Michigan Law Review

Volume 45 | Issue 3

1947

# CONSTITUTIONAL LAW-STATE APPORTIONMENT FOR CONGRESSIONAL ELECTIONS-JUSTICIABILITY OF ISSUE

L. B. Brody S.Ed.
*University of Michigan Law School*

CONSTITUTIONAL LAW—STATE APPORTIONMENT FOR CONGRESSIONAL ELECTIONS—JUSTICIABILITY OF ISSUE—Petitioners, three qualified Illinois voters, filed a proceeding in a United States district court composed of three judges, seeking a determination under the Federal Declaratory Judgment Act that the 1901 State Apportionment Act of Illinois was in violation of the Fourteenth Amendment and Article I of the Constitution, in that it denied to citizens of the United States the equal and unabridged right to vote for Congressmen. On direct appeal to the Supreme Court of a dismissal of the petition by the lower court,[1] the complaint alleged that the statute apportioning the State of Illinois was void in that it failed to provide for compactness of territory and approximate equality of population, with the result of a substantial disparity between the effectiveness of petitioners' votes in their heavily populated districts as compared to those of voters living in more sparsely populated districts.[2] *Held*, affirmed. The complaint was properly dismissed for want of equity: "due regard for the effective workings of our Government revealed this issue to be of a peculiarly political nature and therefore not meet for judicial determination." Justices Douglas and Murphy joined in Justice Black's dissent. *Colegrove v. Green*, (U.S. 1946) 66 S. Ct. 1198.

The right of equality of representation is regarded as fundamental to a demo-

[1] (D.C. Ill. 1946) 64 F. Supp. 632.

[2] Petitioners further argued that the Federal Reapportionment Act of 1929, 46 Stat. L. 26 (1929), 2 U.S.C. (1940) §2a, re-enacted the requirements of previous reaportionment acts as to compactness, continguity and equality of population of districts. This point had been disposed of in Wood v. Broom, 287 U.S. 1, 53 S. Ct. 1 (1932), to the effect that the later statute, which had no such requirements, completely superseded the earlier. The constitutional question was not there involved.

cratic, representative form of government, and accordingly each vote should be granted equal potency in the choice of the legislature.[3] Yet the instant case clearly holds that there is no judicially enforceable provision in the Constitution which prohibits inequality of suffrage. Certainly, the decision nullifies any hopes the "oppressed majorities" may have had to invoke the powers of the federal judiciary in the enforcement of their political rights.[4] By the application of two rather vague concepts from the judicial folkways, namely "political question" and "justiciability," [5] Justice Frankfurter was able to justify the Supreme Court's refusal to authorize a form of relief whose ramifications would have led the judiciary into direct conflict with Congress. Manifestly framed with regard for the Judiciary Article of the Constitution, the Federal Declaratory Judgment Act limits the authority of federal courts to decisions in "actual cases or controversies." [6] A dispute is said to be justiciable in that it presents such a case or controversy, when it involves adverse parties in actual dispute, over a substantial question, which is appropriate for judicial determination. The Court here explained its disability, which seems self-imposed and not required under Article III, by voicing a traditional refusal to decide major political questions [7] or to enforce political rights,[8] but without satisfactorily distinguishing those cases in

[3] See opinion of Rugg, C. J., in Atty. Gen. v. Suffold County Apportionment Commissioners, 224 Mass. 598 at 601 and 604, 113 N.E. 581 (1916), for a forceful statement of this principle.

[4] In Illinois the Seventh Congressional District contained an estimated population, in 1946, of 914,053 people as compared to 112,116 in the Fifth District. The Michigan apportionment scheme currently provides for approximately 419,007 people in the Seventeenth District, and 200,265 in the Twelfth. Principal case at 1202. See, also, Durfee, "Apportionment of Representation in the Legislature: A Study of State Constitutions," 43 MICH. L. REV. 1091 (1945).

[5] See, in general, BORCHARD, DECLARATORY JUDGMENTS, 2d. ed (1941); Weston, "Political Questions," 38 HARV. L. REV. 296 (1925); Finkelstein, "Judicial Self-Limitation," 37 HARV. L. REV. 338 (1924), and "Further Notes on Judicial Self-Limitation," 39 HARV. L. REV. 221 (1925); POST, THE SUPREME COURT AND POLITICAL QUESTIONS (1936).

[6] Judicial Code, § 274d, 48 Stat. L. 955 (1934), as amended by 49 Stat. L. 1027 (1935), 28 U.S.C. (1940) § 400. The text of the first section of the act reads: "In cases of actual controversy except with respect to Federal taxes the courts of the United States shall have power upon petition, declaration, complaint, or other appropriate pleadings to declare rights and other legal relations of any interested party petitioning for such declaration, whether or not further relief is or could be prayed, and such declaration shall have the force and effect of a final judgment or decree and be reviewable as such."

[7] Other questions similarly treated by the Supreme Court include those relating to the conduct of foreign relations. See Ware v. Hylton, 3 Dall. (3 U.S.) 199 at 260 (1796); Weston, "Political Questions," 38 HARV. L. REV. 296 at 316-320 (1925); Terlinden v. Ames, 184 U.S. 270 at 288, 22 S. Ct. 484 (1902); the guaranty of a republican form of government as provided for in Art. IV, § 4 of the Constitution, Luther v. Borden, 7 How. (48 U.S.) 1 (1849); Pacific States Telephone and Telegraph Co. v. Oregon, 223 U.S. 118, 32 S. Ct. 224 (1912); and the ratification of a Constitutional amendment, Coleman v. Miller, 307 U.S. 433, 59 S. Ct. 972 (1939).

[8] Giles v. Harris, 189 U.S. 475, 23 S. Ct. 639 (1903).

which tradition was apparently ignored and relief granted.[9] There is precedent for drawing a distinction between an action at law for damages and one for equitable relief,[10] but the language in the *Colegrove* case offers little to encourage the belief that the present Court would look more favorably upon a suit for damages.[11] There is also precedent for judicial intervention in problems relating to methods of voting.[12] The decision, however, expresses concern over the fact that granting the declaration asked would result in the invalidation of the entire Illinois electoral system, leaving the state undistricted and requiring it to elect all its Congressmen at large. But the possibility of thus coming into "immediate and active relations with party contests" is no greater than in those cases where the Court acted to protect the voting privileges of Negroes, or where it declared a state redistricting act invalid because improperly passed by the state legislature. As a practical matter, the majority must have realized that by intervening it would be assuming the responsibility of guaranteeing fairness of representation throughout the nation, involving the difficult problem of ascertaining exactly what constitutes a fair scheme of political apportionment.[13] Such a duty is particularly adapted to the special competence of legislative bodies rather than the judiciary. It is significant that Justice Frankfurter does not mention the equal protection clause of the Fourteenth Amendment as a guarantee of equal suffrage, although the holding in *Nixon v. Herndon*[14] lends plausibility to such a conclusion. Since the rotten-borough system is more or less self-perpetuating both locally and federally the decision is illustrative of how practical politics can nullify efficacy of a supposedly basic right. The Black-Douglas-Murphy dissent should be noted because of the possibility that a full bench may some day at least modify the 4-3 decision in the *Colegrove* case.[15] In his dis-

[9] Nixon v. Herndon, 273 U.S. 536, 47 S.Ct. 446 (1927); Nixon v. Condon, 286 U.S. 73, 52 S. Ct. 484 (1932); Lane v. Wilson, 307 U.S. 268, 59 S. Ct. 872 (1939).

[10] Compare cases cited in note 9 with Giles v. Harris, 189 U.S. 475, 23 S. Ct. 639 (1903). That political action resulting in an infringement of the right to vote may give rise to a suit for damages is well settled, Ashby v. White, 2 Ld. Raym. 938 (1703); Wiley v. Sinkler, 179 U.S. 58, 21 S. Ct. 17 (1900); Nixon v. Herndon, 273 U.S. 536, 47 S. Ct. 446 (1927).

[11] Justice Frankfurter, however, leaves the question open when he states at p. 1199 of the principal case, "This is not an action to recover for damages 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."

[12] Smiley v. Holm, 285 U.S. 355, 52 S. Ct. 397 (1932), noted in 30 MICH. L. REV. 1338 (1932), where petitioner was permitted to bring suit as citizen, elector and taxpayer to test the validity of a Minnesota redistricting statute which had been enrolled as law in disregard of the governor's veto. The Court spoke of "Constitutional provisions governing the exercise of political rights and hence subject to constant and careful scrutiny." Id. at 369.

[13] Cf. Chafee, "Congressional Apportionment," 42 HARV. L. REV. 1015 (1929); Bowman, "Congressional Redistricting and the Constitution," 31 MICH. L. REV. 149 (1932).

[14] Note 9, supra.

[15] Owing to the death of Chief Justice Stone and the absence of Justice Jackson the decision was handed down by a seven man court. Petitioners were recently denied a "Motion for Reargument Before a Full Bench," 15 U.S. LAW WEEK 3198 (1946). See statement of Marshall, C.J., in Briscoe v. Commonwealth Bank of Kentucky, 8 Pet.

senting opinion Justice Black argues that both the equal protection clause and Article I of the Constitution forbid any discrimination in the right to vote and to have the vote counted.[16]

*L. B. Brody, S. Ed.*

(33 U.S.) 118 (1834), that, except in cases of absolute necessity, the Supreme Court would not deliver a judgment on constitutional questions unless a majority of the whole court concurred. This doctrine was later affirmed in the Legal Tender cases, 12 Wall. (79 U.S.) 457 (1872). Cf. Cushman, "Constitutional Decision by a Bare Majority of the Court," 19 MICH. L. REV. 771 (1921).

Another aspect of the same problem arose in Turman v. Duckworth, (D.C. Ga. 1946) 15 U.S. LAW WEEK 2156 (1946), where a three judge district court held on the authority of the principal case that the Georgia county unit system of nominating candidates for governor is not invalid under the equal protection clause even though under such system voters n certain counties have voting strength in excess of voters in other counties. Appeal to the Supreme Court was dismissed per curiam, 15 U.S. LAW WEEK 3170 (1946), Justice Black, Murphy, and Rutledge dissenting.

[16] It is interesting, albeit confusing, to compare Justice Black's argument on this point with his opinion in Coleman v. Miller, 307 U.S. 433 at 456, 59 S. Ct. 972 (1939), where he vehemently stated that the Court had no power to pass upon questions relating to the ratification of constitutional amendments.