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Constitutional Law - County Unit System Election

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CASE COMMENT

CONSTITUTIONAL LAW—COUNTY UNIT SYSTEM—ELECTION

A qualified voter in Fulton County, Georgia, instituted an action in the federal district court to enjoin the defendant from using the county unit system[1] as a basis for counting votes in a primary for nominating a United States Senator and other statewide officers. The plaintiff alleged that the county unit system of counting, tabulating and certifying votes cast in primary elections for statewide offices violated the seventeenth amendment[2] and the equal protection clause and due process clause of the fourteenth amendment.[3] The district court issued the injunction stating that the county unit system as applied[4] violated the equal protection clause. *Held,* (1) that the primary constituted "state action" within the meaning of the fourteenth amendment; (2) that the plaintiff had standing to sue; and (3) that a justiciable case was stated. However, on the merits of the case, the Supreme Court declared the county unit system unconstitutional and stated that the language of the Constitution "can mean only one thing—one person, one vote." *Gray v. Sanders,* 83 Sup. Ct. 801 (1963).

The Supreme Court until *Baker v. Carr*[5] had refused to hear cases dealing with legislative apportionment on the ground that they presented "political questions."[6] *Colegrove v. Green,*[7] an Illinois case dealing with congressional reapportionment which was decided on the grounds of *Wood v. Broom,*[8] was the beginning of the more recent approach by the Supreme Court to the legislative apportionment questions. Mr. Justice Frankfurter said, in writing the opinion in *Colegrove,* that the Constitution gives Congress the exclusive authority to secure fair representation by the states in the House, and, to compel Congress to reapportion itself and thus involve the judiciary in politics would be hostile to our democratic system.[9]

Since *Colegrove v. Green,*[10] there has been a series of cases[11] appealed to the Supreme Court dealing with both congressional and

1 Ga. Code Ann. § 34-3212 (1936). The county unit system at the time this case was filed is as follows: (1) Candidates for nomination who received the highest number of popular votes in a county were considered to have carried the county and to be entitled to two votes for each representative to which the county is entitled in the lower House of the General Assembly; (2) the majority of the county unit vote nominated the United States Senator and Governor, the plurality of the county unit vote nominated the others.

2 U.S. Const. amend. XVII.

3 U.S. Const. amend. XIV, § 1.

4 The district court said that the county unit system could be used if there was no greater disparity against a county than existed against any state in the conduct of national elections.

5 369 U.S. 186 (1962).

6 Colegrove v. Green, 328 U.S. 549 (1946).

7 *Ibid.*

8 287 U.S. 1 (1932).

9 328 U.S. at 556.

10 See note 6 *supra.*

11 Congressional redistricting: Colegrove v. Barrett, 330 U.S. 804 (1947). Redistricting state legislatures: Radford v. Gary, 352 U.S. 991 (1957) (Okla. State Leg.); Kidd v. McCanless, 352 U.S. 920 (1956) (Tenn. State Leg.); Remmey v. Smith, 342 U.S. 916 (1952) (Pa. General Asm.). Georgia county unit system for primary elections: Cox v. Peters, 342 U.S. 276 (1950) (gubernatorial and senatorial primary); South v. Peters, 339 U.S. 276 (1950) (gubernatorial and senatorial primary); Cook v. Fortson, 329 U.S. 675 (1946) (congressional and gubernatorial primary).

state reapportionment. The Court—not distinguishing between state and congressional reapportionment—denied the appeals on the grounds that they dealt with "political questions" and want of equity.[12] However, in 1962, the Supreme Court in *Baker v. Carr*,[13] in reversing a federal district court decision,[14] said that this case unlike *Colegrove* dealt with redistricting the state legislature and not congressional redistricting and thus there was no conflict between coequal branches of the government and the Court could render a decision on the merits of the case. Thus *Colegrove* was not overruled in *Baker v. Carr* but only distinguished.

There have been seven cases[15] appealed to the Supreme Court dealing with the county unit system or congressional redistricting in Georgia since *Colegrove v. Green*—four cases[16] prior to *Baker v. Carr* and three cases[17] since. The four cases[18] prior to *Baker* were dismissed by the Court without hearing argument on the merits. In dismissing the appeals, the Supreme Court either cited *Colegrove v. Green* and lack of jurisdiction or mootness of the question. In the three cases since *Baker* the district court has rendered a decision in each.

In the instant case,[19] the district court, relying on *Baker*, decided the case on its merits and gave equitable relief by issuing an injunction against conducting primaries under the present county unit system.

In *Toombs v. Fortson*[20] the district court, in rendering a decision on the merits of the case, found that the Georgia General Assembly was malapportioned and directed apportionment of at least one body of the assembly according to population.

However, in *Wesberry v. Vandiver*,[21] the plaintiff sought to have the Court declare invalid the Georgia Act,[22] which established the ten districts for the election of the members to the United States House of Representatives. The district court, citing *Colegrove v. Green*,[23] denied the injunction on the grounds that it was a "political issue" and stated that the plaintiff could seek relief in the form of congressional action.

Of the three cases,[24] the Supreme Court has rendered a decision only on the county unit system case of *Gray v. Sanders*.[25] The Court distinguished this case from *Baker v. Carr*[26] by saying that

12 *Ibid.*

13 369 U.S. 186 (1962).

14 179 F. Supp. 824 (M.D. Tenn. 1959).

15 Gray v. Sanders, 83 Sup. Ct. 801 (1963); Cox v. Peters, 342 U.S. 936 (1952); South v. Peters, 339 U.S. 276 (1950); Cook v. Fortson, 329 U.S. 675 (1946); Turman v. Duckworth, 329 U.S. 675 (1946); Toombs v. Fortson, 205 F. Supp. 248 (N.D. Ga. 1962); Wesberry v. Vandiver, 206 F. Supp. 276 (N.D. Ga, 1962).

16 Cox v. Peters, 342 U.S. 936 (1952); South v. Peters, 339 U.S. 276 (1950); Cook v. Fortson, 329 U.S. 675 (1946); Turman v. Duckworth, 339 U.S. 675 (1946).

17 Gray v. Sanders, 83 Sup. Ct. 801 (1963); Toombs v. Fortson, 205 F. Supp. 248 (N.D. Ga. 1962); Wesberry v. Vandiver, 206 F. Supp. 276 (N.D. Ga. 1962).

18 See note 16 *supra*.

19 Sanders v. Gray, 203 F. Supp. 158 (N.D. Ga. 1962).

20 205 F. Supp. 248 (N.D. Ga. 1962).

21 206 F. Supp. 276 (N.D. Ga. 1962).

22 Ga. Code Ann. § 34-2301 (1936).

23 328 U.S. 549 (1946).

24 See note 17 *supra*.

25 83 Sup. Ct. 801 (1963).

26 369 U.S. 186 (1962).

it was not a reapportionment case as the district court had treated it but rather only a voting case similar to *Nixon v. Herndon*,[27] *Nixon v. Condon*,[28] and *Smith v. Allwright*.[29]

Even though *Gray v. Sanders*[30] did not contain the issue of congressional redistricting in the sense of the election of a Representative, it did deal with the question of selecting a United States Senator. The Supreme Court by distinguishing this case from *Baker v. Carr*[31] and designating it as a voting case has side-stepped the issue at hand—the necessity of judicial action on congressional reapportionment!

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27 273 U.S. 536 (1927).
28 286 U.S. 73 (1932).
29 321 U.S. 649 (1944).
30 See note 25 *supra*.
31 See note 26 *supra*.