Federal Jurisdiction -- Political Question -- Justiciability of Political Rights

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An extensive argument has been made in favor of permitting the trial judge to exercise his discretion in deciding whether added controversies should be decided between the defendant-claimants at the second stage of interpleader.[20] One of the most appealing reasons given in support of this solution is that such a policy would be in the 'spirit' of the Federal Rules of Civil Procedure, a spirit which would ". . . adjudicate all phases of litigation involving the same parties . . . and avoid multiplicity of suits. . . ."[21]

Whether the solution offered in the aforementioned argument is ever accepted, the very existence of such an argument by such a highly respected writer should be sufficient to demonstrate that the problem does not lend itself to solution by any blanket rule. In the absence of clarity on the point under the Federal Rules, perhaps the best solution is for the courts to restrict their decisions to the facts before them; and not attempt in one stroke to eliminate all possibility of claimants ever combining Rule 13(g) and the Federal Interpleader Act to secure settlement of cross-actions between themselves.

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Federal Jurisdiction—Political Question—Justiciability of Political Rights

As a working hypothesis for carrying out the doctrine of "separation of powers" which is implicit in the Constitution,[1] the United States Supreme Court early adopted the "political question" guide.[2] That is, when the issue is one on which final decision rests with the executive or legislative branches, the Court will not take jurisdiction. The controversy is non-justiciable, for the reason that it is a question for the "political departments" and not for the judiciary to decide.[3] It is

[20] Chafee, *Broadening the Second Stage of Federal Interpleader*, 56 HARV. L. REV. 929 (1943).

[21] H. F. G. Co. v. Pioneer Publishing Co., 7 F. R. D. 654, 656 (N. D. Ill. 1947). Rule 1 of Federal Rules of Civil Procedure states ". . . They [the Rules] shall be construed to secure the just, speedy, and inexpensive determination of every action." Although Rule 82 forbids any construction of the Federal Rules which would extend the jurisdiction of the district courts, it is by no means certain that to permit settlement of cross-claims in interpleader actions between claimants of different states would be an extension of jurisdiction.

[1] In the Federal Constitution it is an implicit rather than express doctrine. The North Carolina Constitution has an express provision: "The legislative, executive, and supreme judicial powers of the government ought to be forever separate and distinct from each other." N. C. CONST. Art. I, §8.

[2] Ware v. Hylton, 3 Dall. 199 (U. S. 1796). See Field, *The Doctrine of Political Questions in the Federal Courts*, 8 MINN. L. REV. 485 (1924).

[3] The fact that a case has been labelled non-justiciable as involving a "political question" does not necessarily mean that a partisan political struggle is intimately involved in that case. For example, it is extremely doubtful that party politics was involved in the case which led the court to say that it is up to Congress to determine the end of a war. See Citizens Protective League v. Clark, 155 F. 2d

apparent that this so-called guide, as stated, does not tell us *what* questions are to be decided by the "political departments" rather than by the Court. This marking off of boundaries has been done by the Court, itself, by a process of judicial self-limitation,[4] or by orthodox interpretation of the Constitution,[5] according to one's view.

For example, the Supreme Court has consistently refused to recognize as justiciable questions involving foreign affairs,[6] or to enforce the Constitutional guaranty of a republican form of government.[7] Policies concerning admission and deportation of aliens are not reviewable,[8] nor are questions on which an executive officer acts within his discretion as prescribed by law.[9]

There is another category of cases on which the label *"political question and non-justiciable"* has been stamped by the federal courts, but not with consistency. These may be called the "political rights" cases; i.e., involving the right to vote, to have the vote honestly counted, to form a new political party, or to have equal voting districts.

The right to vote.—At one time it was held that the right of suffrage was not among the privileges and immunities to which citizens are entitled under the Constitution.[10] Not until 1883 did the Supreme Court rule that there is a Constitutional right to vote for members of Congress, and that Congress has authority to enact laws protecting this right.[11]

290 (D. C. Cir. 1946). Rather, the central idea in such decisions is to make a proper apportionment of governmental functions, in accordance with the "separation of powers" doctrine. Of course, the fact that a decision will be made by Congress or the President is a practical guaranty that party politics will be a factor in some degree.

[4] See Finkelstein, *Judicial Self-Limitation*, 37 HARV. L. REV. 338 (1923) and Finkelstein, *Further Notes on Judicial Self-Limitation*, 39 HARV. L. REV. 221 (1925).

[5] See Weston, *Political Questions*, 38 HARV. L. REV. 296 (1924).

[6] "These are considerations of policy, considerations of extreme magnitude, and certainly entirely incompetent to the examination and decision of a court of justice." Ware v. Hylton, 3 Dall. 199, 260 (U. S. 1796). And it is not for the courts to determine the end of a war declared by Congress. Citizens Protective League v. Clark, 155 F. 2d 290 (D. C. Cir. 1946), *cert. denied*, 329 U. S. 787 (1946).

[7] Pacific States Tel. Co. v. Oregon, 223 U. S. 118 (1912); Luther v. Borden, 7 How. 1 (U. S. 1849). U. S. CONST. Art. IV, §4 reads: "The United States shall guarantee to every state in this union a republican form of government. . . ." It is for Congress and not the Court to enforce this provision.

[8] Japanese Immigrant Case, 189 U. S. 86 (1903). However, this doesn't mean the courts will refuse to intervene where an individual alien is denied certain constitutional protections. United States v. Wong Quong Wong, 94 Fed. 832 (D. C. Vt. 1899) (unlawful search and seizure; held, evidence inadmissable in deportation proceeding).

[9] Chicago & S. Air Lines v. Waterman Corp., 333 U. S. 103 (1947); Ness v. Fisher, 223 U. S. 683 (1911); Wilson v. State of N. C., 169 U. S. 586 (1897).

[10] Minor v. Happersett, 21 Wall 162 (U. S. 1874).

[11] *Ex parte* Yarbrough, 110 U. S. 651 (1883). In this case defendants were convicted in federal district court in Georgia of beating a Negro because he voted in an election for a member of Congress. Application for writ of habeas corpus was denied, holding the federal law under which conviction was obtained as valid.

Then in *Wiley v. Sinkler*[12] it was established that federal courts have jurisdiction of actions for damages because of abridgement of this right of suffrage,[13] and subsequent cases have affirmed this view.[14]

Another possible redress for violation of the individual's right to vote was the granting of equitable relief by the federal courts. This form of relief, in connection with the right to vote, was first directly considered in *Giles v. Harris*.[15] Plaintiff, Negro, sued in equity to compel the registrars of Montgomery County, Alabama, to enroll him, as well as other Negroes, upon the voting lists. It seems clear that the decision denying equitable relief in this case was not based on the ground that the subject matter was non-justiciable,[16] but stands for the principle that the Court should not put itself in the position of attempting to supervise an election by exercising its equity jurisdiction.[17] The *Giles v. Harris* opinion apparently still stands. No Supreme Court decision has been found in which *equitable* remedy was permitted to enforce an individual's right to vote.[18]

Counting the vote.—Not only is there a Constitutional right to cast a ballot in an election for federal officials; there is also the right to have one's vote honestly counted.[19] And *United States v. Classic*[20] extended this to apply to primary elections as well as to general elections. So far, Supreme Court decisions on the protection of the right to an honest count have been concerned with criminal action against the

[12] 179 U. S. 58 (1900).

[13] The earlier case of *Ex parte* Yarbrough, 110 U. S. 651 (1883) was relied upon as establishing such jurisdiction.

[14] *E.g.*, Swafford v. Templeton, 185 U. S. 487 (1902) (reversing federal court below which had dismissed suit solely for want of jurisdiction); Nixon v. Herndon, 273 U. S. 536 (1927) (where defendants acted pursuant to Texas statutes in denying Negroes right to vote); Nixon v. Condon, 286 U. S. 73 (1932) (where after the Nixon v. Herndon decision the State Democratic Executive Committee was given authority, by statute, to prescribe voting qualifications but the Court held this was still action under state law and recovery allowed); Smith v. Allright, 321 U. S. 649 (1949) (allowing recovery of damages where plaintiff was denied right to vote in primary election under authority of resolution by the Democratic Party Convention rather than under a state law). This last named case overruled Grovey v. Townsend, 295 U. S. 45 (1935) which had denied recovery on the ground that plaintiff Negro was refused permission to vote pursuant to a resolution of the state convention of the Democratic Party and not under any state law.

[15] 189 U. S. 475 (1902).

[16] ". . . we are not prepared to say that the decree should be affirmed on the ground that the subject matter is wholly beyond the jurisdiction of the circuit court." *Id.* at 486.

[17] See discussion of this point in Lane v. Wilson, 307 U. S. 268, 272 (1939).

[18] The prominent cases concerning the right to vote did not involve equitable relief. Smith v. Allright, 321 U. S. 649 (1943) (action for damages for refusing to permit plaintiff to vote in primary election; recovery allowed). United States v. Classic, 313 U. S. 299 (1940) (indictment under federal statute charging election commissioners altered and falsely counted ballots in primary election upheld).

[19] United States v. Mosley, 238 U. S. 383 (1915).

[20] 313 U. S. 299 (1940).

wrong-doer rather than individual actions for damages or for relief in equity.[21]

Voting districts.—Three cases involving mandamus proceeding which brought into question the validity of state laws setting up Congressional districts were decided in 1931.[22] In *Smiley v. Holm*,[23] *Koenig v. Flynn*,[24] and *Carroll v. Becker*,[25] the issue was the same.[26] The defendants in each case vigorously contended that these were non-justiciable issues, concerning matters which should be left to the "political departments" to decide. In each case this defense was rejected, jurisdiction was taken, and judgment rendered to the effect that the respective redistricting acts were invalid and that elections be held at large[27] until appropriate state legislation provided for districts. So far as the justiciability of a case involving the validity of state redistricting acts, it would appear that the three cases above conclusively settled the matter.[28] But not so. The later case of *Colegrove v. Green*[29] muddied the waters of justiciability which, if not crystal clear up to this point, were at least less murky. Plaintiffs in this case sought a declaratory judgment to the effect that the Illinois redistricting acts denied them equal protection of the laws. The uncontradicted evidence

[21] But see Caven v. Clark, 78 F. Supp. 295 (W. D. Ark. 1948) (where defendants were charged with illegal possession of poll tax receipts with intent to obtain a fraudulent count of votes; equitable relief denied).

[22] Also in an 1892 case, McPherson v. Blacker, 146 U. S. 1, plaintiff sued for writ of mandamus to order the Secretary of the State of Michigan to disregard a legislative enactment providing for election of presidential electors by districts, instead of by the state at large. Defense of "political question and non-justiciable" was rejected, although decision was for the defendants that the Michigan act was valid under the Constitution.

[23] 285 U. S. 355 (1931) (arising from Minnesota).

[24] 285 U. S. 375 (1931) (arising from New York).

[25] 285 U. S. 380 (1931) (arising rrom Missouri).

[26] In Minnesota, New York, and Missouri, a congressional redistricting act had been passed by the legislatures of those states, and in each instance had been vetoed by the governor and the vetoes had not been overridden by a subsequent vote in the legislature. In each case, a writ of mandamus was sought, either to restrain (in Minnesota) or to compel (in Missouri and New York) giving effect to the legislative action in an election soon to take place.

[27] This was the case in Minnesota and Missouri. In the case of New York, two new representatives were allotted on the basis of increased population. The Court of Appeals of New York had ruled that election be based upon old districts (43), with the two new representatives being elected at large, and this was affirmed by the United States Supreme Court.

[28] Apparently two federal district courts considered the matter of justiciability in such cases had been settled. In Wood v. Broom, 1 F. Supp. 134 (S. D. Miss. 1932), plaintiff sought *equitable* relief on the ground that newly created congressional districts were not composed of compact and contiguous territory or had nearly as practicable the same number of inhabitants. The district court thought the 1929 federal act on reapportionment made such requirements of the states, and gave judgment for the plaintiff. But this was reversed in 287 U. S. 1 (1932) on the sole ground that the 1929 act did not make such requirements, and the Court expressly excluded consideration of justiciability of the controversy. See also Hume v. Mahan, 1 F. Supp. 142 (E. D. Ky.), *rev'd*, 287 U. S. 575 (1932), on same grounds.

[29] 328 U. S. 549 (1946).

was that no change in congressional election districts had been made for forty years, despite great changes in the distribution of population resulting in districts which ranged in population from 112,000 to 900,000. The district court dismissed the complaint on the ground that the federal act[30] on reapportionment of congressional districts contained no requirement that districts be compact and have approximate equality of population. In a 4-3 decision, the Supreme Court affirmed dismissal of the action, three members of the majority[31] for the reason adopted by the lower court, and for the additional reason that the matter was "political" and therefore non-justiciable.[32]

Apparently three justices deciding the *Colegrove* case[33] distinguish between an action to recover money damages, and an action seeking equitable relief (before the damage occurs), although the basis of each suit is a discriminatory state districting law.[34] In the first, the action is considered justiciable and the controversy is decided on the merits; in the second, the action is deemed non-justiciable and the merits of the controversy are not considered. Although this view was set out in the controlling opinion of the *Colegrove* case, it could not be taken as a holding of the Court inasmuch as a majority of the members thought that *Smiley v. Holm*[35] had determined that such cases were justiciable.[36]

Forming a new political party.—That the Court did not accept the doctrine of non-justiciability expressed in the *Colegrove* case seems to be borne out by the later case of *MacDougall v. Green*.[37] The plaintiffs here were members of the Progressive Party in Illinois and sought an injunction against enforcement of a state law[38] requiring signatures of

[30] 46 STAT. 21 (1929), as amended, 2 U. S. C. §2a.

[31] Justice Frankfurter announced the judgment of the Court and wrote an opinion as to non-justiciability in which Justices Reed and Burton concurred. Justice Rutledge (casting the deciding vote) concurred in the result solely on the ground that the Court should of its discretion decline equitable relief in view of the short time remaining until the Illinois election, expressing the opinion that the case was justiciable. Justices Black, Douglas and Murphy were also of opinion the case was justiciable, and in addition, dissented from the result.

[32] This Court has refused to intervene in such controversies ". . . because due regard for the effective working of our government revealed this issue to be of a peculiarly political nature and therefore not meet for judicial determination." Colegrove v. Green, 328 U. S. 549, 552 (1946).

[33] Justices Burton, Frankfurter and Reed.

[34] "This is not an action to recover for damage because of the discriminatory exclusion of a plaintiff from rights enjoyed by other citizens. The basis for the suit is not a private wrong, but a wrong suffered by Illinois as a polity." Colegrove v. Green, 328 U. S. 549, 552 (1946).

[35] 285 U. S. 355 (1931).

[36] The fact that Smiley v. Holm originated in the state court and the Colegrove case in the federal court would not seem to be basis for a distinction on the point of justiciability of controversy. If the court deciding Smiley v. Holm had thought it non-justiciable, there was precedent to so declare even though the case came up on appeal from the highest state court rather than originating in a lower federal court. See Pacific States Tel. Co. v. Oregon, 223 U. S. 118 (1912).

[37] 335 U. S. 281 (1948).

[38] ILL. REV. STAT. c. 46, §10-2 (1947).

200 qualified voters from each of at least fifty counties, contending that this gave voters of the less populous counties the power to block completely nomination of candidates whose support was confined to the populous areas. The defense of "political question and non-justiciable" was raised, but without discussing jurisdiction the Court expressly decided the case on its merits against the plaintiffs.[39] Thus by inference, *MacDougall v. Green* holds that such political rights cases are justiciable, and further, that equity jurisdiction may be exercised.[40]

The most recent political rights case in which equitable relief was sought was *South v. Peters*,[41] in which the Georgia county-unit system was attacked as being unconstitutionally discriminatory.[42] In a per curiam opinion dismissing the appeal the language used seems consistent with the prior cases of *Colegrove v. Green* and *MacDougall v. Green* on the point of justiciability of the controversy,[43] but applies a harsher restriction on the use of equity jurisdiction:

> "Federal courts consistently refuse to exercise their *equity powers* in cases posing political issues arising from a state's geographical distribution of electoral strength among its political subdivisions."[44]

Even so, the opinion may be interpreted as leaving open the possibility that equity jurisdiction could be exercised for the protection of political rights other than those involved in the redistricting cases.[45]

Although the non-justiciable obstacle posed in *Colegrove v. Green* has apparently been definitely rejected by the Court in the later cases, the view seems to have been adopted in lower federal court decisions.[46]

[39] "It is allowable state policy to require that candidates for state-wide office should have support not limited to a concentrated locality." MacDougall v. Green, 335 U. S. 281, 283 (1948).

[40] See Note, 62 HARV. L. REV. 659 (1949) for discussion of equity jurisdiction of federal courts in political rights cases.

[41] 70 Sup. Ct. 641 (1950).

[42] Cases contesting the Georgia county-unit system have been before the Court before, but appeals were dismissed. Cook v. Fortson and Turman v. Duckworth, 329 U. S. 675 (1946). Justice Rutledge pointed out that the courts below, Cook v. Fortson, 68 F. Supp. 624 (N. D. Ga. 1946) and Turman v. Duckworth, 68 F. Supp. 744 (N. D. Ga. 1946), based decisions for defendants largely on Colegrove v. Green, and it was his view that the issues of jurisdiction in such cases had not been conclusively adjudicated by that decision.

[43] Justice Douglas in a dissenting opinion writes as if the decision of the court turned on the point of justiciability. See South v. Peters, 70 Sup. Ct. 641, 644 (1950). It is unlikely that the majority would so interpret their decision.

[44] *Id.*, at 642 (italics added).

[45] For example, the right to register and vote in a primary election. See Rice v. Elmore, 165 F. 2d 387 (4th Cir.), *cert. denied*, 333 U. S. 875 (1948). In this case plaintiff sought to enjoin defendants from denying Negro electors right to vote. Judgment of the district court in favor of plaintiff was affirmed by the Court of Appeals.

[46] See Caven v. Clark, 78 F. Supp. 295 (W. D. Ark. 1948); Turman v. Duckworth, 68 F. Supp. 744 (N. D. Ga. 1946); Cook v. Fortson, 68 F. Supp. 624 (N. D. Ga. 1946).

For this reason, a full discussion of the issue by the Supreme Court, as it relates to political rights cases, will likely be necessary to avoid further conflicting opinions in the lower courts.

While it is not clearly known whether the attitude of the Court toward exercising equity jurisdiction in redistricting cases which arose in the federal courts would be equally hostile to such cases originating in the state courts, it is quite probable that both avenues to the Supreme Court were foreclosed by *South v. Peters*. Even though equity jurisdiction is denied in the redistricting cases, there remains a possible redress in an action for damages.[47] In addition, there is the possible use of the writ of mandamus in the state courts, as in *Smiley v. Holm*, by bringing into question the validity of a state law under the Federal Constitution, and thereupon gaining direct appeal to the United States Supreme Court if the highest state court sustains the validity of the state law.

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Insurance—Automobile Comprehensive Coverage

The development of the comprehensive automobile insurance policy has been rapid in recent years and the policy has become one of the major coverages in North Carolina. It is an extensive sort of policy including loss of or damage to an automobile from such older causes as fire and theft as well as losses from more novel causes such as missiles, falling objects, explosion, earthquake, windstorm, hail, water, flood, vandalism, and civil commotion. Generally, the clause provides that the coverage extends to any loss or damage except by collision or upset.[1]

The coverage of the comprehensive clause, however, is subject to a number of exclusions and exceptions. In North Carolina, the coverage does not apply (a) while the car is used as a public or livery conveyance, (b) while the car is subject to an undeclared encumbrance, (c) during war or revolution, (d) if the damage to the automobile is caused by mechanical breakdown unless such breakdown would otherwise be covered, (e) to wearing apparel or personal effects, (f) to tires unless they would otherwise be covered, or (g) to loss due to conversion or embezzlement or secretion by anyone lawfully entrusted with possession of the car.[2]

[47] This possibility may be inferred from language in Colegrove v. Green, 328 U. S. 549, 552 (1946). See note 34 *supra*.

[1] Often losses falling within what would commonly be covered under an ordinary collision policy are also included within the comprehensive clause. See Billings, *Present Periphery of Comprehensive Coverage*, 306 INS. L. J. 572 (1948).

[2] North Carolina Automobile Certificate of Insurance Specimen, December, 1947.