

ORIGINAL

In the
Supreme Court of the United States

HOLT CIVIC CLUB, etc., et al.,

Appellants,

v.

CITY OF TUSCALOOSA, etc., et al.,

Appellees.

No. 77-515

Washington, D. C.
October 11, 1978

Pages 1 thru 51

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HOLT CIVIC CLUB, etc., et al., :
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 Appellants, :
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 v. :
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CITY OF TUSCALOOSA, etc., et al., :
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 Appellees. :
:
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Washington, D.C.

Wednesday, October 11, 1978

The above-entitled matter came on for argument
at 10:05 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

EDWARD STILL, Esq., 601 Title Building, Birmingham,
Alabama 35203; for the Appellants.

J. WAGNER FINNELL, Esq., P. O. Box 2089, Tuscaloosa,
Alabama 35401; for the Appellees.

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments first this morning in 515, Holt Civic Club against the City of Tuscaloosa.

Mr. Still, you may proceed whenever you are ready.

ORAL ARGUMENT OF EDWARD STILL, ESQ.,

ON BEHALF OF THE APPELLANTS

MR. STILL: Mr. Chief Justice, and may it please the Court:

This action was heard by a three-judge district court which was empaneled to hear a challenge to the constitutionality of an Alabama statute which empowers and directs each city and town in Alabama to exercise its police power within a one-and-a-half or three-mile zone around the city or the town. The adverse decision of the district court against the plaintiffs was appealed to this Court under 28 USC, Section 1253. The Court reserved the question of jurisdiction, and we have briefed that extensively; and if the Court does not have any further questions on that point, I will move on to the merits of the case.

Q Mr. Still, how old a statute is this Alabama statute?

MR. STILL: The statute was passed in the early 1900s--one of them. I believe it was 1907. A second one was passed in 1927, and I am not sure about the third one.

Q So, there are three old statutes to be challenged at this late date?

MR. STILL: Yes, sir, they are old.

Q You say, counsel, that the statute empowers and directs the municipal corporations or the cities to do these particular things. Would you make that claim that it both empowers and directs with respect to each of the legislative activities that we are talking about here?

MR. STILL: Do you mean the legislative activities of the city or the three statutes?

Q Of the city.

MR. STILL: Yes, sir, I believe that it does because Section 11-40-10, which is the primary police jurisdiction statute, contained in Addendum B to the brief, the grey brief, says that ordinances of the city or town shall have force and effect in the limits of the city or town. And so that is a mandatory statement there, and I believe that they would have effect whether the city intended them to or not. A city force might choose not to send its police out. But I believe that it is mandatory under state law.

Q What page is Addendum B in the grey book?

MR. STILL: It is about three pages from the back of the brief, Your Honor.

Q Your first brief?

MR. STILL: Of the grey brief, Your Honor, the brief

for the appellants. That contains the new language of the statutes. There has been a recompilation of the Alabama Code since we originally filed the suit. But the text of the statutes has not changed materially.

Q It says in the second paragraph of Section 11, after defining the police jurisdiction, the second paragraph begins, "Ordinances of a city or town enforcing police or sanitary regulations..." Can that not just as readily be read to read "choosing to enforce regulations" as being compelled to enforce regulations?

MR. STILL: No, sir, Your Honor. I believe that that statute has been interpreted in Alabama as defining a class of statutes. Police ordinances, sanitary ordinances are two classes of ordinances. Other types might be financial regulations of the city, internal regulations of the city for one reason or other, or zoning regulations. Under Alabama law zoning regulations are not police ordinances. And so in that way this is a way of differentiating police and sanitary regulations from, say, zoning ordinances or other types of ordinances that would not have an extraterritorial effect.

Q It is descriptive, in other words.

MR. STILL: Yes, sir, it is descriptive of a class of ordinances.

Q Any ordinances falling into those categories are effective within the extraterritorial police jurisdiction

of the municipality?

MR. STILL: Yes, sir, that is the way the statute has been interpreted in Alabama.

Q Is the case that interprets that way cited in your brief?

MR. STILL: Yes, sir. I believe that we cite both the City of Montgomery v. Roberson case and White v. City of Decatur. City of Montgomery v. Roberson was a case that dealt with the power of the City of Montgomery to zone in its extraterritorial jurisdiction. And the Alabama Supreme Court went into statutory construction at great lengths there to explain that these were just ways of describing certain classifications of ordinances and that zoning was not a police power within the normal meaning of the term as far as cities go because we had to pass a special law allowing cities to zone in Alabama. It was not considered to be in the normal grant of powers to cities by the State of Alabama.

The case alleged both due process and equal protection grounds in the original complaint. We have briefed the question of due process. And you will notice that we have cited only two cases, and that is United States v. Texas and United States v. Alabama, Judge Johnson's concurring opinion there.

The question of due process is so fundamental that it generally has not had to be raised in voting rights cases. And yet, if we think about it, the process that is due to all of

these citizens is that if they are governed, they should be allowed to have some voice in the government over them. The question is usually not presented to this Court in a due process context. But I believe that it should be in this case because even ignoring a comparison between what the City of Tuscaloosa does to its citizens and what the City of Tuscaloosa does to the people in the police jurisdiction, the fundamental question under due process would be, What should it do to the people in the police jurisdiction if it does not allow them to vote?

Q What if the State of Alabama provided that the City of Tuscaloosa shall be governed by a five-man commission, appointed by the governor of Alabama so that the residents within the city boundaries of Tuscaloosa would have absolutely no say in the composition of that commission; would that be a violation of due process?

MR. STILL: No, Your Honor, I do not believe that it would because in that case the state would have essentially abolished local government except through commissioners of some sort, agents that it appointed from the central government. It has done that in the past in the Port of Mobile in the late 1800s. I think that would be a fundamentally different situation here than one in which there is a local government which is elected and in which these people are not allowed to participate.

The boundary between the due process and the equal--

Q Yes, that boils down to almost an equal protection claim. If you say that the citizens in Tuscaloosa can vote but citizens in the police jurisdiction cannot vote, it seems to me that is more of an equal protection claim than a due process claim.

MR. STILL: Yes, sir, and that is the question that we have briefed most extensively. But, as I said, the question usually does not arise even, that it is a due process claim; but we have raised that in this case, and I think it is a sufficient ground.

Q It has arisen a good many times, I think. Before I came on the bench this morning, I glanced over a comment in the Chicago Law Review of last fall in which it is pointed out that some 35 states have this sort of system in whole or in part, and that they date back to the late 19th century, and that repeatedly due process attacks on extra-territorial government by municipalities were rejected.

MR. STILL: Yes, Your Honor, they were.

Q So, it perhaps is not quite so obvious as you indicate.

MR. STILL: Well, I was talking about--

Q The article went on to say, I should say in your behalf, that in the light of the modern developments of equal protection law, the result might be quite different.

MR. STILL: Yes, sir, I think most of those challenges

were raised, as you point out, in the late 1800s at a time when--

Q The early years of this century anyway.

MR. STILL: Yes, sir, or the early part of this century.

The equal protection question is, I think, a fundamental one that we are dealing with here. As the Chicago Law Review comment pointed out, there are 35 states that have some sort of extraterritorial power for their cities. Only four states--Alabama, Montana, North Dakota, and South Dakota--have full police power extraterritorial jurisdictions. The rest of them allow some sort of zoning or some sort of business regulation or nuisance regulation in an extraterritorial zone. But the full-fledged police jurisdiction that we are talking about in this case is only in four states.

The equal protection--the first matter that we get to in that regard is, What is the proper standard of review? The City of Tuscaloosa has raised the point that only a rational relationship must be shown between the means and the end that the state has chosen. And they cite for authority on that point Salzer Land Company v. Tulare Water Storage District. That case utilized such a test--the rational relationship test--rather than a strict scrutiny test because this Court first determined that the Tulare District was not a general purpose government; and, therefore, the strict scrutiny rule

did not apply because it was not really the right to vote in the fundamental sense, as we know it, that was involved in the case. The City of Tuscaloosa is not such a limited purpose government in the police jurisdiction. The only things the city cannot do in the police jurisdiction that it can do in the city limits of Tuscaloosa is collect ad valorem property taxes and to zone, as I pointed out a moment ago. It may also collect only one-half of the usual license fee that it charges inside the city.

Q If the City of Tuscaloosa were to attempt to annex the police jurisdiction, would some sort of consent on the part of the residents in the police jurisdiction be required, some sort of referendum?

MR. STILL: Some sort of consent is required under Alabama law, Your Honor. The statutes provide for three or four different methods. Each one of them either requires a referendum among the affected voters, residents of the particular area, or their consent on a petition. There are different statutes for different cities. But every one of them requires both the consent of the city and the consent of the affected voters in a particular area. In some cases there are additional requirements.

Q What if in this situation the city had sought to annex the police jurisdiction that you are complaining about and the citizens in the affected area had refused to be annexed;

would your case be any different?

MR. STILL: No, sir, I do not believe so. The city is constantly growing. As the city has pointed out in their brief, it has grown about--quintupled in size over the last 25 years or so. I do not think that the case is any different if these people had been given a choice about whether they wanted to be in the city of Tuscaloosa and choose not to be because they are still treated differently than the people--

Q Does not the State of Alabama have some concern with the added law enforcement problems right around the ring of an urban area that enable it to do some things that it might not be able to do way out in the country?

MR. STILL: Yes, sir, I believe that the state may have a legitimate concern. But either under the rational relationship test or the compelling state interest test, we have got to look at the end they are seeking, which is protection of these people from marauders of various sorts by the police and the means that they choose to do so. The means that they have chosen to use in this particular case are to allow a different government, that these people do not have a vote in, to govern them. And that is the equal protection question and the due process question. We are not attacking the end of the regulation, state saying that these people need some sort of protection. We are simply attacking the means by which they have done it because, as the Chicago Law Review

article or comment pointed out, there are many different ways in which these people, who live in areas right outside cities, could be governed.

As I pointed out, 46 states do not have the type of jurisdiction that we are talking about in Alabama. So, they have figured out some way to protect these people without depriving them of the right to vote by the government that is supposedly protecting them. There are 15 states that have no sort of extraterritorial jurisdiction at all. They utilize such things as township governments or direct police protection by the county government. And I think those could be used in Alabama under the Alabama constitution, perhaps not townships per se but direct government by the county government could be used.

Q You rely primarily on the reapportionment cases in this Court, do you not?

MR. STILL: Not so much the reapportionment cases, Your Honor, but that line of cases beginning with Kramer v. Union Free School District, which are not so much reapportionment cases as they are voting rights cases.

Q Yes. And in Kramer the complaint was that unmarried man, if that is what he was, was not allowed to vote in a school board election--

MR. STILL: That is correct, Your Honor.

Q --in that school board election in the State of

New York, as I remember it.

MR. STILL: Yes.

Q And what he asked for in his complain was that he be allowed to vote, was it not?

MR. STILL: Yes, sir. He was seeking the right to vote in that particular case because that was the only practical remedy. No matter what he did, there was no way he could isolate himself from the pervasive effects of a school in our society today. That was the whole basis of the Court's decision.

Q He was going to be taxed if the tax levy or bond issue were passed by the voters.

MR. STILL: He was going to be taxed directly. He did not own any property.

Q He was a tenant, as I remember.

MR. STILL: That is right. He lived with his parents, and he was a non-property owner.

Q You may remember that I dissented in that case.

MR. STILL: Yes, sir, I do.

Q So, I do not defend it. But, in any event, the relief he was asking was that he be allowed to vote. The relief you are asking is that this whole extraterritorial jurisdiction be held to be invalid, is it not?

MR. STILL: Yes, sir, that is correct, and that is because we have a choice in this case which no one else has had

as a practical matter. Mr. Kramer, as I said, did not have any practical way to pull himself out of society and say, "The schools are not going to affect me."

Cipriano, in the City of Phoenix case, was going to be affected by the utility rates no matter what he did. As long as he was hooked up directly or indirectly to the city's utilities, he was going to be paying for the bond issue that the property owners were passing.

In Evans v. Cornman the only practical thing to do was to extend the right to vote to those people who lived out at the NIH enclave in Montgomery County, Maryland because if you had said that Maryland must withdraw their authority over them, you would have had to declare unconstitutional the Federal Assimilative Crimes Act and several other federal acts, an entire federal scheme of regulation.

Q But, in any event, those cases would seem to indicate that the constitutional injury perceived by the Court was in prohibiting those plaintiffs from voting.

MR. STILL: Yes, sir.

Q And that was the constitutional injury. You do not allege any such constitutional injury.

MR. STILL: Yes, sir, we allege the flip side of that because these residents of the Holt area are not allowed to vote and they are governed, then they are deprived of their constitutional right. Now, we have a choice--

Q Yes, but you are not asking for a redress of that constitutional injury. You are not asking that you be allowed to vote.

MR. STILL: No, sir, we did not ask for that in the complaint. But I think that the district court could have granted that particular relief if it had found that we stated a cause of action. I think that it also, as a practical matter, could have granted the relief that we sought because that relief would actually be less disruptive of the state's regulatory system than would extending the right to vote.

Q In Reynolds against Sims could the Court have granted the relief of relieving the City and County of Denver of any jurisdiction in the State of Colorado?

MR. STILL: No, sir, I do not believe that they could.

Q That was Lucas.

MR. STILL: Yes.

Q Lucas, yes. Why is that different from this?

MR. STILL: Because in this particular case, if we remove the City of Tuscaloosa's jurisdiction over these people, they will still be governed by the County of Tuscaloosa and by the State of Alabama. And yet they will not be governed by the City of Tuscaloosa. So, we actually have a practical choice that could be made in this case between the remedies. But, as I say, if the District Court had found that we had stated a cause of action, had allowed us to go to trial and it found

that we prevailed, it could have ordered a remedy of saying, "We declare this statute to be unconstitutional, and we give the state legislature one year to come up with a new statute; and, if it does not, then we will undertake to do something ourselves," in much the same way that many times reapportioning courts have done so. They have declared the present scheme unconstitutional and then deferred to the state legislature to do so. And, in fact, this Court requires it to do so if at all practical.

Q But your lawsuit is analogous to what those voting cases and reapportionment cases would have been had the plaintiff in the reapportionment cases said this state legislature is malapportioned; therefore, anything it does is null and void. It is an invalid legislature. And the Court, at least by some reaction, has declined to accept the proposition that a malapportioned legislature cannot legislate.

MR. STILL: Yes, Your Honor, and in those cases in which people actually did claim that a malapportioned legislature did not have the power to legislate--

Q We have had cases, for example, where a malapportioned legislature has enacted laws, and those laws are attacked as invalid because they were enacted by an unconstitutional legislature. And the Court--I do not remember any opinions dealing with it in a plenary way, but the Court at least by summary action has rejected those claims.

MR. STILL: Yes, sir, but in many of those reapportionment cases I believe that the plaintiffs in addition sought to have the present legislature just removed from office immediately and that--

Q No, they sought to ask this Court to hold constitutionally invalid state laws enacted by concededly malapportioned legislatures.

MR. STILL: Yes, sir, and the point that I am trying to make is that just because you ask for the wrong remedy in your initial complaint does not mean that the complaint is invalid if you state a cause of action.

Q But often the remedy identifies the constitutional injury about which you are complaining.

MR. STILL: Yes. And we have identified the constitutional injury as these people being governed and not being allowed to vote.

Q So, if the constitutional injury is that you are not being allowed to vote, then the redress for that injury is that you be allowed to vote.

MR. STILL: It may be that the district court will hold that. It may be that this Court will hold that. We will accept that kind of remedy because I think if it happened, that the State of Alabama would remedy that situation very quickly by passing a new statute probably abolishing the police jurisdiction. But there are approximately 16,000 people who

live in the police jurisdiction of Tuscaloosa. There are 70,000 people who live in the City of Tuscaloosa. We are talking about expanding the City of Tuscaloosa by one-fourth approximately, by judicial fiat, if you hold that these people have a right to vote. We say it would be much less disruptive--

Q How do you get the judicial fiat when you have got a state statute involved?

MR. STILL: Excuse me, Your Honor?

Q It is not the decision of this Court that would do it. It is the state statute that would do it.

MR. STILL: Yes, sir, but I am saying--

Q Am I right?

MR. STILL: Yes, sir, but I am saying that the Court--

Q And what you want us to do is to find that this state statute is unconstitutional and then dream up a remedy for you.

MR. STILL: No, sir, I am not asking this Court--

Q And I mean dream because you have not told us yet what you want, have you?

MR. STILL: Yes, sir, I have. We have asked--

Q Try it again.

MR. STILL: I have asked that the city's jurisdiction over these people who do not live inside the City of Tuscaloosa be removed from them, that the City of Tuscaloosa not be allowed to govern them.

Q And how do you do that?

MR. STILL: You simply tell the City of Tuscaloosa they cannot send their police into that area anymore, and they cannot enforce--

Q You issue an injunction?

MR. STILL: Yes, sir, I believe that you could.

Q Did you ask us to?

MR. STILL: Yes, sir. The original--

Q Did you ask it before right now?

MR. STILL: Yes, sir. The original complaint, if you will look in the complaint, it asks that an injunction be issued enjoining the enforcement of the police jurisdiction statute, the main police jurisdiction statute, and declaring two additional police jurisdiction statutes to be unconstitutional. It does not ask that they be enjoined because I believe that they are dependent upon the main police jurisdiction statute.

Q What evidence did you put on?

MR. STILL: We have never been allowed to put any evidence on in this case. It was dismissed by a single-judge district court. The Fifth Circuit reversed the case, sent it back to be heard by a three-judge district court. The three-judge district court then dismissed on another motion to dismiss. There is some evidence in the file in this case, in the record in this case, because we did take discovery. And

presumably the district court did take a look at that, but it never mentioned it in its particular opinion.

Q But you did have discovery.

MR. STILL: Yes, sir, we did take discovery. The case was pending for three years in the district court at two different times.

Q I notice you put great weight on the fact that you said, in filing a complaint, "and for other relief." You are not relying on that, are you?

MR. STILL: That, Your Honor, is the standard way of doing things in Alabama. But, as I pointed out, the Federal Rules of Civil Procedure allow the Court to grant such other relief as it may find proper. If we have stated a cause of action before we get to the wherefores--

Q That is just why a minute ago I used the word "dream up." That is what you want the Court to do.

MR. STILL: No, sir, I am not asking the Court to dream up. I ask for a specific remedy, and I think--

Q Are you limited to that now in your argument?

MR. STILL: No, sir, I do not believe that we are limited to that because I think under the Federal Rules of Civil Procedure the Court is allowed, whether I ask for such other further equitable relief as may be granted, I think the Court is allowed to fashion such a remedy as would be equitable in the situation.

Q Without any suggestion from you?

MR. STILL: I believe I have some right to make suggestions. But if the Court finds that I am only entitled to A and I ask for B--but A is encompassed within the cause of action that I ask for--that they will grant that sort of thing. There are many cases in which people will ask for injunctions which, for one reason or another, might be barred by equitable principles or by the Constitution of the United States, the Eleventh Amendment or something like that. So, instead of issuing a mandatory injunction that says to the state, "Spend money" the Court comes back and says, "Do not do this unless you do something constitutional, they issue a prohibitive--

Q What do you want us to do other than to issue these injunctions?

MR. STILL: I want this Court specifically to reverse the case and send it back to the district court, which would then issue the injunctions and declare two statutes unconstitutional and enjoin a third statute from being enforced.

Q And what else? That will satisfy you?

MR. STILL: That would be sufficient, Your Honor. That would be sufficient.

Q Mr. Still, when the Court noted probable jurisdiction in this case, as you have already observed, it indicated that four justices had enough doubt about jurisdiction so as to postpone the resolution, and you have elected to submit

that on the brief. I just want to be sure that you are content to do that.

MR. STILL: Yes, sir, I am, but I am certainly ready, willing, and able to answer questions if anyone has any on the jurisdictional question.

Q Before you go on, may I ask your reaction to the authority of the state to authorize extraterritorial jurisdiction limited to police power? And let us assume further that there was no power to impose taxes, merely the authority to send the city police into the county.

MR. STILL: Your Honor, it is a little bit more than just sending the police. They also get to enforce their particular ordinances. So, they get to choose. The City of Tuscaloosa gets to choose what will be enforced, what will be imposed upon the residents of the police jurisdiction. So, in that way they can impose not only their police force, their agency, but they can also impose their will upon these people.

Q You are talking about speed limits and parking restrictions?

MR. STILL: Yes, sir, that sort of thing and all sorts of business regulations--

Q What else; what about criminal laws?

MR. STILL: Yes, sir, they are quasi-criminal ordinances, is what they are called in Alabama. I never have exactly understood the distinction. You still go to jail.

Q Are these different from state criminal provisions?

MR. STILL: Yes, sir, some of them are. For instance, in Alabama, just to take an offhand example, prostitution is not illegal under Alabama law, but prostitution is illegal under Tuscaloosa city ordinances. It is illegal to solicit for prostitution under Alabama law. It is illegal to keep a bawdy house, but it is not illegal to be a prostitute or to actually engage in an act of prostitution. So, the City of Tuscaloosa gets to impose its will upon these people in an area that would not otherwise be governed. They have got solicitation ordinances about charities.

We have got an appendix, I believe, to the jurisdictional statement--

Q I have seen it.

MR. STILL: --which lists all of the ordinances of the City of Tuscaloosa which--

Q And the answer to my question would be the same even if no taxes were imposed upon the residents of the community?

MR. STILL: Yes, sir, I believe so because the police power is so pervasive.

Q There are no taxes involved.

MR. STILL: No, sir, there are no taxes. There are some license fees--

Q I was thinking of the license fees.

MR. STILL: If it please the Court, I would like to reserve the remainder of my time for rebuttal. Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Finnell.

ORAL ARGUMENT OF J. WAGNER FINNELL, ESQ.,

ON BEHALF OF THE APPELLEES

MR. FINNELL: Mr. Chief, and if the Court please:

I first would like to more fully answer some of the questions that have been posed by this Court. For instance, Mr. Justice Powell asked the question, Suppose this were confined to police powers in the extraterritorial aspect. I say that it is so confined because ordinances of a police and sanitary nature may be effective both within the city and within the police jurisdiction. I know really, other than the fact that the court, the municipal court--which is the same as the district court in all respects--has jurisdiction out in this area. That may be an aspect of police power. But, other than that, I know of no other powers that are granted in police jurisdiction.

As the Court or some of the members have pointed out, there is no authority to tax, there is no authority to charge a business outside or a privilege license, for the purpose of general revenue. That has been clearly held by the Alabama Supreme Court. Of course, within the city you can license for general revenue purposes. And the business, the establishment, cannot contest on the ground that it is more than the

cost of services might be. But outside the corporate limits, the Alabama Supreme Court has very carefully limited that to a charge commensurate with the cost of the services rendered. That has been going on since 1881 in the City of Van Hook v. Selma. They were then making charges outside of the corporate limits, and there the Court struck down an ordinance that made a charge more than the reasonable cost of promoting the health and welfare and well-being of those persons in the police jurisdiction. Later, when the so-called authorization to tax that has been cited here many times, was adopted by the state legislature in 1927--that is when it was adopted, and then there is a case which I do not have before me, it is in my brief--squarely ruled on it, and the Court held that this added nothing to the authority of a municipality to license within the police jurisdiction--

Q If I understood it, Mr. Finnell--

MR. FINNELL: Yes, sir.

Q --police power has at least two meanings. There is the constitutional meaning of meaning the states reserve power to enact legislation within the appropriate reserve powers of the states, and that is often compendiously known as the police power of a state. I had understood my Brother Powell's question to be more limited. That is, suppose it had been confined only to sending the city policemen out there--and that is a much more limited concept. It was pointed out by

your brother on the other side that this would involve also the extension of the city's legislative power out into the police jurisdiction.

MR. FINNELL: It does--

Q When you say this is confined to the police power, you are perfectly accurate, if that term is understood as being the appropriate power of the municipality to govern itself. It is only part of the police power that is extended. But it is certainly much more than simply sending the city policemen out there to enforce the law, the state law.

MR. FINNELL: Yes, sir. Certainly it involves--

Q It is an extension of the legislative power of the municipality beyond its territorial limits.

MR. FINNELL: Absolutely, Your Honor. It allows the ordinances that are effective within the corporate limits to be effective also outside within a limited area.

Q Mr. Finnell, suppose in the area outside of Tuscaloosa, which we are talking about, the people in a 14-square-block area say, "Look, we have not seen a policeman in the last 14 years, and we need some policemen here," how would they go about getting one?

MR. FINNELL: We have that complaint quite often.

Q How would they go about getting them?

MR. FINNELL: They would call the police department or the police commissioner or simply come before the commission

board, as they often do, and ask that the patrols be extended on a more regular basis.

Q And if they refuse, what could they do?

MR. FINNELL: I do not think the city could be required to do that, Your Honor.

Q The people inside Tuscaloosa, could they not go one step further and say, "Dear Mr. Commissioner of Police, if you do not put them in there, we will vote you out of office"?

MR. FINNELL: They could do that, Your Honor.

Q Could they not? And the people outside could not do that.

MR. FINNELL: No, sir.

Q But that is a difference, is it not?

MR. FINNELL: In the sense that if you are not talking about a person engaged in business--

Q I am talking about a voter, a qualified, registered voter.

MR. FINNELL: That is quite true. They do not vote in the corporate limits, Your Honor. They do not have that--

Q They have no authority at all as to whether they shall have good or bad police.

MR. FINNELL: No, sir.

Q Is there a county police force? I suppose there is a county sheriff.

MR. FINNELL: There is a county sheriff, and there is a county police force, and it is of course the duty of the sheriff to police in this area. Unfortunately in Alabama maybe our laws are not as good as they should be; but the county has been more or less a caretaking institution. The deputy sheriffs do answer calls outside, but they spend much of their time supporting the courts, issuing subpoenas, that sort of thing.

For instance, our laws for the sale of alcoholic beverages limit the right to have on premises sales to the police jurisdiction for the simple reason that the city police are equipped and able to enforce that area.

Q Does the county police have jurisdiction within the city?

MR. FINNELL: Yes, sir, they do. It is countywide.

Q Countywide, including within the city.

MR. FINNELL: Countywide. As a matter of course, they take the position "It is none of our business in the city. You take care of it" because it is expensive.

Q It is a matter of practical division of labor.

MR. FINNELL: Yes.

Q But they do have jurisdiction in the city.

MR. FINNELL: Yes, sir, they certainly do.

Q Is there a state police force?

MR. FINNELL: Yes, we have a state highway patrol

that also has jurisdiction.

Q Only a highway patrol?

MR. FINNELL: That is all.

Q Its name seems to imply it has jurisdiction only of traffic offenses; is that correct?

MR. FINNELL: They have other jurisdiction; they primarily concern themselves with traffic, yes, sir.

Q I am familiar with the State of Ohio, which is very careful that it does not have a state police force. It has a state highway patrol with very limited jurisdiction.

MR. FINNELL: No, we have other police too. We have a criminal investigation division of the State of Alabama and some of the enforcement people for the ABC Board. There are other police-type officers of the state.

Q Specialized.

MR. FINNELL: Yes, sir.

Q But there is no general state police forces.

MR. FINNELL: Other than the highway patrol.

Q Its name certainly does not indicate it is a general police force.

MR. FINNELL: In practice it is not either, Your Honor.

Q Mr. Finnell, you mentioned liquor licenses. I take it the location of places that may engage in the business of selling alcoholic beverages outside the city itself but

within the three-mile area, that is determined by the government of the city?

MR. FINNELL: They have to have a county license as well as a city license.

Q Can the city prohibit a tavern from opening in a particular part of that whole area?

MR. FINNELL: The city could prohibit the sale of liquor, a liquor license. Under our peculiar law, the ABC Board, a state agency, is vested primarily with the control of all the alcoholic beverages. But the law does grant to the municipality the right to approve or disprove the granting of an on-premises liquor license as such. A bill like--no, we could not prohibit it anywhere except to plead with the ABC Board. But the liquor license, yes, it could be prohibited by the municipal corporation in that area. Or it could be prohibited by the ABC Board, and people often go to the ABC Board with--

Q And, conversely, if both the city and the county grant a license for a particular location, the residents in the neighborhood have no place to complain. I guess they could complain to the county.

MR. FINNELL: They could complain to the county or they could complain to the ABC Board, which is often done, yes.

Q The state.

MR. FINNELL: State board.

Q What about the decision of whether, in a particular part of the three-mile area, there should be one-way streets or what the specific speed limit shall be and stop signs and that kind of thing? That is all done by the city?

MR. FINNELL: The city can do that and does do it in certain cases, and in connection with that, Your Honor, I would like to answer a question too about the annexation procedures in Alabama because I think they are tied together.

For instance, we have no right to annex property to the city unless, in all cases, the majority of the property owners themselves agree. We have many--let us say more than one--several areas where there is a highly developed industrial or business area community. Down the main street on one side will be corporate limits. On the other side will be police jurisdiction. Of course you direct traffic there. They are all bound with the signs. And even where it is not adjacent to they do that where it is necessary to do so to some extent.

For instance, the industries--look at the interrogatories here. That looks like a whole lot of money. It looks like a mass of control when you just read what is in the code, what might be policed out there. But when you consider the fact that all of the industries which gather around the city have traditionally elected not to come within a city--for instance, the B. F. Goodrich Company recently magnanimously gave the city a half acre to build a fire station on, which

they did, not to serve B. F. Goodrich but to serve all the corporate limits that had grown up to and around the plant.

Incidentally, that allowed the company to do away with their own individual fire-fighting proceedings. But the purpose is to serve those residents of the city around there.

So, these people get a great deal of benefit out of this police jurisdiction. It is not a help to the city, financial help.

Q This has puzzled me a little bit, Mr. Finnell. Ordinarily these days people are complaining too much cost for too little service in terms of taxes. Here these people are getting a rather expensive amount of governmental service without paying for it; is that correct?

MR. FINNELL: I agree, Your Honor, and I think that explains the--

Q That does not decide the constitutional question but--

MR. FINNELL: No, sir. It certainly explains, I think though, why there is no person that pays a tax or license for a business engaged in this suit. Not one of them has chosen to sue or complain about it.

Q Mr. Finnell--

MR. FINNELL: Yes, sir.

Q --on page 11a of the Jurisdictional Statement where Section 9 is set out, in the second sentence of that

section, where it says, "Ordinances of a city or town enforcing police or sanitary regulations," is that construed in Alabama as requiring--if a city is going to apply an ordinance in a police jurisdiction, they must also apply it in the city; it cannot apply it just in the police jurisdiction?

MR. FINNELL: Mr. Justice Rehnquist, I have been a city attorney for over 25 years. We have numerous ordinances on the books that say this ordinance shall be effective in the corporate limits. That has never been questioned. I know of no case that says we must enforce them outside. I know of no case that rules that the city cannot limit the operation to the corporate. I think if we were required, I think that if we had the obligation--that point was brought up over here--do you have to send the police? I do not think we could survive without any revenue other than being able to show--and the Alabama cases require that you not only must limit it to the reasonable cost but you must show--affirmatively show--that in adopting your budget, or will be deemed to be unconstitutional.

Q Could the city--the converse of what you are saying--could the city decide that we want to enforce a particular type of ordinance just in the police jurisdiction but not in the city?

MR. FINNELL: Your Honor, I would say no. The wording of this statute itself says they shall have effect in the city and in the police district. I have never heard of that being

done.

Q If a liquor license or any other license is granted where the location becomes a factor, you say that the City of Tuscaloosa reserves the right to issue that license, does the county licensing process get into the fixing of the location too or just the city?

MR. FINNELL: Primarily I think it is the city. Whether that is an abrogation on the part of the county of the responsibility, I am not sure. I think though it is. The city is the one that makes the investigation, has the police investigation, the sanitary investigation, notifies the surrounding people, and goes through the whole procedure, Your Honor. And whether the county could refuse--let us say they do not. I think they possibly could if they wanted to assume that responsibility.

Q Does the City of Tuscaloosa segregate and identify the cost to the taxpayers of Tuscaloosa to provide these services for the appellants in this case?

MR. FINNELL: Since 1977, Your Honor, in the Burge case in Alabama it will certainly do so. That was the first time that had been an actual requirement, although Mr. Justice Livingston had indicated that some years ago in a case.

Q There being no record on that in this case, is that a matter the Court could or did take notice of judicially as to how much services these people were getting for nothing?

MR. FINNELL: I think not. I think it is probably inappropriate and outside of the issues.

Q The district court could have taken judicial notice of the budget in Tuscaloosa.

MR. FINNELL: Taken judicial notice, certainly, yes.

Q Mr. Finnell, along the same line I am bothered a little bit. This case is here on a motion to dismiss, is it not?

MR. FINNELL: Yes.

Q Among other things.

Q Is there any factual controversy at all for us?

MR. FINNELL: Your Honor, I would say no. If you look at this case--and I think both the district judge where it was heard, the single judge, and the three-judge court did, although they did it and documented it as they went along--in the first place, the allegations of the complaint, if you strip it of the unnecessary allegations, first there is an allegation there that people in the City of Northport, which is an incorporated municipality and adjacent to the City of Tuscaloosa, are treated differently from people out in the police jurisdiction who are not in any other city. That apparently is an attempt to show an unequal treatment. I do not think it has any validity. I do not think this Court would say so because actually these people are subject to their own rules, their own organized municipality where they are adjacent. So, disregard

that argument.

Q Are we entitled to disregard it on a motion to dismiss?

MR. FINNELL: Yes, sir, I would think so. I certainly would think so. And as far as the allegation of the right to vote, when these people live outside of the political subdivision, when they have never been a part of the political subdivision, when we are talking about a general municipal election, how could it be said that they have the right to vote? This is not a special type election like Tulare or the other cases this Court went into. This is a general municipal election.

Could it be said that because a person lives outside of the State of Virginia, for instance, but has an abiding interest in that election could vote there? Or could it be said that a person living within the corporate limits of the City of Tuscaloosa, who otherwise is qualified to vote, could be disqualified because he has simply no interest in the election? The interest doctrine is not applicable. These people have never been a part of the political subdivision. They have no right to vote. I think that, on the face of the complaint, is obvious. If you lay that aside, lay aside the allegations that these people have a right to vote--which, it seems to me of course, is not so. It is alleged simply because if you are denied the right to vote, if you allege that you are

denied the right to vote, you allege a substantial injury. But when you allege it only to grant jurisdiction and credibility on another matter, I would say lay that aside, the vote.

Then in the complaint there is no attempt to challenge any particular ordinance. And the brief of the appellants states that "we do not find it necessary to attack any particular ordinance or the effect of it, nor do we find it necessary to show that we are threatened by any such particular ordinance." Now, that puts in issue--

Q Mr. Finnell--

MR. FINNELL: --just one question, as I understand it, and that would be this, whether or not a state statute granting any vestige of extraterritorial jurisdiction to its municipality is unconstitutional per se. That pure legal question, I think, was presented to the Court. And although they documented their various findings beautifully--the district judge did--I think that does present a pure legal question that could be handled on a motion to dismiss.

Q Mr. Finnell, again considering the fact we have a motion to dismiss, have the plaintiffs alleged that they were denied a right to vote?

MR. FINNELL: Yes, sir, they did. They said they unlawfully--

Q I did not think they had. I thought they had alleged that not having the right to vote, their constitutional

rights were being denied by being required to obey the laws that were enacted by the people who could vote. It may be that they have not even alleged a right to vote.

MR. FINNELL: I had thought, Your Honor, that they alleged they had been denied the right to vote.

Q Is it not in paragraph 11 of the complaint?

Q It does not say they were denied; it kind of states it in the abstract. "The denial of the right to vote in city elections infringes on their constitutional right." But they do not ask for the right.

MR. FINNELL: They certainly do not ask for the right to vote. Maybe there is not a specific--

Q In paragraph 13 certain individuals say they have been required to purchase business licenses in order to engage in business. But does not the record show that they purchased them at half price; is that right?

MR. FINNELL: I beg your pardon?

Q That what they pay for their business licenses is less than what they would have to pay if they were residents of the city; is that right?

MR. FINNELL: That aspect of the ordinance was not struck down by the Alabama Supreme Court. It cannot exceed 50 percent, yes, sir.

Q It cannot exceed the cost of providing it.

MR. FINNELL: No, that is the court's ruling.

Q It cannot exceed the cost of providing it, and in no event can it be more than half of what a city resident is charged; is that not right?

MR. FINNELL: Yes, sir. The court's ruling was to the reasonable cost, but they did uphold the state statute in limited to one-half. You see, the privilege license is the only vehicle afforded to collect this so-called charge to pay for the services. It could not be levied against any private individual out there. The ordinary citizen really lives in the best of two worlds. He has some minimum police protection and some minimum fire protection that does not cost him a dime. The county takes care of his schooling, takes care of his roads. He votes for all the elected officials; they set up his balloting place. Actually it may not be an imperfect political situation, but I do not see that it is an unconstitutional situation under the Fourteenth Amendment.

Q Would you describe again how the license tax is measured. You mentioned the Goodrich Company; how is the amount of the tax on it determined?

MR. FINNELL: In that particular place, I believe, Your Honor, for heavy industry we happen to have and still have a flat fee, and they pay--my recollection is they pay a license of \$5,000 per annum, ten thousand--it is based, graduated on--

Q Heavy industry?

MR. FINNELL: It is graduated on volume, but the

maximum is five thousand. They do--

Q By volume you mean gross sales?

MR. FINNELL: Gross sales, yes, sir.

Q And the same tax is applied to the city except it is twice as large?

MR. FINNELL: That is right, sir.

Q City businesses?

MR. FINNELL: Yes.

Q And then you have a category for commercial enterprises and service enterprises and the like?

MR. FINNELL: The elastic code sets out a different category for many of the businesses. We try to standardize--

Q Same categories in the city as within this three-mile limit?

MR. FINNELL: Yes, they have to be there. And once they pay that half license, then they are absolutely entitled to police and fire protection; and of course the reduction in the fire rates probably absorbs that tax. And, as I say, that is probably the reason they are not plaintiffs in this action.

Q There is no county court separate and apart from the courts that exercise jurisdiction within the city, are there?

MR. FINNELL: Yes, sir.

Q There are?

MR. FINNELL: The district court would exercise

jurisdiction within the city.

Q Sir?

MR. FINNELL: The district court.

Q Does the district court have jurisdiction over the county and city both?

MR. FINNELL: Yes, sir.

Q So, the same court functions in both areas?

MR. FINNELL: It does, yes, sir.

Q In Virginia we have separate courts in the counties from those in the cities. But you have a different system in Alabama?

MR. FINNELL: Yes. We have only one set of circuit courts. That is the court of original jurisdiction.

Q How about misdemeanor and small claim courts?

MR. FINNELL: As I say, that is all the district court in the county. And under the new judicial article, you have either a district or a municipal court, which are the same thing. We could elect to go to the district court, and then our court would simply be called a district court. It has the same requirements of judicial training, same costs, all set by the state code.

Q These people in this area--I know they can vote for federal and state offices. But what local offices can they vote for?

MR. FINNELL: Your Honor, they vote for the county

commissioners, that is, the governing body of the county, the ones that set county taxes.

Q So, they vote the same way any other county person votes.

MR. FINNELL: Yes, sir. They vote for their sheriff. They vote for their coroner. They vote for the circuit judges. They vote for the tax assessor, the tax collector. They vote for the county school board--constables, some of the B committeemen, that sort of thing, are all on the ballot.

Q I noticed that in this case. Why are you interested in the vote in this statute? It costs you more than you get out of it. I am speaking about the city.

MR. FINNELL: Your Honor, I guess it is because when you get into law cases, you just do not want to get whipped. [Laughter]

Q Obviously Tuscaloosa must like this or they would not have enacted the ordinances that extend out in the county.

MR. FINNELL: Your Honor, it has been going on long before I was born.

Q Maybe the direct costs are one thing, but the indirect, intangible costs are something else. Tuscaloosa has an interest in protecting its own citizens from encroachment of various influences from right beyond its borders.

MR. FINNELL: Certainly. That is a very important thing. And I think if we gave it up, we could have serious

encroachment on the citizens of the city. I think we might go back to the old days when, rather than have a corporate limit sign, you had a row of boarding houses and saloons out there, and that would not be desirable. We have recently had occasion to close up a disco in the corporate limits. Fortunately we were able to do so. We had had cases of minors being sold, two people killed leaving the place, that sort of thing. There the state was unable to do it. We were able to do it, not through the liquor license but through the withdrawal of the dancing license, which effectively shut it down.

Q Mr. Finnell, that brings up a point that, it seems to me, may be of some importance. This is a class action. It is alleged to be a class action.

MR. FINNELL: It was filed as such.

Q Has there been any determination by the district court of who would belong in the class and whether the interests of all the members of the class are the same or not. I can see how many residents of the police jurisdiction might have a different view from other residents within the district, and maybe they should not all be in the same class. Has that ever been considered by the district court?

MR. FINNELL: The district court, as I understand it, he found that the class action--no, let us see. I do not think they really considered that.

Q Some people might like to get licenses for half

price, and other people might want to open a bawdy house, as you say, and there are a whole lot of different interests.

MR. FINNELL: Quite true, Your Honor. And if you make it a class all over the state, of course you are dealing with different ordinances in each case because we are dealing with enabling legislation.

Q Did they not certify a class consisting of people presently within the police jurisdiction of Tuscaloosa but refused to certify a statewide class of defendants?

MR. FINNELL: I believe Judge McFadden did that, yes, Mr. Justice.

Q But I understood the question to be directed at the possibility, if not the probability, that many of the people in this area would not want the results sought by the appellant.

MR. FINNELL: I think if the people in the police jurisdiction even knew that this case was going on, some of them would be horrified.

Q Are you, like your friend on the other side, going to rely on your brief for your argument on the question of whether or not this Court has jurisdiction?

MR. FINNELL: Yes, sir.

Q The single district court judge of course held that this was not a case for a three-judge court. He was reversed by the Court of Appeals for the Fifth Circuit. But,

nonetheless, that question is still open here, and particularly that was pointed out by the Court's order. Did we not postpone consideration of jurisdiction in this case?

MR. FINNELL: You did, Your Honor. And I very frankly do not think this Court will take jurisdiction under Moody v. Flowers--

Q The question is whether or not we have jurisdiction. If we have, we have no option. If we do not, we also have no option.

MR. FINNELL: The Fifth Circuit did not treat to standing or equity jurisdiction or some of the rather more important ones. I did not argue standing there because the district judge had felt that the case of Tulare Water District was binding. But I distinguish that in the brief, and I think it is distinguishable.

Q The single district court judge, whoever he was--

MR. FINNELL: Judge McFadden, Your Honor.

Q Judge McFadden held very clear in a long discussion in the opinion that is set out in the Jurisdictional Statement that this was not a case for a three-judge court.

MR. FINNELL: Yes, sir.

Q If it is not, then this Court does not have direct appellate jurisdiction.

MR. FINNELL: I understand that, Your Honor. But he ruled that they did have--speculated they did have standing.

Q Yes. You know what he said as well as I do, if not better. He said that this was not a law of statewide application. It was no more than an enabling act.

MR. FINNELL: Yes, sir. The point I was making is that the Fifth Circuit did treat on that part of it, but they did not even treat the question of standing.

Q This is not a question of standing. It is a question of whether or not this Court has jurisdiction in this appeal.

MR. FINNELL: Yes, sir. Of course, the standing goes to the jurisdiction, as I understand it.

Q To the district court's jurisdiction.

MR. FINNELL: I see my time is just about up. There are two propositions that I do want to state that I believe ought to be central to the disposition of this case; certainly they are central to my argument. One, that the right to vote is not at stake here. What is at stake is the right of a state, under its police powers, by statute, to extend any vestige of extraterritorial jurisdiction. And, secondly, that when relief is sought under the Fourteenth Amendment, particularly in the interpretation of a state statute, it is only when an established or fundamental constitutional right is impinged upon by the state that strict judicial scrutiny, the compelling state interest test, or the choice of the least restrictive alternative is required.

Q Mr. Finnell, may I ask, do you regard any of these defendants as state officers?

MR. FINNELL: I do not, Your Honor. In fact, they may have been performing state policy, but they are not performing a state function as required--

Q If they are not state officers, that would be another reason why a three-judge court was not required, would it not?

MR. FINNELL: It certainly would, sir. I was really prepared to argue all of that, but I had not gotten to it.

Q Then in any event there was no service made on the governor or the attorney-general.

MR. FINNELL: No, sir, none was made.

Q Did you raise any objection along that line?

MR. FINNELL: I did not, Your Honor.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Finnell.

REBUTTAL ARGUMENT OF EDWARD STILL, ESQ.,

ON BEHALF OF THE APPELLANTS

MR. STILL: May it please the Court--

Q Even though you have waived it, I would like to have your comment on the lack of pervasive statewide impact here.

MR. STILL: The law, as I pointed out at the beginning of my argument, requires that each city enforce its police ordinances and sanitary ordinances in the police jurisdiction.

It is not simply an enabling statute. It is a statute which requires that this be done statewide. Every city in the State of Alabama, every town in the State of Alabama must enforce its police powers in that police jurisdiction zone.

Q Mr. Still, one of the cases you cited in response to a question from me earlier was Roberson against the City of Montgomery, and I have gotten that case; and there the Supreme Court of Alabama describes the city's contention under Section 9, which is the state's section there. The city contends that it has authority to enforce its zoning ordinances under Section 9. That sounds like an enabling act.

MR. STILL: As I point out, Your Honor, that may be a poor choice of words on the part of the Alabama Supreme Court. I think the question--

Q We are bound by it.

MR. STILL: Yes, sir. But I think the question--

Q We are bound by it.

MR. STILL: Yes, sir, but I think the question presented in the Roberson case was whether or not zoning is included within the term "police power."

Q Do you agree that if this is nothing more than an enabling act, that it is improper for a three-judge court to decide the case?

MR. STILL: No, sir, I do not because I believe even an enabling act--I believe that the complaint, fairly read on

its face, shows that the statute is being enforced or is being utilized by numerous jurisdictions around the State of Alabama, and I do not think that we have the factual controversy; this has never been put into contention by the City of Tuscaloosa, either through a motion to dismiss or through an answer, which has never been filed in this case, that this does not have a statewide impact. This is not like the case of Board of Regents v. New Left Project in which the regulation on its very face only applied to the Texas regent system and not to the other colleges and universities around the state.

I appreciate the Court's attention. Thank you very much.

Q I have just a question for you, which I suggest you need not answer if you do not want to, and you will not be prejudiced for not answering. As I suggested to your friend, most of the complaints these days about government are paying too much and getting too little. Here the people that you purport to represent here, that you do represent, and the others in that area are getting a lot of free services, are they not?

MR. STILL: They are getting some services, Your Honor, which perhaps might be costing them less than if they were in the City of Tuscaloosa.

Q They might have to pay twice as much for the licenses, for example.

MR. STILL: That it would be. But they are not allowed to vote, and they consider that deprivation of the right to vote and, at the same time, the imposition of the government over them to be a commodity that does not have a particular price.

Q This is a little bit like George III running the area from a distance?

MR. STILL: Something like that, Your Honor. I have tried to stay away from Revolutionary War rhetoric in this case, but it is something like that. [Laughter]

Q If that is what goes under Revolutionary War rhetoric, it is strange that in drafting your prayer for relief you did not even ask for the right to vote.

MR. STILL: No, sir, as I say, Your Honor, my clients made a choice about which they wanted--

Q You do not seem to be outraged about the inability to vote. That is the impression that comes across.

MR. STILL: No, sir, we pointed that out. If you will read paragraph 10 of the complaint, we specifically say, "We are denied the right to vote." And then we say in paragraph 11--

Q You do not say, "We are denied the right." You do not even say that. You say the denial does such and such.

MR. STILL: No, in paragraph 11 it says--

Q Paragraph 10 says just what he says.

MR. STILL: Yes.

Q Does it? I am sorry.

MR. STILL: Paragraph 10 says, "People who live in the police jurisdiction are denied the right to vote, denied the right to participate in referenda, initiatives and recalls," that sort of thing, that are allowed to other citizens in the City of Tuscaloosa.

Paragraph 11 goes on to say, "As a consequence of that denial of a right to vote"--

Q Paragraph 10 points out as a factual matter that these people are not allowed to vote. But you never say that there is anything wrong with being not allowed to vote.

MR. STILL: I believe that we do, Your Honor, because we say that not being allowed to vote and being governed is the conflict that creates the constitutional problem in this case.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen; the case is submitted.

[The case was submitted at 11:08 o'clock a.m.]

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