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CHAN POYNER PIKE

Constitutional Law—Municipal Boundary Changes and the Fifteenth Amendment

The struggle of blacks in this country to obtain and preserve the franchise has been a difficult and continuing one. They have had to overcome many obstructions along the path to the voting booth. The fifteenth amendment¹ to the Constitution has served throughout this struggle as the legal standard by which alleged infringements of the right to vote have been judged. In *Holt v. City of Richmond*,² black residents of the city utilized the fifteenth amendment to challenge the city's annexation of a portion of a suburban county immediately prior to a city council election at which black voters were expected to elect a majority of the members. The Fourth Circuit held in *Holt* that the annexation was constitutional on its face and that possible illicit motivations of those individuals responsible for the annexation were, under the circumstances of the case, too remote from the fact of the annexation to taint its constitutional validity.³

The problem in *Holt* had its origins in 1962 when the City of Richmond initiated judicial proceedings to annex portions of two adjacent counties, Henrico and Chesterfield. The city first concentrated on the Henrico area, but upon receiving an unsatisfactory annexation award from the state annexation court,⁴ the city diverted its attention to Chesterfield County. Before a judicial determination was rendered,⁵ Richmond and Chesterfield County reached a compromise agreement specifying the new boundaries of Richmond, the price to be paid for the annexed area, and the county's agreement not to appeal the annexation

¹U.S. CONST. amend. XV, § 1: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."

²459 F.2d 1093 (4th Cir. 1972).

³*Id.* at 1094.

⁴*Id.* at 1095. The annexation court had decided that Richmond ought to pay Henrico County 55 million dollars for 16.16 square miles of land. Richmond thought this price too high.

⁵The formal trial had first begun in September of 1968, but a mistrial was declared in January of 1969 when one of the judges disqualified himself. *Id.*

decree.⁶ The annexed area included 47,262 people of whom only three percent were black. The addition of this predominantly white bloc of voters reduced the percentage of black citizens in Richmond from 51.5 percent to 42 percent of the total population, an important decrease in a city that elects its councilmen at large.

Black voters filed a class action in the United States District Court for the Eastern District of Virginia after the annexation.⁷ They alleged that their fifteenth amendment rights had been violated by the annexation, which had diluted their strength and had thereby prevented them from electing a majority of the city council. The district court found that although Richmond's desire for boundary expansion was not for the sole purpose of obstructing the voting power of black citizens, the annexation compromise, especially the County's agreement not to appeal, "was conceived and operated as a purposeful device to further racial discrimination by way of diluting the vote of the Negroes, and [that] this [was] constitutionally impermissible."⁸

While stating that Richmond's motivation for executing the compromise agreement was relevant to its decision, the district court emphasized that the boundary expansion violated the fifteenth amendment as the result of the combination of the unlawful motivation and the actual effects of the annexation compromise.⁹ However, the court permitted the annexation and ordered new council elections under a court-imposed districting scheme which restored the preannexation voting power of the black citizens. This scheme negated the effects of the dilution by restricting the number of councilmen for whom the newly annexed white people could vote.¹⁰ This remedy would have been effective because it attacked the heart of the constitutional violation, an annexation timed to occur just prior to an important election.

However, the Court of Appeals for the Fourth Circuit reversed the district court decision.¹¹ Concentrating on the issue of the unconstitu-

⁶The judges of the annexation court were obviously influenced by the compromise agreement and, at the close of the proceedings, issued an annexation decree in conformity with the agreement. The decree became effective on January 1, 1970, and the new citizens were able to vote in the councilmanic elections of that year. *Id.*

⁷*Holt v. City of Richmond*, 334 F. Supp. 228 (E.D. Va. 1971).

⁸*Id.* at 236.

⁹*Id.* at 237.

¹⁰*Id.* at 240. One district, composed of most of the original area of Richmond, was to elect seven councilmen, and a second district, composed mainly of the newly annexed area, was to elect two councilmen.

¹¹*Holt v. City of Richmond*, 459 F.2d 1093 (4th Cir. 1972).

tional motivation of the city officials, the court explained that “[w]hen the legislative purpose is not both obvious and constitutionally impermissible . . . the cases uniformly hold that facially constitutional legislation may not be stricken because of suspect legislative motivation.”¹² The court then overruled the district court on its findings of fact in *Holt*.¹³ The court of appeals concluded that the sole or dominant purpose of the annexation, as evidenced by the compromise agreement, was not to deprive black voters of their fifteenth amendment rights.¹⁴ Constitutionally valid reasons for the annexation existed in 1962 when the judicial proceedings began. The city was suffering from a declining tax base and required land for industrial and commercial expansion. In 1962, black citizens were a definite minority, and political control was not an issue. In addition, valid reasons existed for the timing of the annexation compromise.¹⁵ The existing council feared that if the annexation were not completed before the imminent city council elections, the new council majority, supported by an organization of black voters known to oppose any annexation, would defeat the proposed annexation. The court characterized this fear as concerning not the possibility of a black political takeover *per se* but the possible frustration of years of effort to achieve annexation.¹⁶ If discriminatory motives existed in the minds of some members of the Richmond City Council, these motives were not allowed to negate the validity of these dominant, compelling reasons for the annexation.

The overruling of the district court's findings of fact indicates two things. First, it gauges how strongly the court of appeals felt about the case and the issues it presented. Secondly, it reflects upon the nature of the appeals court's legal analysis of the problem. The main question presented by the *Holt* decision is what standards of law should be invoked to determine whether an annexation of land, with a consequent dilution of racial voting power, is in violation of the Constitution.

¹²*Id.* at 1098.

¹³*Id.* at 1099. The court did not explicitly overrule the district court but did so by implication. Judge Butzner, dissenting, reviewed the evidence which indicated that the principal concern of the Mayor of Richmond during the annexation negotiations was the exact number of white people who lived within the area to be annexed. The amount of commercial and industrial land within this area was hardly discussed. When the annexation agreement was reached, the Mayor received the informal approval of six members of the City Council but did not even consult the three members known to oppose annexation. *Id.* at 1103, 1106.

¹⁴*Id.* at 1099.

¹⁵*Id.* at 1096.

¹⁶*Id.*

The first decision which sheds light on this question is *Gomillion v. Lightfoot*.¹⁷ In 1960 *Gomillion* clearly established that the power of state and municipal authorities to alter municipal boundaries is limited by the fifteenth amendment. The Alabama State Legislature had redrawn the boundaries of Tuskegee from a perfect square to an irregular twenty-eight-sided figure. The change excluded all but four or five of Tuskegee's black citizens from the city limits and thus prevented them from voting in municipal elections. The state and city advanced no reasons justifying the necessity of such a change in the city boundaries. The Supreme Court held that "[a] statute which is alleged to have worked unconstitutional deprivations of petitioners' rights is not immune to attack simply because the mechanism employed by the legislature is a redefinition of municipal boundaries."¹⁸

Gomillion applied a fifteenth amendment standard to an exclusion of black voters through the alteration of municipal boundaries. *Reynolds v. Sims*¹⁹ examined the constitutional effect of the dilution of voting power. The court declared in *Reynolds* that Alabama's reapportionment plans for its state legislature violated the equal protection clause of the fourteenth amendment. "[T]he right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise."²⁰ The condemned apportionment plans diluted voting power of both blacks and whites by creating and maintaining legislative districts of grossly unequal size. Large districts were not accorded a proportionally greater number of representatives.²¹

While *Reynolds* condemned the deliberate dilution of voting power, it did so under a fourteenth amendment equal protection test. The dilution of votes produced by a *Holt*-type annexation is probably best analyzed under a fifteenth amendment standard, however. The nature of the fourteenth amendment equal protection test involves a numerical balancing. One voting district or school system is compared to other districts or systems under a quantitative as well as a qualitative standard.

¹⁷364 U.S. 339 (1960).

¹⁸*Id.* at 347.

¹⁹377 U.S. 533 (1964).

²⁰*Id.* at 555.

²¹*Id.* at 545. The Court relied on *Gomillion* to justify the power of federal courts to review the use of state powers when they are used to circumvent a right protected by the Constitution. *Id.* at 566. See also *Wright v. Rockefeller*, 376 U.S. 52 (1964), in which the Court held that plaintiffs failed to show that congressional district lines in Manhattan had been drawn with either the effect or the intent to produce racial imbalance.

In *Reynolds*, legislative districts with large populations elected the same number of representatives as did districts with much smaller populations.²² This relative inequality of voting power between districts made a fourteenth amendment standard applicable. Such a comparison was not possible in *Gomillion* or *Holt*. In each of these cases, the voting power of black citizens was affected by an electoral change which altered the nature of the entire voting population and not just the size of one district in relation to that of another. Thus the more absolute standard of the fifteenth amendment was applied. The dilution of black votes in *Holt* should have been examined to see if it constituted an "abridgement" of the right to vote as prohibited by the amendment.²³

In *Fairley v. Patterson*²⁴ and *Perkins v. Matthews*,²⁵ the Supreme Court analyzed the dilution of racial voting power resulting from municipal boundary changes in terms of its fifteenth amendment effects. Both *Fairley* and *Perkins* involved section 5 of the Voting Rights Act of 1965.²⁶ *Fairley* was a federal suit to determine whether a switch by a county from single-member-district voting to at-large voting for the election of county supervisors was a change in voting procedure requiring a section 5 determination of the possible impact on fifteenth amendment rights. *Perkins* presented a section 5 question concerning the annexation of land by a municipality. The change in boundaries in each case²⁷ diluted the power of black voters by adding white voters to the election unit. The Court held in both cases that a change in voting procedure had occurred and that the resultant dilution of the black voting strength increased the potential for a fifteenth amendment violation. Therefore, these changes were held to be subject to prior judicial review under the act.²⁸ Richmond failed to follow the section 5 procedure before annexing the county land. The Attorney General filed an objection just before *Holt* was argued in the Fourth Circuit. However,

²²377 U.S. at 545.

²³See note 1 *supra*.

²⁴393 U.S. 544 (1969).

²⁵400 U.S. 379 (1971).

²⁶Voting Rights Act § 5, 42 U.S.C. § 1973c (1970). The Voting Rights Act of 1965 was passed by Congress to aid in the protection of fifteenth amendment rights. Section 1973c provides that no changes in state or local voting methods and procedures may be put into effect until they have been submitted to either the District Court for the District of Columbia or to the Attorney General of the United States for a determination of possible violations of the fifteenth amendment.

²⁷*Fairley v. Patterson*, 393 U.S. 544 (1969), involved the elimination of internal boundaries and *Perkins v. Matthews*, 400 U.S. 379 (1971), the expansion of external ones.

²⁸The Court did not rule on the substantive issues of alleged constitutional infringements, leaving that decision to the proper lower courts. 393 U.S. at 550; 400 U.S. at 382.

at the request of the parties, the court proceeded to hear the case without considering the section 5 question.²⁹ The court did, however, employ a fifteenth amendment analysis in making its decision.³⁰

Although it is relatively clear that the fifteenth amendment should serve as the legal standard for the analysis of the problem presented by *Holt*, it is not clear what factors may be considered in determining whether a violation of the fifteenth amendment has indeed occurred. Annexation of land by a municipality is not in itself unconstitutional. To prove a particular annexation unconstitutional, courts must look beyond the fact of the annexation. More specifically, the question in *Holt* was whether a court should review the motivation behind a legislative act.

Gomillion was read in one *Holt* dissent³¹ as justifying the conclusion that a facially constitutional law may be declared void because of the unconstitutional motivation of the man who enacted it. Judge Butzner argued that the evidence compelled such an application of *Gomillion*: " 'Acts generally lawful may become unlawful when done to accomplish an unlawful end . . . ' " ³² The deliberate use of a facially valid annexation scheme to effect the dilution of racial voting blocs is a violation of the fifteenth amendment, he said, and the determination of such a violation may rest on an analysis of motivational evidence.³³

The *Holt* majority, however, rejected this application of *Gomillion* and relied instead on other Supreme Court decisions which specifically limited the *Gomillion* decision. Eight years subsequent to *Gomillion* the Court, in *United States v. O'Brien*,³⁴ declared that it is a well established principle of constitutional law that the Court will not invalidate an otherwise constitutional statute on the basis of an alleged unconstitutional motive.³⁵ The *O'Brien* court characterized the *Gomillion* decision as standing "not for the proposition that legislative motive is a proper basis for declaring a statute unconstitutional, but that the inevitable effect of a statute on its face may render it unconstitutional."³⁶

The Court upheld this interpretation in *Palmer v. Thompson*.³⁷

²⁹459 F.2d at 1100.

³⁰*Id.*

³¹*Id.* at 1101 (Butzner, J., dissenting).

³²*Id.* at 1100, quoting, *Gomillion v. Lightfoot*, 364 U.S. 339, 347 (1960).

³³459 F.2d at 1100-01 (Butzner, J., dissenting).

³⁴391 U.S. 367 (1968).

³⁵*Id.* at 384-85.

³⁶*Id.* at 384.

³⁷403 U.S. 217 (1971).

It is true there is language in some of our cases interpreting the Fourteenth and Fifteenth Amendments which may suggest that the motive or purpose behind a law is relevant to its constitutionality. . . . But the focus in those cases was on the actual effect of the enactments, not upon the motivation which led the States to behave as they did. . . . And in *Gomillion* the Alabama Legislature's gerrymander of the boundaries of Tuskegee excluded all Negroes from voting in town elections.³⁸

Although they expressly relied on *O'Brien* and *Palmer*, the *Holt* majority only partially adopted the reasoning of those Supreme Court decisions. The *Holt* court declared that *O'Brien* and *Palmer* stated the general rule for the judicial analysis of legislative motivation,³⁹ but then failed to consider the Supreme Court reasoning which distinguishes *Gomillion*. *Gomillion*, as subsequently interpreted by *O'Brien*⁴⁰ and *Palmer*,⁴¹ at least compels a determination of the effect of the enactment. However, the *Holt* court relegated *Gomillion* to exceptional cases in which the legislative motive is subject to judicial review but only when the motive is clear, singular, and dominant.⁴² Unjustly limiting the effectiveness of *Gomillion* in this manner, the court distinguished *Holt* from *Gomillion* on the facts. In *Holt*, valid reasons existed for the annexation. Therefore, the motivations of the responsible city officials were, at worst, only partially illicit. The *Holt* court would not consider these illicit motivations as a basis for granting relief when the legislation under attack was facially constitutional and supported by some valid motives.⁴³ By deciding the case on the facts, the court of appeals, as mentioned previously,⁴⁴ was forced to reverse the lower court on its findings as well as its law. The court ignored evidence of the Mayor's overwhelming concern during the compromise negotiations for the number of white people in the area to be annexed and his lack of concern for the amount of available industrial and commercial land.⁴⁵ A reversal on the facts helped the court fit *Holt* into its all-or-none interpretation of *Gomillion* and judicial review of motivation.

The majority also ignored the implications of the *Palmer* case,

³⁸*Id.* at 225.

³⁹459 F.2d at 1098-99.

⁴⁰391 U.S. at 384.

⁴¹403 U.S. at 225.

⁴²459 F.2d at 1097-98.

⁴³*Id.* at 1099.

⁴⁴See note 13 and accompanying text *supra*.

⁴⁵See note 13 and accompanying text *supra*.

which, as Judge Winter's dissent suggested, may allow motivational analysis when the effects of the act make a prima facie showing of unconstitutionality.⁴⁶ Judge Winter argued that the annexation, timed as it was to occur just prior to the election, made a prima facie case of unconstitutional effect. Once established, the prima facie case could then, according to *Palmer*, be supported by evidence of legislative motivation.⁴⁷ This view was consistent with the legal position and findings of fact of the lower court in *Holt*.⁴⁸ The annexation had a prima facie unconstitutional effect because it diluted black voting power precisely at the moment electoral gain might have been reaped from that power. The timing of the annexation to occur at that moment with the consequent dilution of black votes was the essence of the prima facie case. The court should have then examined the motives of the Richmond officials to determine if the timing of the annexation was for the deliberate purpose of abridging black voting power.

The *Holt* majority, however, was apparently unwilling to assign any weight to the effects of the timely dilution of votes absent conclusive proof that the sole or dominant purpose of the annexation was to thwart a constitutional right.⁴⁹ A more reasonable approach was indicated by the Supreme Court in the recent fourteenth amendment school desegregation case, *Wright v. Council of the City of Emporia*.⁵⁰ The city desired to remove its schools from the county school system which had been recently ordered to desegregate.⁵¹ The Fourth Circuit found the dominant purpose behind the proposed change to be nonracial and refused to enjoin the separation.⁵² The Court reversed, holding that the "'dominant purpose' test finds no precedent in our decisions."⁵³ *Palmer* was said to require the Court to focus on "the effect—not the purpose or motivation—of a school board's action"⁵⁴ However, once the effects of a proposed change make a prima facie showing of unconstitutionality, a "heavy burden" is placed on the approving authority to justify its proposal.⁵⁵ Demonstrated racial purpose may then be taken

⁴⁶459 F.2d at 1109 n.3.

⁴⁷*Id.* at 1109-10 n.3.

⁴⁸334 F. Supp. at 237.

⁴⁹459 F.2d at 1097-1100.

⁵⁰92 S. Ct. 2196 (1972).

⁵¹See VA. CODE ANN. § 22-43 (1950). Under Virginia law, a city must provide for the education of its children and can choose to create its own school district.

⁵²*Wright v. Council of the City of Emporia*, 442 F.2d 570, 573-74 (4th Cir. 1971).

⁵³92 S. Ct. at 2203.

⁵⁴*Id.*

⁵⁵*Id.* at 2206.

into consideration in weighing these justifications.⁵⁶

The Supreme Court then would go one step further than Judge Winter's interpretation of *Palmer*. Not only would it allow motivational factors to be considered once a prima facie case has been established, but it would shift the burden of persuasion to the party responsible for the challenged activity. In *Holt* a prima facie case of unconstitutional effect had been made with the proof of the timing of the dilution of black votes. The City of Richmond should then have been forced to justify its actions, and motivational factors should have been considered in determining whether the city has met its burden of proof.

The Court formulated the *Emporia* analytical rules in a fourteenth amendment school desegregation decision. It should logically apply them to the fifteenth amendment voting rights problem in *Holt*. Motivation is perhaps even more relevant to fifteenth amendment problems where numerical comparisons of equality are not possible as they are in fourteenth amendment questions. In the meantime, the *Holt* court seems to have seized on a hybrid rule of law to avoid rectifying a subtle infringement on rights guaranteed by the fifteenth amendment. In any event, the court in its *Holt* decision has perpetrated the injustice done by the Richmond annexation and has further confused the issue of when legislative motivation may be considered by the court in determining the existence of a violation of the fifteenth amendment.

ALLEN H. OLSON

Constitutional Law—The First Amendment and Advertising: The Effect of the "Commercial Activity" Doctrine on Media Regulation

*Mitchell Family Planning, Inc. v. City of Royal Oak*¹ presented the United States District Court for the Eastern District of Michigan with a novel first amendment issue framed in the context of media regulation. Plaintiff Mitchell Family Planning, Inc., a non-profit² corporation, was

⁵⁶*Id.* at 2205. Emporia had had since 1967 to establish its own school system. It began to show interest in doing so only after the county system was ordered to integrate. The effect of the city's withdrawal from the county system would have been to increase the number of white students in city schools and decrease their numbers in the county schools.

¹335 F. Supp. 738 (E.D. Mich. 1972).

²While the non-profit nature of plaintiff corporation was accepted here, in *S.P.S. Consultants, Inc. v. Lefkowitz*, 333 F. Supp. 1370 (S.D.N.Y. 1971), plaintiff Martin S. Mitchell was identified as president of Mitchell Referral Service, Inc., a profit-making enterprise engaged in the referral of pregnant out-of-state women to New York physicians for the purpose of abortion procurement.