 22 degrees 33 minutes East, 4305.9 feet; thence North 86 degrees 43 minutes East, 236.3 feet to the point of beginning.

Section 2. All laws or parts of laws which conflict with this Act are repealed.

Section 3. This Act shall become effective immediately upon its passage and approval by the Governor, or upon its otherwise becoming a law.

This bill became an Act on July 15, 1957 without approval by the Governor.

Statement

Petitioners, who are of Negro origin, are citizens of the United States and of the State of Alabama and residents of the City of Tuskegee, Alabama, as the geographical

lines of that municipality were constituted prior to the passage of Act 140 of the Alabama Legislature, 1957 Regular Session, hereinabove set forth (R. 5), the statute herein challenged.

Act 140, described as "another bid to maintain total segregation" (Montgomery Advertiser-Alabama Journal, May 19, 1957, p. 16 (R. 22)), was introduced on June 7, 1957 by State Senator Sam Engelhardt of Macon County, of which Tuskegee is the county seat (R. 8). Senator Engelhardt is also the author of an amendment to the State Constitution permitting the abolition of Macon County, which was approved in December, 1957 by a majority of those voting on the proposal (R. 9). Senator Engelhardt is executive secretary of the Alabama Association of Citizens Councils (New York Times, July 14, 1957, p. 51, col. 1). He explained that because the Negro population was dominant in Macon County (approximately 87 per cent (R. 8)), state action was needed to prevent Negro control of governmental affairs; and that his legislation was intended to "offset the coming civil rights legislation in Washington" (New York Times, July 14, 1957, p. 51, col. 1). This was apparent reference to the Civil Rights Act passed by Congress later in 1957, which included new measures to assure Negroes the right to vote. Senator Engelhardt was also quoted as saying: "We couldn't stand seeing a Negro in the Alabama legislature" (New York Times, July 7, 1957, p. 41, col. 1).

On the grounds that the disenfranchisement and deprivations which Act 140 effected were purposeful and grounded solely in racial and color considerations in violation of both the Fourteenth and Fifteenth Amendments to the Constitution of the United States, petitioners instituted the instant action in the United States District Court for the Middle District of Alabama on behalf of themselves and all others similarly situated. A declaratory judgment to

the effect that Act 140, as applied, violated the Fourteenth and Fifteenth Amendments was sought (R. 11). Petitioners also prayed for temporary and permanent injunctions to restrain respondents from enforcing the aforesaid statute and from denying to petitioners and other Negroes similarly situated rights and privileges incident to their status as residents and citizens of the City of Tuskegee (R. 11-12).

The complaint alleged that prior to the passage of Act 140, Tuskegee was square in shape and had a population of approximately 5,397 Negroes, of whom approximately 400 were qualified as voters, and some 1,310 white persons, of whom approximately 600 were electors (R. 7).

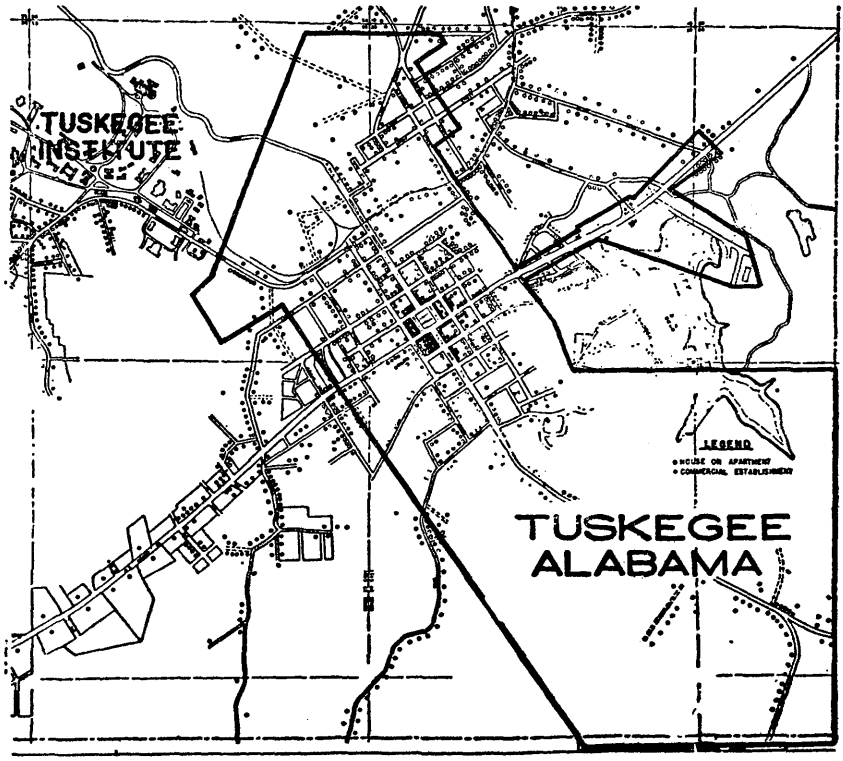

CHART SHOWING TUSKEGEE, ALABAMA, BEFORE AND AFTER ACT 140

As re-defined, the reduced area of Tuskegee takes on a highly irregular shape with 28 sides resembling a "sea dragon". No reason for the change in boundary lines is set forth in the Act. In operation, the statute removed and excluded from the City of Tuskegee all Negro neighborhoods, including the world-famous Tuskegee Institute, and all but four or five of its qualified Negro voters; it removed no white residents or voters (R. 7).[1] The complaint alleged that the petitioners and other Negro residents, similarly removed, were thereby deprived of benefits which they had enjoyed when domiciled in Tuskegee, including, of course, the right to vote in municipal elections (R. 7, 10).

The complaint further alleged that Tuskegee is the county seat of Macon County in which seven-eighths of the population are Negroes (R. 8). Macon County had had no Board of Registrars to qualify applicants for voter registration for more than 18 months, from January 16, 1956 to June 3, 1957 (R. 8). Petitioners alleged as reason therefor the fact that almost all white qualified voters in the county were already registered, whereas thousands of Negroes who possess the necessary qualifications are not registered and cannot vote (R. 8).

Petitioners alleged that the obvious purpose and necessary effect of Act 140 was to disenfranchise Negro citizens as electors in Tuskegee and to deprive them of police patrol, general street improvements and the right of effective participation in municipal affairs (R. 10-11).

Respondents filed a motion to strike on the ground that Rule 8(e) of the Federal Rules of Civil Procedure had been violated (R. 24) and a motion to dismiss on the ground that the complaint failed to state a claim upon which relief could be granted (R. 26). The Court denied the motion to strike (R. 39-40), but granted the motion

[1]See also Report of the United States Commission on Civil Rights (1959), page 77.

to dismiss (R. 39-40). On appeal, the Court of Appeals affirmed by a divided vote.

Reasons for Allowance of Writ

1. The decision below is inconsistent with the line of decisions of this Court extending from *Yick Wo* v. *Hopkins,* 118 U. S. 356, through *Guinn* v. *United States,* 238 U. S. 347; *Nixon* v. *Herndon,* 273 U. S. 536; *Nixon* v. *Condon,* 286 U. S. 73; *Lane* v. *Wilson,* 307 U. S. 268; *Smith* v. *Allwright,* 321 U. S. 647; and *Terry* v. *Adams,* 345 U. S. 461, through *Buchanan* v. *Warley,* 245 U. S. 60, through *Norris* v. *Alabama,* 294 U. S. 587; *Pierre* v. *Louisiana,* 306 U. S. 354; *Smith* v. *Texas,* 311 U. S. 128; *Hill* v. *Texas,* 316 U. S. 400; *Cassell* v. *Texas,* 339 U. S. 282; and *Hernandez* v. *Texas,* 347 U. S. 475, through *Takahashi* v. *Fish and Game Commission,* 334 U. S. 410, through *Sweatt* v. *Painter,* 339 U. S. 629; *McLaurin* v. *Oklahoma State Regents,* 339 U. S. 637; *Brown* v. *Board of Education,* 347 U. S. 483, and *Cooper* v. *Aaron,* 358 U. S. 1, through and including *Mayor and City Council of Baltimore* v. *Dawson,* 350 U. S. 877; *Holmes* v. *City of Atlanta,* 350 U. S. 879; *Gayle* v. *Browder,* 352 U. S. 903, and very recently *Evers* v. *Dwyer,* 358 U. S. 202, and *State Athletic Commission* v. *Dorsey,* 359 U. S. 533.

The opinions of both the District Court and that of Judge Jones in the Court of Appeals stressed the point that the action of a state in establishing or changing the boundaries of a municipality is not subject to review. The ground of decision of the Court of Appeals is aptly summarized in the concluding paragraph of the controlling opinion (270 F. 2d 594, 598-99, *infra* at 25):

> "Our consideration of what we regard to be the applicable rules of law leads us to the conclusion that, in the absence of any racial or class discrimination appearing on the face 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. Since we have reached this conclusion, it follows that the judgment of the district court must be
>
> Affirmed."

This statement is in irreconcilable conflict with the aforementioned decisions of this Court. Each of those cases dealt with an activity largely subject to regulation and control in the discretion of the states and their subordinate units, including municipal bodies. Yet, in each instance this Court held that the Fourteenth or Fifteenth Amendment or both forbade the establishment of an excluding classification or demarcation based on race, color or national origin. This was true whether the question involved the regulation of laundries or fishing, qualification for voting or for jury duty, zoning regulations, public education in schools, colleges or universities, public recreation, transportation or sports exhibitions.

The courts below would render state power to establish or alter municipal boundaries immune from the Fourteenth Amendment's command of due process and equal protection of the laws and the proscriptions of the Fifteenth Amendment as well. But this Court has answered similar assertions many times—most recently, perhaps, in *Cooper* v. *Aaron, supra* at 19, where every member of the Court joined in saying:

> "It is, of course, quite true that the responsibility for public education is primarily the concern of the States, but it is equally true that such responsibilities, *like all other state activity,* must be exercised consistently with federal constitutional requirements as they apply to state action." (Emphasis supplied.)

In its most notable recent decisions above referred to, the Court has ruled that no municipality or other

public body may deny its facilities, be they educational or recreational, to persons classified according to race or color. Those decisions will soon be rendered meaningless if geographic boundaries may be altered so as to accomplish the explicit racial exclusions and disqualifications which this Court has found proscribed by the federal Constitution. Logic makes its demands. If Negroes, as a group, may not be excluded from some of the public facilities of a city, it must necessarily follow that they cannot be removed and disqualified from all of the municipal benefits and facilities open to citizens of other racial origins.

Indeed, it is hardly thinkable that the courts below—despite some of the language of the opinions—would have upheld Act 140, if on its face it had operated explicitly to withdraw the boundaries of the City of Tuskegee beyond the area of habitation of its Negro citizens, and this whether the statute had so acted unfailingly and in every case, or only where the habitation of Negro citizens was predominant. Cf. *Cassell* v. *Texas, supra; and Buchanan* v. *Worley, supra.*

2. The question, then, is whether Act 140 is saved, as the Court of Appeals concluded it was, "in the absence of any racial or class discrimination appearing on the face of the statute". The decisions of this Court make it clear that it is not.

Yick Wo v. *Hopkins, supra,* involved an ordinance requiring the licensing of laundries, unless conducted in buildings of brick or stone. The ordinance was fair on its face, nor was the administration explicitly discriminatory. But the facts showed over two hundred Chinese applicants had been denied a license while "eighty others, not Chinese subjects, are permitted to carry on the same business under similar conditions" (*Id.* at 374). It followed, in the words of this Court, "[t]he fact of this discrimination is admitted. No reason for it is shown, and the conclu-

sion cannot be resisted, that no reason for it exists except hostility to the race and nationality to which the petitioners belong, and which in the eye of the law is not justified. The discrimination is, therefore, illegal, . . ." (*Ibid.*). It does not require paraphrase to demonstrate the applicability of this historic decision to the facts alleged in the petitioners' complaint, which the courts below have dismissed.

When a state sought to define the qualifications for voting in statutes which were not discriminatory on their face, but which nevertheless operated to exclude Negro voters, this Court had no doubt that the discriminatory operation of the statutes brought them into conflict with the national Constitution, whether the device was the relatively crude one of the "grandfather clause" of *Guinn* v. *United States, supra,* or the somewhat subtler and slightly more flexible exclusion involved in *Lane* v. *Wilson, supra.* "The Amendment nullifies sophisticated as well as simple-minded modes of discrimination." *Lane* v. *Wilson, supra* at 275. And see *Smith* v. *Allwright, supra,* and *Terry* v. *Adams, supra.*

And in the field of education, this Court has only recently made pointed warning that a statute non-discriminatory on its face might be rendered unconstitutional in its application. *Shuttlesworth* v. *Birmingham Board of Education,* 358 U. S. 101, referring specifically to page 384 of the District Court's opinion, 162 F. Supp. 372, 384.[2]

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[2] Of similar import, *see* United States v. Curtis M. Thomas, in which this Court on January 26, 1960, in a per curiam order invited the Solicitor General to file a petition for writ of certiorari and, in the event the petition is filed, set the cause down for argument on February 23, 1960. There, a United States District Judge ordered restored to the voting rolls the names of 1,377 Negroes who had been purged in what state officials sought to justify as a nondiscriminatory effort to remove unqualified voters from the voting lists. The District Court, despite a profession of a lawful purpose, found unlawful discrimination to have been the intent and effect of the state's action.

Perhaps the most detailed and frequent consideration of an analogous problem has come in the long series of decisions of this Court dealing with the exclusion of Negroes or national groups from juries. In none of these cases after the first, *Neal* v. *Delaware,* 103 U. S. 370, did the statutes on dealing with qualification for jury service explicitly suggest unconstitutional discriminatory standards. Yet from *Norris* v. *Alabama, supra,* through its recent decision in *Hernandez* v. *Texas, supra* (see also the Memorandum of January 18, 1960, in *Bailey* v. *Henslee,* — U. S. —, 28 L. W. 3217), this Court has consistently held that continued absence from, or only token presence on, jury panels of Negroes or defined national groups in communities, where there were substantial numbers qualified for jury service, established a *prima facie* case of unconstitutional discrimination.

Here, the facts alleged in the complaint demonstrate as stark a pattern of discrimination as that in *Norris* v. *Alabama.* In the phrase of *Neal* v. *Delaware, supra* at 397, it would require a "violent presumption" to assume that the altered and irregular boundaries of Tuskegee, excluding virtually all of its Negro residents and Negro voters, and no white voters or residents, did not establish, at the very least, a *prima facie* case of unconstitutional discrimination. Whether it is the fact of discrimination or purposeful discrimination which may ultimately prove significant (see the majority and concurring opinions in *Cassell* v. *Texas, supra* at 282, 290 and 296), those refinements are not now relevant. The complaint alleges purposeful discrimination (R. 10-11), and the judgment sought to be reviewed is a judgment dismissing the complaint as defective in that it failed to allege a valid cause of action. Even without the averment of purposeful discrimination, "the law would have to have the blindness of indifference rather than the blindness of impartiality" (*Cassell* v. *Texas* at 293) not to find, at least, a *prima facie* case of purposeful discrimination.

It is perhaps possible that on a hearing of this case considerations other than unalloyed discrimination may be advanced to support the altered boundaries which the Legislature of Alabama has sought to establish. While a mere recital of permissible motives would hardly be sufficient to support the statute, *Dean Milk Company* v. *City of Madison,* 340 U. S. 349, 354, it may be that considerations can be advanced which would diminish the force of the *prima facie* case alleged in the complaint. Then, as in the jury cases, differentiations such as those which were made between *Cassell* v. *Texas* and *Hill* v. *Texas, supra,* on the one hand, and *Akins* v. *Texas,* 325 U. S. 398, on the other, might be relevant. No such evaluation is here required. This complaint establishes a pattern of discrimination harsh and unrelieved. Those allegations require a hearing. Possibly, but only after such a hearing has been held, could a court be called upon to consider whether mitigating factors exist.

3. Because the pattern of discrimination set forth in the complaint is sharp and clear, this case involves no issues similar to those considered in *Colegrove* v. *Green,* 328 U. S. 549, and *South* v. *Peters,* 339 U. S. 276, as Judge Wisdom apparently thought it did, 270 F. 2d 594, 611 et seq. (*infra,* at 52). Though the Court has never attempted an exhaustive statement of the considerations which render an issue "political" and non-justiciable, two common aspects of such cases are clear. One is that in such matters as districting or the setting up an electoral system, a legislature has a wide range of choices involving the interplay and evaluation of many legitimate, but imponderable, considerations. In such instances, judicial review is difficult if not impossible, if those factors properly open to legislative determination are not to be foreclosed. The second aspect common to issues deemed "political" is the difficulty, or the awkwardness, of affording appropriate relief.

Neither factor is applicable to this case. The fact that a legislature has a wide range of choices does not mean that the Constitution does not put some considerations

beyond the pale. Neither *Colegrove* v. *Green* nor *South* v. *Peters* could be thought to control, if a legislature established a "separate list" for Negro voters and permitted them to vote only for one or more separately designated Representatves, while districting other voters according to geographic location. Other cases involving geographic boundaries producing discrimination less clear than this may possibly require consideration of *Colegrove* v. *Green* and *South* v. *Peters*. This case does not. If petitioners may pursue the analogy of the jury cases yet a step further, this case is not more closely related to *Colegrove* v. *Green* and *South* v. *Peters* than *Norris* v. *Alabama* and *Hernandez* v. *Texas* were to *Fay* v. *New York*, 332 U. S. 261, and *Moore* v. *New York*, 333 U. S. 565. This case, the *Norris* and *Hernandez* cases involve clear patterns of racial or national discrimination. If such distinctions were present in the latter cases, their presence was thought to be too remote to warrant judicial intervention.

Nor is there difficulty in awarding relief here. In *Colegrove* v. *Green* and *South* v. *Peters*, it was thought that judicial relief might have brought the Court into conflict with Congress in an area of responsibility specifically awarded to Congress by the Constitution. That is not true here, and the formulation of a decree poses no problem. The complaint requests only that an amending statute be held inoperative, and action pursuant to it be enjoined. This is a common form of relief, granted in scores of cases.

4. Although an aggregate of all rights incident to residence in a city is involved here, the particular importance of the right to vote warrants special stress. In the last few years, increasing attention has been focused on the fact that Negroes are disenfranchised because of their race in many sections of the country. In 1957 Congress, in the first federal civil rights legislation in 82 years, addressed itself to this problem. It set up a new mechanism to enable the

federal government to play a more active role in the protection of the Negro's right to vote by creating a Civil Rights Commission, whose primary function is the investigation of complaints of unconstitutional denials of franchise rights, and by empowering the Attorney General to use civil remedies to protect the right to vote. (For a description of the Civil Rights Act of 1957, see Brief for the United States in *United States* v. *Raines,* No. 64, October Term, 1959, argued here on January 12, 1960.)

The first report of the Commission issued on September 9, 1959 documents the extent to which Negroes are illegally excluded from the ballot—and the devices used to perpetuate such discrimination. (See, generally, pages 40-68, Report of the United States Commission on Civil Rights, 1959.) Only 25 per cent of the Negroes of voting age in the South are registered in contrast to 60 per cent of the whites (*Id.* at 40-41). Negroes make up 29.5 per cent of Alabama's voting age population, but only 8.1 per cent of those registered (*Id.* at 49). The Commission notes that the main opportunity for Negro participation in the political life of the South is in urban areas (*Id.* at 52-55), because Negroes are most likely to be frightened or coerced out of their right to vote in rural counties where they are in a majority (*Ibid.*).

The Commission discusses the voting situation in *Alabama* in detail (*Id.* at 69-97), and particularly in Macon County, where petitioners reside. It received more complaints from Macon County about voting discrimination than from any other county in the nation (*Id.* at 56), and enumerates a host of devices used by the officials of Macon County to prevent Negroes from registering. The Board of Registrars ceased to function for periods of months or years (*Id.* at 75-76); Negro applicants were subjected to extended delays and denied registration despite being "well educated" and "previously registered in one or more other states" (*Id.* at 90-91); and in its findings the Commission details other discriminatory techniques (*Id.* at 90-92).

In 1950, Macon County had a population of approximately 27,000 Negroes and 3,177 whites. In 1958, there were 1,218 registered Negro voters and 3,102 whites (*Id.* at 92). After suit was brought in 1946, *Mitchell* v. *Wright,* 154 F. 2d 924 (5th Cir.), to require the Board to register Negroes, it resigned and ceased to function for 18 months (*Id.* at 75, 76). One witness before the Commission estimated that at the present rate it would take 203 years for the currently eligible but unregistered Negroes to become qualified voters (*Id.* at 76). When the United States brought suit under the 1957 Act, the suit was dismissed because the Macon County registrars had again resigned. That case is now before this Court on writ of certiorari (*United States* v. *Alabama,* No. 398, October Term, 1959).

The Commission also makes specific reference to the state statute at issue in this litigation. After discussing the difficulties faced by Negroes trying to register in Macon County, it states: "Not content to hold the line against new Negro voters, the City of Tuskegee recently moved to decrease the number already voting in its election . . ." (*Id.* at 77).

The critical importance of the instant case for the future of the Negro's struggle for equal citizenship rights emerges against the background of these facts. The ballot is the key to all other rights. In urban centers of the South, the growing political strength of the Negro has already had its effect in securing him an improved economic and social status and better treatment as a man.

The Attorney General of the United States, in explanation of new legislative proposals designed to insure more adequately exercise of the franchise by Negroes, highlighted the great weight which free exercise of the ballot must be given in a democratic society. His statement is particularly relevant in consideration of the issues which this case poses:

> "It has been an unpleasant fact for too many years that in a few areas of the country segments of our population have been systematically and de-

> liberately denied the right to vote because of their race or color. Fortunately, in recent times there has been a growing concern with the problem and a strong national determination to end racial discrimination in all its forms. It is particularly important to do so in the field of voting. Discrimination in that field is totally inconsistent with our democratic system. Then, too, the opportunity to use the ballot is a principal means by which other forms of racial discrimination may be combatted" (New York Times, January 27, 1960, p. 18).

If a city may be carved up to exclude Negroes from its political affairs, and if the federal courts cannot grant relief pursuant to the Fourteenth and Fifteenth Amendments to the federal Constitution, the state's action is foreclosed to challenge in the only forum where, at present, relief can be obtained. If this can be done with impunity, the bitter-end opponents of equal citizenship rights will have found a ready new device to perpetuate racial discrimination in effective nullification of the decisions of this Court.

CONCLUSION

Wherefore, for the reasons hereinabove stated, it is respectfully submitted that this petition should be granted.

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APPENDIX

The Opinion of the Court of Appeals for the 5th Circuit entered on September 15, 1959 before JONES, BROWN and WISDOM, Circuit Judges.

JONES, Circuit Judge: The Legislature of Alabama passed a statute which changed the boundaries of the City of Tuskegee in Macon County of that State. The boundary changes reduced the area of the municipality. The plaintiffs, appellants here, are Negroes. They brought a class suit in the District Court for the Middle District of Alabama against the Mayor, the members of the City Council and the Chief of Police of the City of Tuskegee, and the members of the Board of Revenue, the Sheriff, and the Judge of Probate of Macon County, and the City of Tuskegee, alleging that as a result of the realignment of the boundaries most of the Negroes who had formerly lived in the City and substantially all of the Negroes who had been qualified to vote in City elections would no longer reside within the City. No white person residing in the City as previously constituted was excluded from it by the Act. The named plaintiffs, Negroes who had resided within the City limits as they formerly existed but beyond those limits as they are redefined by the statute, for themselves and others of such class, assert in their complaint that they have been deprived of police protection and street improvements, and have been denied the right to vote in municipal elections and participate in the municipal affairs of Tuskegee. It was averred that the purpose of the passage of the statute was to deny and deprive the plaintiffs of the right of franchise and other rights and privileges of citizenship of the City of Tuskegee.

By the prayer of the complaint the plaintiffs asked for a declaration that the Legislative Act, as applied to the plaintiffs, is in violation of the due process and equal protection clauses of the Fourteenth Amendment and of the

Fifteenth Amendment. Temporary and permanent injunctions were sought to restrain the defendants from enforcing the statute as to the plaintiffs and those similarly situated, and from denying them the right to participate in municipal elections and to be recognized and treated as citizens of the City of Tuskegee. The defendants filed a motion to dismiss upon the grounds, variously stated, that the courts of the United States cannot inquire into the purpose of enacting or interfere with the carrying out of State legislation fixing the boundaries of municipalities within the State; and that the suit was, in substance, one against the State of Alabama which these plaintiffs could not maintain. The district court granted the motion to dismiss and in its opinion discussed the questions presented, and thus stated its conclusions:

> "Thus this Court must now conclude that regardless of the motive of the Legislature of the State of Alabama and regardless of the effect of its actions, in so far as these plaintiffs' right to vote in the municipal elections is concerned, this Court has no authority to declare said Act invalid after measuring it by any yardstick made known by the Constitution of the United States. This Court has no control over, no supervision over, and no power to change any boundaries of municipal corporations fixed by a duly convened and elected legislative body, acting for the people in the State of Alabama."

The Court entered a judgment dismissing the action upon the ground that the complaint failed to state a claim against the defendants upon which relief could be granted, and for lack of jurisdiction. From this judgment the plaintiffs have appealed.

A general statement of the powers of States over municipal corporations has been made in these words:

> "The creation of municipal corporations, and the conferring upon them of certain powers and subjecting them to corresponding duties, does not deprive the legislature of the State of that general control over their citizens which was before possessed. It still has authority to amend their charters, enlarge or diminish their powers, extend or limit their boundaries, consolidate two or more into one, overrule their legislative action whenever it is deemed unwise, impolitic or unjust, or even abolish them altogether in the legislative discretion, and substitute those which are different. The rights and franchises of such a corporation, being granted for the purposes of government, can never become such vested rights as against the State that they cannot be taken away; nor does the charter constitute a contract in the sense of the constitutional provision which prohibits the obligation of contracts being violated. * * * Restraints on the legislative power of control must be found in the constitution of the State, or they must rest alone in the legislative discretion. If the legislative action in these cases operate injuriously to the municipalities or to individuals, the remedy is not with the courts. The courts have no power to interfere, and the people must be looked to, to right through the ballot-box all these wrongs." 1 Cooley's Constitutional Limitations, 8th Ed. 393 et seq.

To this rule Professor Cooley notes exceptions but none are here pertinent. A portion of the language above has been quoted with approval by the Supreme Court. *Mount*

Pleasant v. *Beckwith,* 100 U. S. 514, 529, 25 L. Ed. 699. With fewer words it has been said:

> "The power to create or establish municipal corporations, to enlarge or diminish their area, to reorganize their governments or to dissolve or abolish them altogether is a political function which rests solely in the legislative branch of the government, and in the absence of constitutional restrictions, the power is practically unlimited." 37 Am. Jur. 626, Municipal Corporations, § 7.

In an often cited opinion the Supreme Court has thus pronounced governing principles:

> "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 intrusted 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 to be used for governmental purposes, or authorizing them to hold or manage such 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 action to the state Constitution, may do as it will, unrestrained 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." *Hunter* v. *Pittsburgh,* 207 U. S. 161, 28 S. Ct. 40, 52 L. Ed. 151. See *Pawhuska* v. *Pawhuska Oil Co.,* 250 U. S. 394, 39 S. Ct. 526, 63 L. Ed. 1054; *City of Trenton* v. *New Jersey,* 262 U. S. 182, 43 S. Ct. 534, 67 L. Ed. 937, 29 A.L.R. 1471.

In a leading Florida case it is stated:

"The existence of the power [of a State legislature to establish, alter, extend, or contract municipal boundaries] is freely conceded. But is that power unlimited, and the exercise of it entirely beyond the reach of judicial review in any and all cases? The weight of authority in this country seems to answer this question in the affirmative, and to hold that the legislative power in this regard is practically plenary and unlimited, in the absence of express constitutional restriction thereof." *State ex rel. Davis* v. *City of Stuart,* 97 Fla. 69, 120 So. 335, 64 A.L.R. 1307.

It is a general rule that the "power of increase and diminution of municipal territory is plenary, inherent and discretionary in the Legislature, and, when duly exercised, cannot be revised by the courts." Cooley on Municipal Corporations 106 § 32. See 16 C.J.S. 706, Constitutional Law § 145; Cooley's Constitutional Limitations, *supra*; *State ex rel. Davis* v. *City of Stuart, supra.*

It is not claimed that any provision of the State Constitution is violated. The Alabama Constitution expressly recognizes the legislative power of "altering or enlarging the boundaries" of municipalities. Ala. Const. Sec. 104 (18); *Ensley* v. *Simpson,* 166 Ala. 366, 52 So. 61; *State* v. *Gullatt,* 210 Ala. 452, 98 So. 373. Should it be contended that a state constitutional question is presented, such contention should not be submitted, in the absence of diversity of citizenship, to Federal tribunals. We find no necessity to declare the rule that a state legislature may do as it will in altering municipal boundaries unrestrained by any provision of the Federal Constitution to be a rule without exception. We think this case does not present the exception. We need not say, for our purposes here, that there may not be cases where courts can properly inquire as to whether a statute fixing boundaries transcends constitutional limits. We think this is not such a case.

Judicial interposition will be sustained where general obligation municipal bonds have been issued and thereafter a change in boundaries has diminished the extent and value of the property subject to tax liens for servicing the bond issue. In such a case the Federal Constitution prevents the contract obligation of the bonds from being impaired by the reduction of the security pledged for their payment. However, the statute contracting the area is not to be declared void. The City's area would be reduced but the City would have a continuing right and be under a continuing duty to levy taxes upon the territory outside, but which was formerly within, its limits as well as upon its remaining area to provide revenue to meet the matur-

ities of interest and principal on the bonds. *Mobile* v. *Watson,* 116 U. S. 289, 6 S. Ct. 398, 29 L. Ed. 620. Cf. *City of Sour Lake* v. *Branch,* 5th Cir. 1925, 6 F. 2d 355, cert. den. 269 U. S. 565, 46 S. Ct. 24, 70 L. Ed. 414; *Town of Oneida* v. *Pearson Hardwood Flooring Co.,* 169 Tenn. 449, 88 S. W. 2d 998; 1 Quindry, Bonds and Bondholders 744 § 529.

The members of a municipal corporation, its citizens, are those residing within the municipal boundaries. They and all of them, but none others, are entitled to the benefits, privileges and immunities and they are subject to the burdens and liabilities of the municipalities. Property within an incorporated city or town is subject to taxation by the corporation. So also, as has been observed, land excluded may be subjected to taxation by the municipality to prevent impairment of a contract obligation. Sojourners must comply with the City's police regulations. When a person removes from a municipal corporation he loses his membership and the rights incident to such membership and this is no less true where the removal is involuntary and results from a change of boundaries than where the resident removes to another place. That this is so does not restrict the legislative power to alter municipal boundaries.

It is said by Mr. Justice Jackson, a "fundamental tenet of judicial review that not the wisdom or policy of legislation but only the power of the legislature, is a fit subject for consideration by the courts." Jackson, Struggle for Judicial Supremacy 81. See *Hunter* v. *Pittsburgh, supra.* In the consideration of statutes the courts will refrain from making inquiry into the motives of the legislature, and will not be influenced by the opinions of any or all the members of the legislature, or of its committees or of any other person. 82 C. J. S. 745-746, Statutes § 354. It has recently been stated that "In testing constitutionality we cannot undertake a search for motive. If the State has the power to do an act, its intention or the reason by which it

is influenced in doing it cannot be inquired into." *Shuttlesworth* v. *Birmingham Board of Education,* D. C. N. D. Ala. 1958, 162 F. Supp. 372, aff. 358 U. S. 101, 79 S. Ct. 221, 3 L. Ed. 2d 145. An attack was made in the Tennessee courts upon an act of the legislature of that State which altered the boundaries of the City of Nashville. The plaintiffs charged that, among other things, the boundaries were arbitrarily drawn with irregular lines and numerous angles which subjected plaintiffs' property to municipal taxation while excluding other property similarly situated it violation of the due process constitutional provisions. It was alleged that the act was conceived and its passage procured for sinister motives for the purpose of assessing the property of the plaintiffs and excluding the property of others, and this was done pursuant to an agreement between the persons benefited and a few members of the legislature. In holding the allegations insufficient the court said:

> "That a bill is inspired by private persons for their own advantage and to the detriment of others is clearly not a sufficient reason for holding the law void, when passed. Nor can the courts annul a statute because the legislature passing it was imposed upon and misled by a few of its members in conjunction with interested third parties. If the act in question is unwise and oppressive, the bill may be remedied by repeal or amendment. The courts have nothing to do with the policy of legislation nor the motives with which it is made." *Williams* v. *City of Nashville,* 89 Tenn. 487, 15 S. W. 364.

In a case where an issue was presented not wholly dissimilar to that before us, an attack was made on the County Unit System of voting that prevails in Georgia. It was asserted, among other things, that the statute providing for the "System" was unconstitutional because it had the "present effect and purpose of preventing the

Negro and organized labor and liberal elements of urban communities, including Fulton County, from having their votes effectively counted in primary elections." It was held by a Three-Judge District Court that the Federal Constitution does not take from states the right to set up their own internal organizations and prescribe the manner of state elections. *South* v. *Peters,* D.C.N.D.Ga. 1950, 89 F. Supp. 672. The Supreme Court affirmed, although a dissenting opinion took the view that the statute abridged the right to vote on account of color in violation of the Fifteenth Amendment. *South* v. *Peters,* 339 U. S. 276, 70 S. Ct. 641, 94 L. Ed. 834, reh. den. 339 U. S. 959, 70 S. Ct. 980, 94 L. Ed. 1369.

The enactment by a state legislature of a statute creating, enlarging, diminishing or abolishing a municipal corporation is, as has been noted, a political function. It is a governmental act. *American Bemberg Corporation* v. *City of Elizabethton,* 180 Tenn. 373, 175 S. W. 2d 535. Hence it is an act of sovereignty performed under a power reserved by the Tenth Amendment, 81 C.J.S. 858, States § 2. This universally recognized sovereign power should not be restricted by prohibiting its exercise where, as an incidence of it, Negroes would be purposely excluded from the municipality and from participation in its affairs.

Our consideration of what we regard to be the applicable rules of law leads us to the conclusion that, in the absence of any racial or class discrimination appearing on the face 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. Since we have reached this conclusion, it follows that the judgment of the district court must be

AFFIRMED.

BROWN, Circuit Judge, Dissenting.

WISDOM, Circuit Judge, Concurring Specially.

BROWN, Circuit Judge, dissenting:

Feeling that this decision is wrong, I cannot presume to speak for the Court. But in sounding this respectful dissent from the action of my Brothers who are no less sensitive than I to the compelling obligations of the Constitution, I would suggest that the Court itself is troubled by this decision.

Does the Court really mean to apply the absolute of *Hunter* v. *Pittsburgh*, 207 U. S. 161? It is sweeping and unequivocal:

> "In all these respects the state is supreme, and its legislative body, conforming its action to the state Constitution, may do as it will, unrestrained by any provision of the Constitution of the United States."

If this is the law, then why does not the opinion end with it? Why does the Court disavow any purpose to hold that it is a rule without exception?[1]

Does the Court really determine that the question of alteration of municipal boundaries is a "political" matter and hence beyond the scrutiny of the Judiciary? If it means this, then why does it emphasize time and again that the discriminatory purpose does not appear on the *face* of

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[1] "We find no necessity to declare the rule that a state legislature may do as it will in altering municipal boundaries unrestrained by any provision of the Federal Constitution to be a rule without exception. We think this case does not present the exception. We need not say, for our purposes here, that there may not be cases where courts can properly inquire as to whether a statute fixing boundaries transcends constitutional limits. We think this is not such a case."

the Alabama Act? If it is a "political" matter beyond judicial scrutiny, then what difference does it make whether the purpose is frankly stated or stealthfully concealed by artful sophistication?[2]

Does the Court mean to recognize that where the purpose of the Act is patent on its face the constitutional guaranty or prohibition is then sufficient to invest the Judiciary with a power to so declare by an effective order? If the Judiciary has the power to strike down what is plainly forbidden, what is there about the nature of the judicial process, traditional notions of separation of powers, or the doctrine of judicial abstention from "political" matters, that robs the Judiciary of its accustomed role of inquiry and ascertainment of legislative purpose?

I do not find the answers to these questions in the Court's opinion. I believe earnestly that analysis will demonstrate that satisfactory answers may not be found either to them, or to others suggested by them. Like analysis will show, I think, that the courts are open to hear and determine the serious charge here asserted.

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[2] As much is implied by the Court's statement:

> "The enactment by a state legislature of a statute creating, enlarging, diminishing or abolishing a municipal corporation is, as has been noted, a political function. It is a governmental act. American Bemberg Corporation v. City of Elizabethton, 180 Tenn. 373, 175 S. W. 2d 535. Hence it is an act of sovereignty performed under a power reserved by the Tenth Amendment. 81 C. J. S. 858, States § 2. This universally recognized sovereign power should not be restricted by prohibiting its exercise where, as an incidence of it, Negroes would be purposely excluded from the municipality and from participation in its affairs."

The last sentence indicates that *purposeful* exclusion of Negroes has a "sovereign" or "political" immunity regardless of its patent or latent genesis.

I.

Unlike the inherent ambiguity of a phrase like "due process" or "equal protection" found in the immediately preceding Fourteenth Amendment, the 34 words comprising the Fifteenth Amendment are plain. Their command is clear:

> "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."

The idea, implicit in the Court's opinion that being a "political" matter the sanction of the constitutional guaranty is to be found in the self-imposed sense of responsibility of the individual states—here Alabama—is a denial of history.

> "A few years experience satisfied the thoughtful men who had been the authors of the other two Amendments that, notwithstanding the restraints of those articles on the states, and the laws passed under the additional powers granted to Congress, these were inadequate for the protection of life, liberty and property, without which freedom to the slave was no boon. They were in all those states denied the right of suffrage. The laws were administered by the white man alone. It was urged that a race of men distinctively marked as was the negro, living in the midst of another and dominant race, could never be fully secured in their person and their property without the right of suffrage.
>
> "Hence the 15th Amendment, which declares that 'the right of a citizen of the United States to vote shall not be denied or abridged by any state on account of race, color, or previous condition of servitude.' The negro having, by the 14th Amendment, been declared to be a citizen of the United States, is thus made a voter in every state of the Union.

> "We repeat, then, in the light of this recapitulation of events, almost too recent to be called history, but which are familiar to us all; and on the most casual examination of the language of these amendments, no one can fail to be impressed with the one pervading purpose found in them all, lying at the foundation of each, and without which none of them would have been even suggested; we mean the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly made freemen and citizen from the oppression of those who had formerly exercised unlimited dominion over him. It is true that only the 15th Amendment, in terms, mentions the negro by speaking of his color and his slavery. But it is just as true that each of the other articles was addressed to the grievances of that race, and designed to remedy them as the fifteenth." *The Butchers' Benevolent Ass'n* v. *The Crescent City Live-Stock Landing and Slaughter-House Co.* (Slaughter-House Cases), 1873, 83 U. S. (16 Wall.) 36, 71-72, 21 L. Ed. 394.

Tested in this light, these statements of the District Court are compelling indeed. As he declared, in dismissing Appellants' complaint,

> "Prior to the passage of Act No. 140, the boundaries of the municipality of Tuskegee formed a square, and, according to the complaint * * * contained approximately 5,397 Negroes, of whom approximately 400 were qualified as voters in Tuskegee, and contained approximately 1,310 white persons, of whom approximately 600 were qualified voters in said municipality. As the boundaries are redefined by said Act No. 140, the municipality of Tuskegee resembles a 'sea dragon.' The effect of the Act is to remove from the municipality of Tuskegee all but

> four or five of the qualified Negro voters and none of the qualified white voters. Plaintiffs state that said Act is but another device in a continuing attempt to disenfranchise Negro citizens not only of their right to vote in municipal elections and participate in municipal affairs, but also of their right of free speech and press, on account of their race and color." *Gomillion* v. *Lightfoot,* M. D. Ala., 1958, 167 F. Supp. 405, 407.

The conclusion and judgment of the District Court, which we have this day affirmed, is "that the complaint fails to state a claim * * * upon which relief can be granted and that this Court does not have any authority or jurisdiction to declare void this particular duly enacted statute of the State of Alabama."[3] 167 F. Supp. 405, 410. Accordingly, the case must now be measured against the allegations of the complaint which categorically charges purposeful discrimination for race. For, as we have learned from *Conley* v. *Gibson,* 1957, 355 U. S. 41, 45-46, 78 S. Ct. 99, 2 L. Ed. 2d 80, "In appraising the sufficiency

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[3] The District Court puts it squarely on the basis that the "court does not have any authority or jurisdiction." Another thing still unclear in this Court's opinion is whether it takes a like view or whether, in the expression "the courts will not *hold* an act * * * to be invalid * * *" this Court is to be understood as recognizing that it has the power to review—and exercising it—affirmatively finds the act within the constitutional prerogative of Alabama. The Court expresses its conclusion this way:

> "Our consideration of what we regard to be the applicable rules of law leads us to the conclusion that, in the absence of any racial or class discrimination appearing on the face 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 enacement 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."

of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set facts in support of his claim which would entitle him to relief." And for this purpose the complaint must be taken as true. *Glus* v. *Brooklyn Eastern District Terminal,* 1959, —U. S.—, —S. Ct.—, 3 L. Ed. 2d 770, 774.

Considering the procedural context in which this case now finds itself, the Court has permitted the Legislature of Alabama to simply abolish a substantial part of one of its cities, Tuskegee, and thereby disenfranchise all but four or five of its Negro citizens. Almost as anticipating the existence of this invincible power, the legislature is perhaps presently considering using it to eradicate the entire County of Macon.[4]

II.

Although to me this is an apt illustration of "burn[ing] the house to roast the pig,"[5] I agree with much of that said by the Appellees, the District Judge and the majority of this Court. Zoning and districting regulations are primarily for states. Voting regulations are primarily for states. As a general rule, the Constitution of the United States, the Congress, the Federal Courts, and the Executive Branch of the Federal Government are not concerned with such local matters.

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[4] An amendment to the Alabama Constitution providing that the legislature "may * * * by a majority vote of each house, enact general or local laws * * * reducing the area of, or abolishing, Macon County * * * *" was introduced and passed by the 1957 session of the Alabama Legislature as Act No. 526. It was subsequently submitted to a referendum, and approved, December 17, 1957. The Act is reported at 3 Race Rel. L. Rep. 357 (1958).

[5] Butler v. Michigan, 1957, 352 U. S. 380, 383, 77 S. Ct. 524, 1 L. Ed. 2d 412 (per Frankfurter, J.).

This is not to say, however, as the Court's opinion tends to conclude from the *Hunter, Beckwith* and *Laramie* cases,[6] that the Constitution imposes *no* limitation upon the actions of the states in these areas.

It is axiomatic that in a federal system the laws of the individual states cannot be supreme. For even in a field reserved expressly to the States or to the people it is the Constitution which assures that. The Constitution so prescribes. Article Six of the Constitution provides that "This Constitution * * * shall be the supreme Law of the Land; * * * any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." Moreover, Alabama, like most states, requires that "All members of the legislature, and all officers, executive and judicial, before they enter upon the execution of the duties of their respective offices * * *" must swear to "support the Constitution of the United States * * *." Ala. Const. Art. 16, § 279 (1901).

The nearly 360 volumes of the United States Reports are full of the historical story of the occasional conflict between what are in all other respects matters of wholly local concern, and some provision of the Constitution. Needless to say, whenever true conflict has in fact existed, the Constitution has always won out. There is no local matter which is not subject to potential examination for Constitutional defects. To list them all is the task of a case digest or encyclopedia, not a judicial opinion. But a few examples are helpful to illustrate the broad spectrum of constitutional concern.

A mere cursory examination of the following areas will show that they are all typically thought of as matters of nearly exclusive local control. And yet the footnotes indicate some of the familiar cases in which it was determined

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[6] Hunter v. Pittsburgh, 1907, 207 U. S. 161, — S. Ct. —, 52 L. Ed. 151; Mount Pleasant v. Beckwith, 1880, 100 U. S. 514, — S. Ct. —, 35 L. Ed. 699; Comm'rs of Laramie County v. Comm'rs of Albany County, 1876, 92 U. S. 307, — S. Ct. —, 23 L. Ed. 552. 167 F. Supp. 405, 408-409.

that, for some reason, the state or local government's treatment was weighed and found constitutionally wanting: local education,[7] transportation,[8] and recreation [9] facilities; athletic contests control;[10] local housing developments;[11] state taxation[12] and educational institutions;[13] what are essentially state judicial procedure matters like admission

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[7] Cooper v. Aaron, 1958, — U. S. —, — S. Ct. —, 3 L. Ed. 2d 3, 5, 17 (Little Rock); Brown v. Board of Education, 1954, 347 U. S. 483, 74 S. Ct. 686, 98 L. Ed. 873, Anno. 98 L. Ed. 882, 38 A. L. R. 2d 1180; supplemental opinion, 1955, 349 U. S. 294, 75 S. Ct. 753, 99 L. Ed. 1083; also companion case, Bolling v. Sharpe, 1954, 347 U. S. 497, 74 S. Ct. 693, 98 L. Ed. 884 (the original "school segregation cases").

[8] Gayle v. Browder, 1956, 352 U. S. 903, 77 S. Ct. 145, 1 L. Ed. 2d 114, affirming per curiam, M. D. Ala., 1956, 142 F. Supp. 707 (Montgomery busses).

[9] Beal v. Holcombe, 5 Cir., 1951, 193 F. 2d 384, cert. denied, 1954, 347 U. S. 974, 74 S. Ct. 783, 98 L. Ed. 1114 (golf course); City of Ft. Lauderdale v. Moorhead, 5 Cir., 1957, 248 F. 2d 544, affirming per curiam, S. D. Fla., 1957, 152 F. Supp. 131 (same); New Orleans City Park Improvement Assn. v. Detiege, 5 Cir., 1958, 252 F. 2d 122 (Park); Kansas City v. Williams, 8 Cir., 1953, 205 F. 2d 47, affirming, W. D. Mo., 1952, 104 F. Supp. 848, cert. denied, 1953, 346 U. S. 826, 74 S. Ct. 45, 98 L. Ed. 351 (swimming pool).

[10] State Athletic Comm. v. Dorsey, 1959, — U. S. —, — S. Ct. —, — L. Ed. 2d — [May 25, 1959, 27 L. W. 3337], affirming per curiam, E. D. La., 1959, — F. Supp. — [Judge Wisdom, 27 L. W. 2289] (statute barring interracial athletic contests).

[11] Banks v. Housing Authority of San Francisco, —, 120 Cal. App. 2d 1, 260 P. 2d 668, cert. denied, 1954, 347 U. S. 974, 74 S. Ct. 784, 98 L. Ed. 1114 (public low rent housing).

[12] Spector Motor Service, Inc. v. O'Connor, 1951, 340 U. S. 602, — S. Ct. —, 95 L. Ed. 573.

[13] Sweatt v. Painter, 1950, 339 U. S. 629, 70 S. Ct. 848, 94 L. Ed. 1114 (law school); Missouri ex rel. Gaines v. Canada, —, 305 U. S. 337, 59 S. Ct. 232, 83 L. Ed. 208 (same).

to the state bar,[14] appointment of counsel,[15] enforcement of restrictive covenants,[16] payment of filing fees[17] and furnishing of transcripts[18] for appeal, and the selection of jurors;[19] and even a governor's control of his state's militia,[20] and control of highway safety.[21]

One would be hard-pressed to find an area of "exclusive state action" which has or could not, in some way, by legislative design or administrative execution, be found to be violative of some constitutional provision. This has nothing to do with the occasional strife surrounding overlapping congressional and state legislation. No one here contends that Congress has the right to redistrict Tuskegee or prescribe the qualifications for voting in its municipal elections. But the fact that these are solely, or primarily, the initial concerns of Alabama alone does not mean that when it acts it may act without regard for the Constitution.

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[14] Konigsberg v. State Bar of California, 1957, 353 U. S. 252, 77 S. Ct. 722, 1 L. Ed. 2d 810; Schware v. Board of Bar Examiners, 1957, 353 U. S. 232, 77 S. Ct. 752, 1 L. Ed. 2d 796.

[15] Powell v. Alabama, 1932, 287 U. S. 45, — S. Ct. —, 77 L. Ed. 158.

[16] Barrows v. Jackson, 1953, 346 U. S. 249, 73 S. Ct. 1031, 97 L. Ed. 1586, Anno. 97 L. Ed. 1602; Shelly v. Kraemer, 1948, 334 U. S. 1, 68 S. Ct. 836, 92 L. Ed. 1161, 3 A. L. R. 2d 441.

[17] Burns v. Ohio, 1959, — U. S. —, —S. Ct. —, 3 L. Ed. 2d — [June 15, 1959].

[18] Griffin v. Illinois, 1956, 351 U. S. 12, 76 S. Ct. 585, 100 L. Ed. 891.

[19] Cassell v. Texas, 1950, 339 U. S. 282, — S. Ct. —, 94 L. Ed. 839; Smith v. Texas, 1940, 311 U. S. 128, — S. Ct. —, 85 L. Ed. 84; United States ex rel. Goldsby v. Harpole, 5 Cir., 1959, 263 F. 2d 71.

[20] Sterling v. Constantin, 1932, 287 U. S. 378, — S. Ct. —, 77 L. Ed. 375; and see Cooper v. Aaron, note 7, supra.

[21] Bibb v. Navajo Freight Lines, 1959, — U. S. —, 79 S. Ct. —, 3 L. Ed. 2d 1003 (truck mud guard regulations).

The Supreme Court expressed the standard in *Cooper* v. *Aaron*, note 7, *supra*, when they said,

> "It is, of course, quite true that the responsibility for public education is primarily the concern of the States, but it is equally true that such responsibilities, *like all other state activity*, must be exercised consistently with federal constitutional requirements as they apply to state action." (emphasis supplied). 358 U. S. —at— [3 L. Ed. 2d 5 at 17].

Of course, the same thing could be said of state regulation of voting and zoning.

In *Sterling* v. *Constantin*, note 20, *supra*, the Supreme Court was confronted with the contention that,

> "'* * * the Governor's order had the quality of a supreme and unchallengeable edict, overriding all conflicting rights of property and unreviewable through the judicial power of the Federal Government." 287 U. S. 378 at 397.

A contention, it might be noted, which is not altogether dissimilar from that advanced here as to the omnipotence of the Alabama legislature. The assertion was quickly disposed of by the Court in the very next sentence.

> "If this extreme position could be deemed to be well taken, it is manifest that the fiat of a state Governor, and not the Constitution of the United States, would be the supreme law of the land; that the restrictions of the Federal Constitution upon the exercise of state power would be but impotent phrases, * * *." Id., at 397-98.

III.

Nothing in the *Hunter, Beckwith* and *Laramie* municipal redistricting cases, note 6, *supra,* primarily relied upon by the majority and the District Court, alters this view.

Indeed, in those very cases the Supreme Court acknowledged that *some* limitations were to be imposed upon the state's action.

> "Text writers concede *almost* unlimited power to the State Legislatures in respect to the division of towns and the alteration of their boundaries, but they all agree that in the exercise of these powers they cannot defeat the rights of creditors nor impair the obligation of a valid contract. [citations]
>
> "Concessions of power to municipal corporations are of high importance; but they are not contracts, and, consequently, are subject to legislative control without limitation, *unless the Legislature oversteps the limits of the Constitution.*" (emphasis supplied).
>
> *Mount Pleasant* v. *Beckwith,* note 6, *supra,* 100 U. S. 514, 533.

Moreover, they are not recent cases. Only one was decided in the Twentieth Century, and that over 50 years ago. Racial discrimination was in no way involved. The problems involved concerned property: higher taxes for the annexed city (Hunter), and the liability of a newly created county for the extinguished county's debts (Beckproper context, that "the state is supreme, and its with and Laramie). Extravagant dicta, taken out of its legislative body, conforming its action to the state Constitution, may do as it will, unrestrained by any provision of the Constitution of the United States"[22] should not now be spread, some 52 years later, to cover and control our

[22] Hunter v. Pittsburgh, note 6, supra, 207 U. S. 161, 179.

determination of issues of a different area, and of another era.[23]

IV.

Of course it is true that there are many and varied areas of potential controversy which the courts have held to be, for one reason or another, beyond the limits of judicial relief. These include, for example, the constitutional "guarantee to every State in this Union a Republican Form of Government"[24] (Art. IV, § 4), the congressional

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[23] I make no apologies for the view that the business of judging in constitutional fields is one of searching for the spirit of the Constitution in terms of the present as well as the past, not the past alone. I find respectable authority in the words of Chief Justice Hughes in Home Building & Loan Association v. Blaisdell, 290 U. S. 398, 442, — S. Ct. —, 78 L. Ed. 413:

> "It is no answer to say that this public need was not apprehended a century ago, or to insist that what the provision of the Constitution meant to the vision of that day it must mean to the vision of our time. If by the statement that what the Constitution meant at the time of its adoption it means today, it is intended to say that the great clauses of the Constitution must be confined to the interpretation which the framers, with the conditions and outlook of their time, would have placed upon them, the statement carries its own refutation. It was to guard against such a narrow conception that Chief Justice Marshall uttered the memorable warning—'We must never forget that it is *a Constitution* we are expounding' (McCulloch v. Maryland, 4 Wheat 316,407)—'A Constitution intended for ages to come, and consequently, to be adapted to the various crises of human affairs.' * * *. When we are dealing with the words of the Constitution, said this Court in Missouri v. Holland, 252 U. S. 416, 433, 'We must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters * * *.' The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago."

[24] Pacific States Telephone & Telegraph Co. v. Oregon, 1912, 223 U. S. 118, — S. Ct. —, 56 L. Ed. 377; Taylor v. Beckham, 1900, 178 U. S. 548, — S. Ct. —, 44 L. Ed. 1187; Luther v. Borden, 1849, 48 U. S. (7 How.) 1, 42, 12 L. Ed. 581.

regulation of Indian tribes,[25] the legislative and executive control of foreign relations, recognition of foreign governments, and the war powers,[26] control of civilian and military appointing power,[27] or for that matter, the inherent *wisdom* of any executive or legislative policy or specific action,[28] as, for example, taxation.[29]

An outstanding illustration is the Supreme Court's traditional reluctance to grant taxpayers relief against governmental action. As that Court declared in *Massachusetts* v. *Mellon,* 1923, 262 U. S. 447, 487, 488, —S. Ct.— 67 L. Ed. 1078, regarding a citizen's attack upon a federal appropriation bill,

> "His interest in the moneys of the Treasury * * * is shared with millions of others * * *. * * * If one taxpayer may champion and litigate such a cause, then every other taxpayer may do the same, not only in respect to the statute here under review, but also in respect of every other appropriation act and statute whose administration requires the outlay of

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[25] Lone Wolf v. Hitchcock, 1903, 187 U. S. 553, 565, — S. Ct. —, 47 L. Ed. 299.

[26] Harisiades v. Shaughnessy, 1952, 342 U. S. 580, 588-89, 72 S. Ct. 512, 96 L. Ed. 586; Hirabayashi v. United States, 1943, 320 U. S. 81, 93, — S. Ct. —, 87 L. Ed. 1774; United States v. Curtiss-Wright Export Corp., 1936, 299 U. S. 304, — S. Ct. —, 81 L. Ed. 255; Oetjen v. Central Leather Co., 1918, 246 U. S. 297, 302, — S. Ct. —, 62 L. Ed. 726; Neely v. Henkel, 1901, 180 U. S. 109, — S. Ct. —, 45 L. Ed. 448; Kennett v. Chambers, 1852, 55 U. S. (14 How.) 38, 50-51, 14 L. Ed. 316.

[27] Orloff v. Willoughby, 1953, 345 U. S. 83, 90, 73 S. Ct. 534, 97 L. Ed. 842.

[28] Trop v. Dulles, 1958, 356 U. S. 86, 114, 120, 78 S. Ct. 590, 2 L. Ed. 2d 630 (dissenting opinion).

[29] Massachusetts v. Mellon, 1923, 262 U. S. 447, 487-88, — S. Ct. —, 67 L. Ed. 1078.

> public money, and whose validity may be questioned. The bare suggestion of such a result, with its attendant inconveniences, goes far to sustain the conclusion which we have reached, that a suit of this character cannot be maintained. * * * The party who invokes the power [of courts to declare acts unconstitutional] must be able to show not only that the statute is invalid, but that he * * * is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally."

Such reasoning is hardly applicable here. Appellants' complaint is not one "in common with people generally" —only those whose skin is black. And their suffering is not indefinite: one day voting citizens of Tuskegee, the next they have been deprived of both vote and village.

Nor do the two voter cases applying judicial abstention because the cases were political in nature either justify or compel a different result.

In *Colegrove* v. *Green,* 1946, 328 U. S. 549, —S. Ct.—, 90 L. Ed. 1432, Illinois citizens sought a redistricting of the state because of the gross inequality inherent in a range of population in congressional districts of from 112,116 to 914,000. The Court affirmed the dismissal of the complaint "because due regard for the effective working of our Government revealed this issue to be of a peculiarly political nature, and therefore not meet for judicial determination." 328 U. S. 549, 552. Again, however, this case involved no consideration of racial issues. The conflict was between rural and urban Illinois, or political parties, not races. And, although some citizens only had one-ninth the vote of others, they were all still permitted to engage in the formality of balloting. It may also be noted that this was not a determination that the districting was constitutional, that the three dissenters felt that the Court should have decided the case, and against the constitutionality of the

districting complained of, that Mr. Justice Rutledge's concurring opinion expressed the view that the Court has the power to provide relief in such cases but that here "the cure sought may be worse than the disease," 328 U. S. 549, 566, and that the opinion has come under some criticism. See, e.g., Lewis Legislative Apportionment and the Federal Courts, 71 Harv. L. Rev. 1057 (1958).

A case of disenfranchisement of Negroes by redistricting has apparently never before arisen. But, as I shall point out in detail, the right of Negroes to vote equally with whites has been jealously guarded by the Supreme Court.

Even in *Breedlove* v. *Suttles,* 1937, 302 U. S. 277, —S. Ct.—, 82 L. Ed. 252, in which the Court found that Georgia's poll tax did not deny any privilege or immunity of the 14th Amendment, the opinion notes that the otherwise complete freedom of a state to "condition suffrage as it deems appropriate" is "restrained by the Fifteenth and Nineteenth Amendments and other provisions of the Federal Constitution * * *." 302 U. S. 277, 283.

And although the brief per curiam in *South* v. *Peters,* 1950, 339 U. S. 276, —S. Ct.—, 94 L. Ed. 834, affirming the dismissal of a petition attacking Georgia's county unit voting system for primary elections as violative of the Fourteenth and Seventeenth Amendments, harks back to *Colegrove* v. *Green, supra,* and the categorization of "cases posing political issues arising from a state's geographical distribution of electoral strength among its political subdivisions," 339 U. S. 276, 277, it too, does not completely disenfranchise any citizen, is primarily concerned with the urban-rural conflict, and carries a strong dissent, that begins by acknowledging for all, "I suppose that if a State reduced the vote of Negroes, Catholics, or Jews so that each got only one-tenth of a vote, we would strike the law down."

V.

When a racial discrimination voting issue is clearly posed the Court has evidenced little concern for judicial abstention in "cases posing political issues." Mr. Justice Holmes provided this frontal attack for the Court in the "white primary case" of *Nixon* v. *Herndon,* 1927, 273 U. S. 536, 540, 541, — S. Ct. —, 71 L. Ed. 759 "The objection that the subject-matter of the suit is political is little more than a play upon words. Of course, the petition concerns political action, but it alleges and seeks to recover for private damage. That private damage may be caused by such political action, and may be recovered for in a suit at law, hardly has been doubted for over two hundred years * * *. * * * States may do a good deal 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." In *Smith* v. *Allwright,* 1944, 321 U. S. 649, — S. Ct. —, 88 L. Ed. 987, the Court acknowledged that, "Texas is free to conduct her elections and limit her electorate as she may deem wise, save only as her action may be affected by the prohibitions of the United States Constitution * * *." 321 U. S. 649, 657, and then went on to note that, "the Fifteenth Amendment specifically interdicts any denial or abridgement by a state of the right of citizens to vote on account of color," (Id.) and found the Texas white primary procedure unconstitutional. Its teaching was applied to strike down the Jaybird Association in *Terry* v. *Adams,* 345 U. S. 461, 72 S. Ct. 809, 97 L. Ed. 1152. Mr. Justice Black reviewed many of the predecessor cases, took note of the fact that the Fifteenth Amendment has been held "self-executing" and declared:

> "The Amendment bans racial discrimination in voting by both state and nation. It thus establishes a national policy, obviously applicable to the right of Negroes not to be discriminated against as voters

in elections to determine public governmental policies or to select public officials, national, state, or local." 345 U. S. at 467.

Not only have the courts uniformly enforced Negro voting rights under the Constitution, but Congress pursuant to the constitutional mandate has for nearly 100 years specifically provided for judicial enforcement of civil rights by legislation.[30] See, e.g., 18 U. S. C. A.

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[30] 18 U. S. C. A. § 241:

"If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having exercised the same; or

"If two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise of enjoyment of any right or privilege so secured—

"They shall be fined not more than $5,000 or imprisoned not more than ten years, or both."

18 U. S. C. A. § 242:

"Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than $1,000 or imprisoned not more than one year, or both."

18 U. S. C. A. § 243:

Providing that there shall be no discrimination in the selection of jurors and setting a $5,000 fine for violation.

28 U. S. C. A. § 1343:

"The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

"(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;

"(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

§§ 241-243, 28 U. S. C. A. §§ 1343, 1443, 42 U. S. C. A. §§ 1981-1995.

It is of little significance that the Alabama Tuskegee redistricting act under consideration does not, as this Court

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"(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

"(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, *including the right to vote.*" (Emphasis supplied.)

Part (4) added Sept. 9, 1957, 71 Stat. 637. Legislative history reported at 2 U. S. Code Cong. & Ad. News 1966, 1974 (1957).

28 U. S. C. A. § 1443:

"Any of the following civil actions or criminal prosecutions, commenced in a State court may be removed by the defendant to the district court of the United States for the district and division embracing the place wherein it is pending:

"(1) Against any person who is denied or cannot enforce in the courts of such State a right under any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction thereof;

"(2) For any act under color of authority derived from any law providing for equal rights, or for refusing to do any act on the ground that it would be inconsistent with such law."

42 U. S. C. A. §§ 1981-1995

1981 (equal rights)
1982 (equal property rights)
1983 (action for deprivation of rights)
1984 (reviewable by Supreme Court)
1985 (action for conspiracy to interfere with civil rights)
1986 (action for failure to prevent interference)
1987 (officers may institute proceedings)
1988 (proceedings in conformity with common law)
1989 (additional commissioners)
1990 (penalty for failure to execute warrant)
1991 (provision for $5 fee for arrests)
1992 (President may request more speedy proceedings)
1993 (repealed)
1994 (peonage abolished)
1995 (new; fine and imprisonment for criminal contempt)

so greatly emphasizes, demonstrate on its face that it is directed at the Negro citizens of that community. If the act is discriminatory in purpose and effect, "whether accomplished ingeniously or ingenuously [it] cannot stand." *Smith* v. *Texas*, note 19, *supra*, 311 U. S. 128, 132. Or, as the Court said in *Lane* v. *Wilson*, 1939, 307 U. S. 268, 275 — S. Ct. —, 83 L. Ed. 1281, another case of voting discrimination "The Amendment nullifies sophisticated as well as simple-minded modes of discrimination." Means of disenfranchising Negroes, like fraud, have historically been "as old as falsehood and as versable as human ingenuity." *Weiss* v. *United States*, 5 Cir., 1941, 122 F. 2d 675, 681, cert. denied, 314 U. S. 687, 62 S. Ct. 300, 86 L. Ed. 550. And "in determining whether a provision of the Constitution applies to a new subject matter, it is of little significance that it is one with which the farmers were not familiar." *United States* v. *Classic*, 1941, 313 U. S. 299, 316, — S. Ct. —, 85 L. Ed. 1368.

VI.

The effect of the act is clear. The District Court so found. "As the boundaries are redefined by said Act No. 140 the municipality of Tuskegee resembles a 'sea dragon.' The effect of the Act is to remove from the municipality of Tuskegee all but four or five of the qualified Negro voters and none of the white voters."

Even if the procedural effect of a motion to dismiss for failure to state a claim—admission of allegations—is disregarded the sheer statistics alleged may demonstrate a prima facie purpose of discrimination.

It might well be, as was true in *United States ex rel. Goldsby* v. *Harpole*, 5 Cir., 1959, 263 F. 2d 71, that if Appellants were ever allowed the opportunity of a trial that "the naked figures [would themselves] prove startling enough." 263 F. 2d 71, 78. In that case, involving exclusion of Negroes from juries, the fact that 57% of the popu-

lation of Carroll County, Mississippi was Negro and yet no county official "could remember any instance of a Negro having been on a jury list of any kind," without refutation by the State of the reason for such a result was considered enough to prove systematic exclusion of Negroes from the juries of that county. This was the standard of proof of a prima facie case established by such cases as *Norris* v. *Alabama,* 1935, 294 U. S. 587, 55 S. Ct. 579, 79 L. Ed. 1074, and *Hernandez* v. *Texas,* 1954, 347 U. S. 475, 74 S. Ct. 667, — L. Ed. —. And in *United States* v. *Alabama,* 5 Cir., 1959, — F. 2d — [No. 17684, June 16, 1959], this Court took note of the allegations that in Macon County, Alabama, the fact that 97% of the eligible whites were registered and *only 8% of the 14,000* eligible Negroes resulted in the fact that whites could outvote Negroes nearly three to one and was at least some evidence, if not proof, of discrimination in registration. — F. 2d —, —, n. 3. Perhaps the fact that in the present case the Act in question excludes 99% of the 400 Negro voters from the City of Tuskegee and yet not one single one of the 600 white voters will likewise be considered on the trial as proof enough of the discriminatory and unconstitutional purpose of the Act. But it is again well to point out that the adequacy of the proof in this case is not presently before us as we consider it on the basis of the complaint alone.

VII.

We need not be that "blind" Court that Mr. Chief Justice Taft described as unable to see what "all others can see and understand * * *." *Bailey* v. *Drexel Furniture Co.* [Child Labor Tax Case], 1922, 259 U. S. 20, 37, — S. Ct. —, 66 L. Ed. 817. Cited in *United States* v. *Butler,* 1936, 297 U. S. 1, 61, — S. Ct. —, 80 L. Ed. 477; *United States* v. *Rumely,* 1953, 345 U. S. 41, 44, 73 S. Ct. 543, 97 L. Ed. 770; *Uphaus* v. *Wyman,* 1959, — U .S. —, — S. Ct. —, 3 L. Ed. 2d — (dissenting opinion) [June 8, 1959] [dissent p. 17]. "[T]here is no reason why [we] should

pretend to be more ignorant or unobserving than the rest of mankind." *Affiliated Enterprises* v. *Waller,* Del., —, 5 A. 2d 257, 261. How it can be suggested that we should, for some reason, not make inquiry in this case is a mystery to me. Many cases could be cited but the most recent example will do. A little over a month ago, in deciding *Harrison* v. *NAACP,* 1959, — U. S. —, — S. Ct. —, 3 L. Ed. 2d — [June 8, 1959], the Supreme Court took note of the District Court's findings that the acts there in question were passed "to nullify as far as possible the effect of the decision of the Supreme Court in *Brown* v. *Board of Education,* 347 U. S. 483 * * * as parts of the general plan of massive resistance to the integration of schools of the state under the Supreme Court's decrees." — U. S. —, —, quoting from *NAACP* v. *Patty,* E. D. Va., 1958, 159 F. Supp. 503, 511, 515. The dissenting opinion notes the same findings, — U. S. —, — [slip op. dissent p. 3], and refers to *Guinn* v. *United States,* 1915, 238 U. S. 347, — S. Ct. —, 59 L. Ed. 1340, and the celebrated Alabama case of *Schnell* v. *Davis,* 1949, 336 U. S. 933, — S. Ct. —, 93 L. Ed. 1093, affirming per curiam, S. D. Ala., 1949, 81 F. Supp. 872. The "legislative setting" surrounding the statute in the latter case was also alluded to in another case decided the same day. *Lassiter* v. *Northhampton Election Board,* 1959, — U. S. —, — S. Ct. —, — L. Ed. — [June 8, 1959]. In *Guinn* the Court observed that an Oklahoma "Grandfather Clause" statute could have "no discernible reason other than the purpose to disregard the prohibitions of the [Fifteenth] Amendment," 238 U. S. 347, 363, although the statute did not specifically declare as its purpose the disenfranchisement of Negroes. The District Court opinion in the *Schnell* v. *Davis* case discusses the legislative background of an "understand and explain the Constitution" registration requirement statute for three pages, 81 F. Supp. 872, 878-81, and concludes, at 880, 881:

> "The defendants argue that the Boswell Amendment is not 'racist in its origin, purpose or effect,'

> but, as has already been illustrated, a careful consideration of the conditions existing at the time, and of the circumstances and history surrounding the origin and adoption of the Boswell Amendment and its subsequent application, demonstrate that its main object was to restrict voting on a basis of race or color. That its purpose was such is further illustrated by the campaign material that was used to secure its adoption. * * * We cannot ignore the impact of the Boswell Amendment upon Negro citizens because it avoids mention of race or color; 'to do this would be to shut our eyes to what all others than we can see and understand.' "

And this Court has taken note that such inquiry into motive and purpose was a main theme of the *Davis* case. *Orleans Parish School Board* v. *Bush,* 5 Cir., 1957, 242 F. 2d 156, 165.

Of course, here, as in *Colegrove* v. *Green,* 328 U. S. 549, *supra,* the effect of the statute is not only a demonstration of its purpose but is enough to demonstrate its unconstitutionality standing alone. As Justice Black stated for three members of the Court,

> "Whether that was due to negligence or was a wilful effort to deprive some citizens of an effective vote, the admitted result is that the Constitutional policy of equality of representation has been defeated." 328 U. S. 549, 572.

VIII.

The District Court has quoted, and my Brothers have echoed, language from cases to the effect that legislative motive cannot be inquired into. E.g., *Doyle* v. *Continental Ins. Co.,* 1876, 94 U. S. 535, 24 L. Ed. 148; *Shuttlesworth* v. *Birmingham Board of Education,* D. Ala., 1958, 162 F. Supp. 372. It is necessary to ascertain precisely what they mean by this discussion and quotations. Of course, at this late date, to "overrule" the principle of statutory inter-

pretation would be somewhat like overruling the principle of stare decisis—equally as impossible and undesirable. It is so firmly established—and for so long—that a mere quotation from Corpus Juris Secundum is adequate to make the point.

> "Since the intention of the legislature, embodied in a statute, is the law, the fundamental rule of construction, to which all other rules are subordinate, is that the court shall, by all aids available, ascertain and give effect, unless it is in conflict with constitutional provisions, or is inconsistent with the organic law of the state, to the *intention* or *purpose* of the legislature as expressed in the statute." 82 C. J. S., Statutes § 321 (1953). (emphasis supplied)

What the Legislature of Alabama, as distinguished from its members, *intended* and what the *purpose* of the Legislature, as distinguished from its members, was in the enactment of this law is then a traditional matter for concern to the Judiciary. Obviously the Legislature of Alabama could have had the purpose of discriminating against Negro voters. Many states have had such purpose as the cases discussed in Part V, *supra,* attest. All that *Doyle* can mean is that in the judicial process of ascertaining *legislative* purpose and intention the individual motives [31]

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[31] For an interesting discussion of the distinction between inquiries into legislative "motive" and legislative "purpose" see NAACP v. Patty, E. D. Va., 1958, 159 F. Supp. 503, 515 n. 6, vacated and remanded for consideration by Virginia courts, — U. S. —, — S. Ct. —, — L. Ed. 2d — [No. 127, June 8, 1959].

In ordinary usage the shadings of the three terms are subtle. Webster's New International Dictionary (2d ed. 1954): Purpose: "That which one sets before himself as an object to be attained; the end or aim to be kept in view in any plan, measure, exertion or operation; design; intention." Intention: "A determination to act in a certain way or to do a certain thing; purpose; design; as, an *intention* to go to Rome." Motive: "That within the individual, rather than without, which incites him to action; any idea, need, emotion, or organic state that prompts to an action."

and expression of the individual members is not pertinent. But where the collective purpose and intention of the body is expressly stated or is ascertained on a trial by the exercise of traditional rules of statutory construction in the light of record facts, the judicial ascertainment and declaration of that purpose and intention is not prohibited by the fact that individual legislators, either in legislative chambers or through the press, may have uttered statements of startling candor.

Of course, to say that "If the State has the power to do an act, its intention or the reason by which it is influenced in doing it cannot be inquired into," *Doyle* v. *Continental Ins. Co., supra,* 94 U. S. 535, 541, quoted in *Shuttlesworth* v. *Birmingham Board of Education, supra,* 162 F. Supp. 372, 381, is to beg the question. If the sole and exclusive legislative purpose is to deprive citizens of a state of their constitutional rights then the state does not have "the power to do [that] act." Naturally, once this unconstitutional purpose is ascertained, and it is determined that the act is unconstitutional and beyond the power of a state legislature to enact, then it is unnecessary and unwise to try to find *why* the legislature harbored this purpose, to psychoanalyze them individually or collectively, and to try and verbalize the *motive* which prompted them to action.

This was recognized in *Doyle, supra,* when the Court made this almost self-defeating pronouncement: "The State of Wisconsin * * * is a sovereign State, possessing all the powers of the most absolute government in the world." 94 U. S. 535, 541. That this "most absolute government in the world" was nevertheless subject to some restraints was acknowledged by the parenthetical phrase elipsed purposefully from the quotation just made that "(except so far as its connection with the Constitution and laws of the United States alters its position)" Wisconsin is an absolute sovereign state.

Doyle like *Hunter* is not really then an aid to decision. Each represents only the result once it has been concluded that the particular act does not offend the Constitution. Each is a sweeping generalization, the effect of which would be to supplant all constitutional guaranties if literally applied.

IX.

If the Courts are not open to perform the traditional judicial function of ascertaining *legislative* purpose and intent, then these appellants stand helpless before the law so that, as to the Fifteenth Amendment, in the memorable words of Chief Justice Marshall, " * * * the declaration that the Constitution * * * shall be the supreme law of the land, is empty and unmeaning declamation." *M'Culloch* v. *Maryland,* 4 Wheat 316, 433, 4 L. Ed. 579, 608. The suggestion, implicit if not expressed, that "for protection against abuses by Legislators the people must resort to the polls, not to the Court." *Munn* v. *Illinois,* 1877, 94 U. S. 113, 134, — S. Ct. —, 24 L. Ed. 77; *Williamson* v. *Lee Optical of Oklahoma,* 1955, 348 U. S. 483, 488, 75 S. Ct. 461, 99 L. Ed. 563, is here unavailing.

For there can be no relief at the polls for those who cannot register and vote. Significantly the complaint in this case further alleged: "Macon County had no Board of Registrars to qualify applicants for voter registration for more than eighteen months, from January 16, 1956 to June 3, 1957. Plaintiffs allege that the reason for no Macon County Board of Registrars is that almost all of the white persons possessing the qualification to vote in said County are already registered, whereas thousands of Negroes, who possess the qualifications, are not registered and cannot vote." It was this fact, incidentally, which gave rise to the necessity of the dismissal of a cause of action against the Board of Registrars of Macon County for discriminatory practices in registration. *United States* v. *Alabama,*

5 Cir., 1959, — F. 2d — [No. 17684, June 16, 1959]. In Macon County, of which Tuskegee is a geographical part, neither the Constitution nor Congress nor the Courts are thus far able to assure Negro voters of this basic right.

That this has occurred demonstrates, I think, that the Fifteenth Amendment contemplated a judicial enforcement of its guaranties against either crude or sophisticated action of states seeking to subvert this new right.

If the force of the ballot was to be the sole sanction for the effectual enforcement of the constitutional guaranty, it really created no right and imposed no prohibition. For all that a recalcitrant state need do is neglect the implementing of its own election machinery. If a Court may strike down a law which with brazen frankness expressly purposes a rank discrimination for race, it has—and must have—the same power to pierce the veil of sham and, in that process, judicially ascertain whether there is a proper, rather than an unconstitutional, purpose for the act in question.

The Court denies the existence of that power. The Constitution is left to a majority of the Alabama Legislature.

X.

As Mr. Justice Frankfurter has recently said elsewhere, "The problem represented by this case is as old as the Union and will persist as long as our society remains a constitutional federalism." *Irvin* v. *Dowd,* 1959, — U. S. —, — S. Ct. —, 3 L. Ed. 2d — [May 4, 1959]. State Legislatures are accorded, and rightfully so, great respect and a far ranging latitude in their legislative programs. Occasionally there comes the time, however, when legislation oversteps its bounds. Then "it must * * * yield to an authority that is paramount to the state." *Wisconsin* v. *Illinois,* 1930, 281 U. S. 179, 197, 50 S. Ct. 266, 74 L. Ed. 799 (per Holmes, J.).

In such times the Courts are the only haven for those citizens in the minority. I believe this is such a time.

I respectfully dissent.

WISDOM, Circuit Judge, concurring:

I concur fully in the majority opinion. However, the gravity of the issue, the gulf between the majority and dissenting opinions, and a few sharp quillets in the dissent impel me to make some observations on the application to the instant case of the doctrine of judicial abstention in political cases.

I.

The plaintiffs propose a cure worse than the disease. The Court therefore should withhold the exercise of its equity powers. That was Mr. Justice Rutledge's view in an analogous situation. *Colegrove* v. *Green,* 1946, 328 U. S. 549, 566. That is my view in this case.

An attempt by the federal judiciary to control a state legislature's right to fix the boundaries of a political subdivision is an intrusion of national courts in the polity of a state that in a federal system carries consequences even more serious and far-reaching than the partial disfranchisement of plaintiffs unable to vote in municipal elections because by legislative definition their voting district is not in a municipality. There are other considerations. The plantiffs ask for something courts cannot give. Courts, any courts, are incompetent to remap city limits. And any decree in this case purporting to give relief would be a sham: the relief sought will give no relief.

There is an obvious reply: in a democratic country nothing is worse than disfranchisement. And there is no such thing as being just a little bit disfranchised. A free man's right to vote is a full right to vote or it is no right to vote. Perhaps so, but in similar situations—to me they are similar—the United States Supreme Court has made no such reply. Instead, in at least two decisions the Supreme Court declined jurisdiction when the relief from partial disfranchisement would require federal courts to intrude in the internal structure and organization of the

government of a state. *Colegrove* v. *Green,* 1946, 328 U. S. 549; *South* v. *Peters,* 1950, 339 U. S. 276.

When Illinois partially disfranchised the citizens in its seventh congressional district by gerrymandering[1] away ninety per cent of their effective vote as against the vote of Illinois citizens in the fifth congressional district, the Court declined to interfere. *Colegrove* v. *Green,* 328 U. S. 549. In congressional elections, therefore, 100,000 votes may equal 900,000 votes, and a thirty-five per cent minority may outvote a sixty-five per cent majority (over the state as a whole). Georgia, by the county-unit device, disfranchises citizens of Fulton County (Atlanta) by ninety-nine per cent as against citizens in certain rural counties.[2] When the constitutionality of the system was attacked in the Supreme Court, again the Court held that federal courts should not interfere. *South* v. *Peters,* 339 U. S. 276.

I can see no difference between partially disfranchising negroes and partially disfranchising Republicans, Democrats, Italians, Poles, Mexican-Americans, Catholics, bluestocking voters, industrial workers, urban citizens, or other groups who are euchered out of their full suffrage because their bloc voting is predictable and their propensity for propinquity or their residence in certain areas, as a result of social and economic pressures, suggests the technique of partial disfranchisement 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 or votes cast in certain counties in Georgia in a state election. The dissenting

[1] The Supreme Court of Illinois invalidated a 1931 reapportionment and ordered a return to the statute of 1901. Moran v. Bowley, 1932, Ill. S. Ct. 179 N. E. 526. Legislative inaction resulted in a gerrymander as effective as any gerrymander created by legislative action reshuffling district lines.

[2] For a defense of the system see Henson, The County Unit System is Constitutional, 14 Ga. Bar J. 22 (1951).

justices in *Colegrove* v. *Green* and in *South* v. *Peters* found no sound distinction between those cases and the negro-voting cases.

Colegrove v. *Green* and *South* v. *Peters* may be distinguishable at the periphery. At the center these cases and the instant case are the same. In the respect that *Colegrove* v. *Green* involved congressional districts, there was more reason for federal courts to intervene in Illinois' gerrymandering affecting federal elections than there would be to intervene in Albama's gerrymandering that affects only municipal elections.

No one thinks that in *Colegrove* v. *Green* and *South* v. *Peters* the Supreme Court gave its constitutional blessing to partial disfranchisement. The Court did not reach the constitutional question. The Supreme Court was willing to assume that malapportionment was unconstitutional. "The Constitution", said Mr. Justice Frankfurter for the majority in *Colegrove* v. *Green,* "has many commands that are not enforceable by the courts, because they clearly fall outside the conditions and purposes that circumscribe judicial action."[3] In effect, the suit was "an appeal to the federal courts to reconstruct the electoral process of Illinois". Mr. Justice Frankfurter stated: "[T]he petitioners ask of this Court what is beyond its competence to grant. * * * [T]his Court, from time to time, has refused

[3] Mr. Justice Frankfurter continued: "Thus, 'on Demand of the executive Authority,' Art. IV, § 2, of a State it is the duty of a sister State to deliver up a fugitive from justice. But the fulfillment of this duty cannot be judicially enforced. Commonwealth of Kentucky v. Dennison, 24 How. 66. The duty to see to it that the laws are faithfully executed cannot be brought under legal compulsion. State of Mississippi v. Johnson, 4 Wall. 475. Violation of the great guaranty of a republican form of government in States cannot be challenged in the courts. Pacific States Telephone & Telegraph Co. v. Oregon, 223 U. S. 118. The Constitution has left the performance of many duties in our governmental scheme to depend on the fidelity of the executive and legislative action and, ultimately, on the vigilance of the people in exercising their political rights." Colegrove v. Green, 328 U. S. 549, 556.

to intervene in controversies * * * because due regard for the effective working of our government revealed the issue to be of a peculiarly political nature and therefore not meet for judicial interference." Mr. Justice Rutledge, concurring, stated:

> "[The Court has] power to afford relief in a case of this type. * * * But the relief it seeks pitches this Court into delicate relation to the functions of state officials and Congress, compelling them to take action which heretofore they have declined to take voluntarily or to accept the alternative of electing representatives from Illinois at large in the forthcoming elections: * * * If the constitutional provisions on which appellants rely give them the substantive rights they urge, other provisions qualify those rights in important ways by vesting large measures of control in the political subdivisions of the government and the state. * * * I think, therefore, the case is one in which the Court may properly, and should decline to exercise its jurisdiction."

In *South* v. *Peters,* 1950, 339 U. S. 276, a majority of the Supreme Court considered that the holding warranted only a short per curiam opinion: "Federal courts consistently refuse to exercise their equity powers in cases posing political issues arising from a state's geographical distribution of electoral strength among its political subdivisions."

Long before these cases the Cherokee Nation asked for an injunction to restrain the State of Georgia and its officials from asserting certain rights and powers over the people of the Cherokee Nation. In defiance of a treaty between the United States and the Cherokee Nation, Georgia had passed laws dividing the Indian territory into districts and subjecting the Cherokees to the jurisdiction of the state. The Cherokees had the sympathy of almost all Americans. They had no possible haven but the United States Supreme Court. The Court refused to take jurisdiction. *The Chero-*

kee Nation v. *The State of Georgia,* 1831, 30 U. S. (5 Pet.) 1, 8 L. Ed. 1. In the opinion the Court, Chief Justice John Marshall went out of his way to write, by way of dictum:

> "If courts were permitted to indulge their sympathies, a case better calculated to excite them can scarcely be imagined. * * * A serious additional objection exists to the jurisdiction of the court. Is the matter of the bill the proper subject for judicial inquiry and decision? * * * The bill requires us to control the Legislature of Georgia, and to restrain the exertion of its physical force. The propriety of such an interposition by the court may be well questioned. It savors too much of the exercise of political power to be within the proper province of the judicial department."

II.

With due deference to my able associate, it seems to me that the rhetorical questions in the opening paragraphs of the dissent assume a process of reaching a decision that is inapplicable to political cases. In political cases there are few absolutes and few either-or questions. There may be some matters that clearly fall within the exclusive control of the executive or the legislative branches of government or controversies that these political departments manifestly may settle more appropriately than the judicial department. Courts then apply the doctrine of abstention almost automatically. But since every official act is political in a sense, in most cases courts are driven to inquire. How political? And what are the consequences of granting or denying the relief requested? Because of this and because discretionary equitable powers usually are invoked, courts have considered it proper to take a pragmatic approach and to weigh a variety of considerations in reaching a decision, not stopping, for example, with the flat statement that the

issue is political and non-justiciable.[4] A weighing of practical considerations along with broad principles may blur the line between no-jurisdiction and jurisdiction-but-abstention, yet it has characterized political cases since *Luther* v. *Borden,* 1849, 7 How. (U. S.) 1.

To abstain or not to abstain in a hard case that seriously affects the balance between the federal government and the states puts a court to the task of assaying values and assessing effects. Here we must weigh the value, in a federal system, of preserving the integrity of a state as a polity, including a state's control over its political subdivisions and the state administrative process—against the value of an individual's right to vote in city elections when as a consequence of a state law gerrymandering municipal limits he does not live in a municipality. We must weigh the effects of federal action against inaction, of judicial intervention against self-limitation. This weighing of values and effects is in no sense a play on the word "political". It is a reasonable basis for a decision that may appear indefensible only when the case is sought to be reduced to the single question: did the plaintiff have a constitutional right of which he was deprived or did he not?

[4] In Colegrove v. Green, for example, the Court attached importance to these considerations: the court lacked satisfactory criteria for a judicial determination; the basis for the suit was not a private wrong, but a wrong suffered by Illinois as polity; no court can affirmatively remap the Illinois districts; it is hostile to a democratic system to involve the judiciary in the politics of the people; regard for the Constitution as a viable system precludes judicial correction, since authority for dealing with the problem resides first with Congress and ultimately with the people (to secure a state legislature that will apportion properly); malapportionment is chronic and embroiled in politics, and courts should avoid this political thicket; the Constitution has many commands that are not enforceable but left to legislative or executive action, and ultimately to the people; the possible consequences of decision were of great magnitude and the judicial processes inadequate for dealing with them; in our system of government it is appropriate that Congress have the final determination whether to seat Congressmen.

III.

In my judgment, *Colegrove* v. *Green* and *South* v. *Peters* control this case. Even if they were not controlling, I would favor withholding the exercise of our equity powers for the reasons given and for the following reasons.

(1) Grant of relief would put federal courts in the position of interfering with the internal governmental structure of a state, putting a new kind of strain on federal-state relations already severely strained. Control over the political subdivisions of a state including the incorporation of cities and towns and the determination of their boundaries, is a political function of the state legislature and an attribute of state sovereignty in a federal union. So it has always been held. Let the chips fall where they may, the courts have decided. This is the substance of the holdings in *Laramie County* v. *Albany County,* 1876, 92 U. S. 307; *Town of Mount Pleasant* v. *Beckwith,* 1879, 100 U. S. 514; and *Hunter* v. *Pittsburgh,* 1907, 207 U. S. 161. In these and similar cases the citizens who suffered from changes in city limits, by loss of property values or by increased taxation (if the boundaries are extended) or from lack of fire and police protection (if the boundaries are contracted) and from loss of voting privileges (in the case of a gerrymander), were in the same situation as the plaintiffs are in this case.

(2) The plaintiffs ask the Court to hold unconstitutional a law that is clearly constitutional on its face. The statutory approach necessary to reach that somewhat unusual result would compel the Court to go beneath the surface of the law and impute to the legislature an unprofessed subjective intention. This ulterior motive, when coupled with inferences from the effect of the law, would then be fatal to the constitutionality of the statute. As Mr. Justice Cardozo put it, this process spreads psychonalysis to unaccustomed fields. *United States* v. *Constantine,* 296 U. S.

287, 299. I recognize that occasionally there may be statutes which are unconstitutional in the light of their effect and the legislature's intentions. Over the long pull, however, I believe that the interests of justice lie in the direction of testing a law in the light of what the law says, not in the light of what the legislature intends. Rather than deviate from that principle in a case involving the exercise of a political function historically lodged with the state and free from federal supervision, I would heed the frequent admonition to avoid a decision upon the constitutional question when there is a tenable alternative ground for disposing of the controversy.

(3) This case differs from all cases involving successful complaints of discrimination under the Fourteenth and Fifteenth Amendments in that there is no effective remedy. An injunction will enable a citizen to vote—if he lives in a voting district where an election is held. It is an empty right when he does not live in a voting district. The best that this Court could do for the plaintiffs would be to declare Act 140 of 1957 invalid. There is nothing to prevent the legislature of Alabama from adopting a new law redefining Tuskegee town limits, perhaps with small changes, or perhaps a series of laws, each of which might also be held unconstitutional, each decision of the court and each act of the legislature progressively increasing the strain on federal-state relations. As stated in Colegrove: "No court can affirmatively remap the Illinois districts. * * * At best we could only declare the existing electoral system invalid." Nor can this Court remap Tuskegee. If we had the competency to determine the proper geographical limits for towns in Alabama, still there would be no way of our giving effect to the talents of our judges: the plaintiffs' only real remedy is one we have no right to give—a mandamus against the legislature of Alabama.

In short, the situation is unmanageable. If we intervene we shall only intensify the very dispute we are asked to settle. And federal courts have no mission— from the

constitution or from that brooding omnipresence of higher law so often an influence on constitutional decisions—to find a judicial solution for every political problem presented in a complaint that makes a strong appeal to the sympathies of the court. To repeat the words of Chief Justice John Marshall: "If courts were permitted to indulge their sympathies, a case better calculated to excite them can scarcely be imagined. * * * [But] such an interposition by the court * * * savors too much of the exercise of political power to be within the proper province of the judicial department."

A true copy.

Test: EDWARD W. WADSWORTH
Clerk, U. S. Court of Appeals,
Fifth Circuit

By MICHAEL D. FEEHAN
Deputy

(SEAL)

New Orleans, Louisiana
Sep. 18, 1959

Judgment

(Extract from the Minutes of September 15, 1959)

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Alabama, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellants, C. G. Gomillion, and others, be condemned, in solido, to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

"Brown, Circuit Judge, Dissenting."

"Wisdom, Circuit Judge, Specially Concurring."

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