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On November 8, 1966, almost one million citizens of the State of Georgia cast their ballots in the general election for governor. The results of that election were: Howard H. Callaway, 47.07%; Lester G. Maddox, 46.88%; and Ellis G. Arnall, 6.05% of the votes cast. Since no candidate received a majority of the votes, the state assembly, according to a state constitutional provision, fell heir to the public electorate's right to choose the next governor. The constitutionality of that provision, allowing the legislature to complete the election process, was challenged as permitting unequal treatment of the voters contrary to the principle of "one man, one vote," espoused by the United States Supreme Court. Before discussing the case and the decision by the Supreme Court,[1] it is necessary, in order to understand its impact, to investigate the history of judicial intervention into voting cases.

Colegrove and its Progeny

The Supreme Court had consistently acted without hesitation to assume jurisdiction over alleged apportionment abuses and grant the necessary relief;[2] but in *Colegrove v. Green*,[3] decided in 1946, Mr. Justice Frankfurter's opinion, which was assented to by only three of the seven participating justices, cast a shadow over previously clearly established precedent. In dictum, Mr. Justice Frankfurter declared that the drawing of congressional district lines was not a proper matter for judicial determination and admonished the courts to avoid this "political thicket."[4] This caveat remained a major obstacle to intervention by the federal courts despite the fact that Mr. Justice Rutledge, in his concurring opinion which was necessary for dismissal of the suit, agreed with the dissenting justices on the question of jurisdiction, thereby constituting a majority

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[1] Fortson v. Morris, 385 U.S. 231 (1966).

[2] Carroll v. Becker, 285 U.S. 380 (1932), held a state districting law invalid and ordered an at-large election; Smiley v. Holen, 285 U.S. 355 (1932), recognized a private citizen's standing to bring an action in a federal court to challenge illegal apportionment. See also Koenig v. Flynn, 285 U.S. 375 (1932), which rejected an appeal for a writ of mandamus to compel an election according to certain defined district lines.

[3] 328 U.S. 549 (1946). The holding was primarily based on Wood v. Broom, 287 U.S. 1 (1932). The Court found that the Reapportionment Act of 1929, 46 Stat. 21, as amended, 2 U.S.C. § 2(a) (1964), was controlling and did not require "compactness, contiguity and equality in population of districts." However, even the *Wood* case had gone to the merits and was therefore jurisdictionally consistent with the 1932 cases, *supra* note 2. There was support for the dictum in a concurring opinion in *Wood*, which however failed in its ten lines to cite any earlier authority.

[4] Colegrove v. Green, 328 U.S. 549, 556 (1946).

in favor of jurisdiction. The caveat also remained insurmountable despite a subsequent review of the merits in *MacDougall v. Green*, wherein the Court held that an Illinois Election Code provision was valid.[5]

The Reordering of Political Life

Fourteen years later, in *Baker v. Carr*,[6] the Supreme Court finally ended the *Colegrove* problem when six of the justices concluded that the question of the effect of the equal protection clause on a state's power to geographically distribute representation was a justiciable issue.[7] Although the holding was narrow, and merely removed any jurisdictional barrier to the federal courts' determination of malapportionment questions, *Baker* signified the end of the Supreme Court's passivity in the area.[8]

Thereafter, two cases were heard within the next two years which brought the Court deeply into the "political thicket." The

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[5] 335 U.S. 281 (1948). As was said in analyzing the significance of *Colegrove*:

> Perhaps the doubts were groundless, insecurely based as they were on a reading—particularly of *Colegrove*—that was demonstrably erroneous. But it is incontestible that other courts, federal and state, read into *Colegrove* a restrictive meaning; and the Supreme Court itself, in a series of ambiguous per curiam opinions, not only failed to dispel the doubts, but may well have given some support to the belief that questions of apportionment and districting were not appropriate for judicial determination because of their involvement with political considerations.

MCKAY, REAPPORTIONMENT 66 (1965). The per curiam opinions referred to include: Matthews v. Handley, 361 U.S. 127 (1959); Hartsfield v. Sloan, 357 U.S. 916 (1958); Radford v. Gary, 352 U.S. 991 (1957); Kidd v. McCanless, 352 U.S. 920 (1956); Anderson v. Jordan, 343 U.S. 912 (1952); Cox v. Peters, 342 U.S. 936 (1952); Remmey v. Jordan, 342 U.S. 916 (1952); Tedesco v. Board of Supervisors, 339 U.S. 940 (1950); South v. Peters, 339 U.S. 276 (1950). For a discussion of the significance of these cases see Lucas, *Legislative Apportionment and Representative Government: The Meaning of Baker v. Carr*, 61 MICH. L. REV. 711 (1964).

It is interesting to note that state courts did not share the doubts of the federal courts after *Colegrove* but continued to grant relief in lawsuits brought by citizens against state officials challenging apportionment schemes. Lewis, *Legislative Apportionment and the Federal Courts*, 71 HARV. L. REV. 1057, 1066 (1958).

[6] 369 U.S. 186 (1962).

[7] This narrow holding must be culled from the four opinions in favor of jurisdiction. There were, all told, six opinions, totalling approximately 50,000 words, and the case was remanded to the district court for a hearing on the merits.

[8] Before the end of the term two other cases were also remanded to the lower courts for further proceedings consistent with *Baker v. Carr*. WMCA, Inc. v. Simon, 370 U.S. 190 (1962); Scholle v. Hare, 369 U.S. 429 (1962).

first case, *Gray v. Sanders*,[9] challenged the Georgia county unit system which favored voters from rural areas in primary elections for statewide offices.[10] In striking down the Georgia plan, Mr. Justice Douglas analogized discrimination against urban voters to abridgement of the votes of Negroes or women, and concluded that:

> The conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing—*one person, one vote*.[11]

Thus, in the context of a voting case, not strictly dealing with reapportionment, the Court first espoused the appealing rule of "one man, one vote." [12]

In *Wesberry v. Sanders*,[13] the Court dealt with the problem of dilution of votes inherent in congressional elections in grossly unequally populated voting districts. The unusual aspect of this case is the foundation for the decision. Not basing the holding on the equal protection clause, Mr. Justice Black, writing for the majority, found authority for the decision in article I, section 2

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[9] 372 U.S. 368 (1963).

[10] This county unit system, analogous to the federal electoral college, provided each county with a specified number of representatives and the candidate receiving the most votes in the county received two votes for each representative that the county had.

Prior to *Gray*, the system had been unsuccessfully challenged four times in the Supreme Court: Hartsfield v. Sloan, 357 U.S. 916 (1958); Cox v. Peters, 342 U.S. 936 (1952); South v. Peters, 339 U.S. 276 (1950); Cook v. Fortson, 329 U.S. 675 (1946). This fact was not mentioned in the majority opinion, but as Mr. Justice Harlan pointed out in dissent, "none of these cases reached the stage of full plenary consideration. . . ." Gray v. Sanders, 372 U.S. 368, 383 (1963).

> That the Supreme Court should select *Gray* for its first full-opinion decision after *Baker* is itself an interesting example of docket control and orderly progression in the development of a constitutional principle. *Baker* was a good 'first case' because, once the preliminary issues were disposed of to permit adjudication of the equal protection issue, the merits were relatively simple. . . . For similar reasons *Gray* was a good 'second case' because, if ever the equal protection clause was to be applied in a meaningful way, the voter discriminations there laid bare fairly cried out for correction.

McKAY, REAPPORTIONMENT 83-84 (1965).

[11] Gray v. Sanders, 372 U.S. 368, 381 (1963). (Emphasis added.) In his concurring opinion, Mr. Justice Stewart similarly concluded, "within a given constituency, there can be room for but a single constitutional rule —one voter, one vote." *Id.* at 382.

[12] As Mr. Justice Douglas pointed out, the use of the term did "not involve a question of the degree to which the Equal Protection Clause . . . limits the authority of a State Legislature in designing the geographic districts. . . ." *Id.* at 376.

[13] 376 U.S. 1 (1964).

of the federal constitution and his interpretation of that section's historical context.[14] Because of this reliance, despite the fact that the opinion sounded with and reinforced the "one man, one vote" doctrine, the opinion was of less value in attempting to foretell what would be the Court's decision in the state reapportionment cases than if the decision had been based on the equal protection clause.

In *Reynolds v. Sims*,[15] the first of six cases decided on the same day involving state malapportionment,[16] the Court applied the equal protection clause to legislative districting and concluded that the representatives of both state houses must be apportioned by population. Writing for the majority, Mr. Chief Justice Warren began with the premise that the right to vote is among the most basic rights of citizenship and "that the fundamental principle of representative government . . . is . . . equal representation for equal numbers of people. . . ." [17] In effect, the decision established a presumption of unconstitutionality for any system of apportionment that deviates from the norm of equal representation. The concept of equal protection requires similar treatment of those similarly situated and unequal apportionment directly dilutes votes contrary to this "one man, one vote" standard. Thus, in just two years, the Supreme Court foretold and began "the reordering of fundamental concepts of social or political life in large sections of the nation. . . ."[18]

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[14] "The House of Representatives shall be composed of Members chosen every second year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature."

Mr. Justice Clark, concurring, believed that the equal protection clause was the relevant provision and felt that the case should have been remanded for further proceedings. Wesberry v. Sanders, 376 U.S. 1, 18 (1964).

For an account of how surprising the basis of the decision was, see MCKAY, REAPPORTIONMENT 90-92 (1965).

[15] 377 U.S. 533 (1964). Once again the choice of *Reynolds* for the principal opinion was the logical one. The facts indicated an example of gross weighting of votes; the decision was an affirmance of a lower court decision and served as an approving hand for a difficult decision; only one Justice dissented. MCKAY, REAPPORTIONMENT 121 (1965).

[16] The companion cases were: Lucas v. Forty-Fourth Gen. Assembly, 377 U.S. 713 (1964); Roman v. Sincock, 377 U.S. 695 (1964); Davis v. Mann, 377 U.S. 678 (1964); Maryland Comm. for Fair Representation v. Tawes, 377 U.S. 656 (1964); WMCA, Inc. v. Lomenzo, 377 U.S. 633 (1964).

[17] Reynolds v. Sims, 377 U.S. 533, 560-61 (1964).

[18] McKay, *Political Thickets and Crazy Quilts: Reapportionment and Equal Protection*, 61 MICH. L. REV. 645 (1963). For an interesting outline of the parallel drawn between the *Reapportionment Cases* and the *School Segregation Cases* see McKay, *supra* at 645-46 and MCKAY, REAPPORTIONMENT 7-8 (1965).

After the 1964 decisions, the question became how much further into the "thicket" would the Court carry the banner. The egalitarian interpretation of the equal protection clause finally adopted by the Court in the solution of questions involving the right of franchise had found considerable support among scholars before finally having been adopted by the Court.[19] Voices, seemingly prophetic, were heard urging the application of the equal protection principle announced in *Reynolds* to the various legislative units of municipal government.[20]

Containing the Principle

It is in this context that the rationale of *Fortson v. Morris*,[21] the decision concerning the Georgia election law, becomes difficult to comprehend. According to the Constitution of the State of Georgia,[22] if no candidate for governor receives a majority of the votes cast, the state assembly is to elect the governor by choosing between the two persons receiving the highest number of votes at the election. Prior to the application of this provision after last November's election, a three judge district court enjoined the state assembly from employing the procedure on the ground it would deny the voters equal protection of the law as guaranteed by the fourteenth amendment.[23] The United States Supreme Court, in a five-four decision, reversed and upheld the constitutionality of the Georgia election law provision.

The majority's opinion, written by Mr. Justice Black, framed the issue as whether Georgia could select a governor through a legislative election, and found that since there is no federal constitutional provision which dictates how a state must select its governor, any "method which would be valid if initially employed is equally valid where employed as an alternative." [24]

In the majority's view, the failure to produce a winner in the November election brought an end to the popular election. It held that the *Gray* case was not applicable since that case dealt with the right of those participating in an election to have their votes counted equally. In *Fortson*, the general electorate was no longer involved since the electoral process in which they had participated had ended, and the alternative method provided for was triggered

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[19] *E.g.*, TWENTIETH CENTURY FUND, ONE MAN — ONE VOTE (1962). At the time of this publication only *Baker* had been decided and none of the opinions delivered in that case hinted at the position eventually adopted by the Court.

[20] See, *e.g.*, MCKAY, REAPPORTIONMENT 264-66 (1965); Weinstein, *The Effect of the Federal Reapportionment Decisions on Counties and Other Forms of Municipal Government*, 65 COLUM. L. REV. 21 (1965).

[21] 385 U.S. 231 (1966).

[22] GA. CONST. art. V, § 1, ¶ 4 (1948).

[23] Fortson v. Morris, 262 F. Supp. 93 (N.D. Ga. 1966).

[24] Fortson v. Morris, 385 U.S. 231, 234 (1966).

by the failure of the general election to fulfill the majority vote condition.

A dissenting opinion, written by Mr. Justice Douglas, argued that the majority had misstated the issue of the case. The dissent asserted that the issue was not whether a state may select a governor through a legislative election, but rather whether "[any] legislature may make the final choice when the election has been entrusted to the people and no candidate has received a majority of the votes." [25] Mr. Justice Douglas stated that the general election had not ended with the failure of any of the participants to receive a majority of the votes but instead could only end at the point where one of the candidates emerged victorious. Hence, he argued that if the legislature was allowed to determine the ultimate outcome of the election, the votes would necessarily be unconstitutionally weighted, and thereby contrary to the "one man, one vote" principle of *Gray*.[26]

It would appear that necessarily some unequal weighting of votes must occur under the Georgia system since the determination of the legislature has no relation to the actual tally of the votes. Whether the individual legislator's vote is cast for or against the candidate receiving the greatest amount of popular votes in his district, the candidate receiving the lesser number of the total popular vote could be the victor. Even at the level of the individual district the unequal treatment of voters is evident since, even if the representative votes for the candidate receiving the most votes in his district, he cannot give any recognition to the ballots of those constituents who voted for another candidate.

Obviously, the Court has become strongly divided over the applicability of the "one man, one vote" principle. For the majority, the principle does not necessitate that the candidate receiving the greatest amount of votes win. On the other hand, the dissenters clearly believe that the majority has unjustifiably backed down from the "one man, one vote" principle.

Conclusion

The significance of the case is somewhat difficult to determine. Perhaps it is an indication that a majority of the Court does not desire, at least for the present, to extend the doctrine any further;

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[25] *Id.* at 238.

[26] Mr. Justice Fortas dissented on the additional ground that the Georgia legislature, itself malapportioned, could not elect the governor. Mr. Justice Black dismissed this contention on the ground that the Court had previously held, in *Tombs v. Fortson*, 384 U.S. 210 (1966), that the legislature could continue to function until May 1, 1968. This argument Mr. Justice Fortas considered "a weak reed for so monumental a conclusion," *i.e.*, to perpetuate a wrong disallowed under the equal protection clause.

or perhaps it just refuses to extend it to a slightly different context. On the other hand, this decision may simply be a digression from the Court's previously announced rationale and, therefore, be of little aid in determining what stand the Court will take after hearing next term's municipal government reapportionment cases.* In any event it would appear that the rationale for the holding is overly conceptualized, or, as the dissent termed it, "unrealistic." As the dissent indicated, this was not a new election by an alternate method but the same election as was initiated with the selection of candidates at the primaries. That there is actually only one election is further evidenced by the restriction on the Assembly's selection; they were limited to choose between the two candidates who received the most votes in the popular election. Thus, in reality, the state constitution merely granted the legislature the power to complete what was previously begun by the popular election. In so doing, the constitution permits the Assembly to disregard the results of the popular election, which is exactly what they did. For all the worth of Mr. Justice Black's distinction in drawing the issue, "if the voting right is to mean anything, it certainly must be protected against the possibility that victory will go to the loser." [27]

The majority asserted that *Gray* dealt with the right of the voters "to vote and have their votes counted without impairment or dilution." That the results here "impaired and diluted" ballots seems apparent. The fact that a state constitutional provision, expressing the majority's will, permitted it, is of no consequence. As was stated in *Lucas v. Forty-Fourth Gen. Assembly*,[28] "an individual's constitutionally protected right to cast an equally weighted vote cannot be denied even by a majority of the State's electorate. . . ." [29] This system is as effective to nullify the weight of votes as is gross malapportionment. Certainly the decision in *Gray* was not meant merely to protect the physical act of casting a ballot, but was intended to safeguard its effectiveness. Intellectually, rather than attempt to turn around, it might have been less painful for the Court to go a little deeper into the briars of the "political thicket."

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* Since the writing of this article, the Supreme Court has decided that the "one man, one vote" principle does not apply to the election of county administrative bodies. Sailors v. Kent County Bd. of Educ., 35 U.S.L. WEEK 4462 (U.S. II May 23, 1967).

[27] Fortson v. Morris, 385 U.S. 231, 243 (1966). (Fortas, J., dissenting).

[28] 377 U.S. 713 (1964) (companion case to *Reynolds*).

[29] *Id.* at 736. In that case the Court struck down a Colorado apportionment plan which a majority of voters in every county had approved, because it provided for weighted districts in one state house.