JUDICIAL ATTITUDE TOWARD POLITICAL QUESTION DOCTRINE: THE GERRYMANDER AND CIVIL RIGHTS

> I conclude that the doctrine of political question is currently undergoing a most undesirable expansion. Because it may well exclude important claims of individual liberty from any judicial review, it is contrary to the spirit of our institutions and ought to be confined to situations in which it is imperative.[1]

The political question doctrine, which Professor Frank concluded is expanding in a very undesirable direction, has been recently applied by a federal court in exactly the manner which he prophesied.[2] In the summer of 1957, the Alabama legislature passed an act entitled "An Act To alter, re-arrange, and re-define the boundaries of the City of Tuskegee in Macon County."[3] The act stated in specific detail the territory to be included in the City of Tuskegee, and excluded all territory lying outside the newly defined boundaries.

Prior to the passage of the act, the boundaries of Tuskegee formed a square. After the passage of the act, however, the boundaries as redefined, resembled a "sea dragon."[4] The effect of the act was to remove from Tuskegee all but four or five of the qualified Negro voters (out of a total of about 400), and none of the qualified white voters.

Plaintiffs sought a declaratory judgment in the federal district court invalidating the act on the grounds that, as to them, the act was in violation of the due process and equal protection clauses of the fourteenth amendment, and also of the fifteenth amendment of the federal constitution. The district court granted a motion to dismiss on the ground that the court did not have jurisdiction since "This Court has no control over, no supervision over, and no power to change any boundaries of municipal corporations fixed by a duly convened and elected legislative body, acting for the people in the State of Alabama."[5] The court of appeals for the Fifth Circuit affirmed the district court's holding by a 2-1 decision.[6] Judge Jones, writing the majority opinion, felt that in the absence of any racial discrimination on the face of the statute, it would be improper for the court to question the motive of the legislature in passing the act. He also felt that this was a

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1. Frank, Political Questions, in Supreme Court and Supreme Law 36, 43 (Cahn ed. 1954).
2. Gomillion v. Lightfoot, 270 F.2d 594 (5th Cir. 1959).
3. Ala. Acts 1957, No. 140, at 185.
4. Gomillion v. Lightfoot, 167 F. Supp. 405, 407 (M.D. Ala. 1958).
5. Id. at 410.
6. Note 2 supra.

political question, and thus not subject to judicial review. Judge Wisdom, in a concurring opinion, placed the decision squarely on the political question doctrine as presented in *Colegrove v. Green*[7] and *South v. Peters*.[8]

This case and the consequences which its holding augurs for further disenfranchisement of the Southern Negro invites analysis of the rationale of the political question doctrine, particularly the appropriateness of that doctrine in the malapportionment or gerrymandering cases.

Among the cases which have traditionally been considered nonjusticiable are those containing what the courts have labeled political questions. Beginning in 1849 with the case of *Luther v. Borden*,[9] when the Supreme Court refused to rule whether or not Rhode Island had a republican form of government, the federal courts have refrained from taking jurisdiction over those cases which in their judgment come under the purview of the other departments of government, despite the fact that a controversy exists that might be settled by a court. The cases in which the doctrine has been applied are quite varied and have involved such questions as: (1) recognition of foreign governments;[10] (2) commencement and termination of war;[11] (3) jurisdiction over territory;[12] (4) status of Indian tribes;[13] (5) admission and deportation of aliens;[14] (6) enforcement of treaties;[15] (7) authority of foreign ambassadors and ministers[16] and (8) establishment of electoral districts.[17] Once there has been a determination that a case is substantially concerned with a political question, the case will be dismissed and the decision of the department of government involved will stand undisturbed.

Two major theories have been advanced to explain the political question doctrine. Although each theory is grounded on a purportedly different premise, it should be noted that, generally, either of the theories would support the courts' decisions in this area.

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7. 328 U.S. 549 (1946).
8. 339 U.S. 276 (1950).
9. 48 U.S. (7 How.) 1 (1849).
10. Oetjen v. Central Leather Co., 246 U.S. 297 (1918).
11. Ludecke v. Watkins, 335 U.S. 160 (1948); The Protector, 79 U.S. (12 Wall.) 700 (1871).
12. Wilson v. Shaw, 204 U.S. 24 (1907); In re Cooper, 143 U.S. 472 (1892).
13. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831).
14. The Chinese Exclusion Case, 130 U.S. 581 (1889); Harisiades v. Shaughnessy, 342 U.S. 580 (1952).
15. Ware v. Hylton, 3 U.S. (3 Dall.) 199 (1796).
16. Sevilla v. Elizalde, 112 F.2d 29 (D.C. Cir. 1940); Doe v. Braden, 57 U.S. (16 How.) 635 (1853).
17. Colegrove v. Green, 328 U.S. 549 (1946).

The first and most obvious explanation of the doctrine of political question is to be found in the theory of separation of powers.[18] This is to say that a certain question is political if the power to decide it has been delegated either expressly or by implication to the executive or legislative branch of government. This theory follows naturally from the checks and balances system under which the American tripartite system of government was theoretically established. The Constitution sets out the duties and responsibilities of the Legislative,[19] Executive[20] and Judicial departments.[21] Under this theory if a court has before it a case which, in its best judgment, involves a question within the jurisdiction of the executive or legislative branch, the court is obliged to label that question political, and defer to the decision of the executive or legislative branch, whichever has jurisdiction over the matter. If this is the correct rationale, then, as is stated by the proponents of the theory of separation of powers, the court is furnished with a guide which is easily applied. Either the Constitution has conferred jurisdiction on the court, in a given case, or it has conferred it on another branch of the government. If the latter, the case concerns a political question and is thus beyond the scope of the court's power to decide.

The second theory usually advanced to explain the political question doctrine is that of judicial self-limitation.[22] This theory considers that the courts, moved by reasons of expediency, have refrained from taking jurisdiction in certain types of cases. Three principal reasons have been put forward as influential in causing a court to decide that action on the merits will be inexpedient:[23] (1) a belief that the court is incompetent to deal with the question presented;[24] (2) fear of the vastness of the consequences of a decision on the merits;[25] (3) a feeling that the matter is "too high" for the courts.[26] The implication of the self-limitation theory is that the court will take cognizance of all the circumstances involved in a particular case and if "political wisdom"[27] dictates that it would be inexpedient to take jurisdiction, the political question label will be affixed.

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18. Weston, Political Questions, 38 Harv. L. Rev. 296 (1925).

19. U.S. Const. art. I.

20. U.S. Const. art. II.

21. U.S. Const. art. III.

22. Finkelstein, Judicial Self-Limitation, 37 Harv. L. Rev. 338 (1924); Finkelstein, Further Notes on Judicial Self-Limitation, 39 Harv. L. Rev. 221 (1925). The second article was written as an answer to Mr. Weston's article, supra note 18.

23. Finkelstein, Judicial Self-Limitation, 37 Harv. L. Rev. 338, 344-45 (1924).

24. E.g., Colegrove v. Green, supra note 17.

25. E.g., Luther v. Borden, supra note 9.

26. Mr. Finkelstein explains that cases which fall into this category are those where the courts have said they will not question the motives of the legislature.

27. Finkelstein, supra note 23, at 345.

It is interesting to note that in the leading case of *Luther v. Borden*,[28] Mr. Chief Justice Taney applied both theories to explain why the Court refused to adjudicate the merits of the case. A brief history of the case will be helpful to set the colorful background of this famous controversy. In the year 1841, Rhode Island was operating under the old colonial charter which, with a few minor changes, served as its constitution. The charter was a very rigid document. It contained no procedure for amendment and the legislature, which was authorized to prescribe the qualification of voters, had limited suffrage to freeholders only.[29] A large portion of the population was dissatisfied with the charter, and particularly with the restrictions on voting. Thomas W. Dorr, a citizen of Rhode Island, organized a constitutional convention which framed a constitution. The constitution was presented to the people, voted upon, and passed by a majority of the male citizens over the age of twenty-one. Accordingly, this constitution was proclaimed the supreme law of Rhode Island by the Dorr faction, and an election was held under the new constitution for the officers of government.

The charter government, of course, recognized none of these proceedings and in order to protect the government, declared martial law in the state. Borden, as officer-in-charge of a small group of militia, was ordered to arrest Luther, a known adherent of the "Dorr Rebellion," as it is known today. Carrying out his orders, Borden broke into Luther's home and arrested him. Luther, after moving to Massachusetts to establish diversity of citizenship, brought an action of trespass *quare clausum fregit* against Borden in the United States Circuit Court for the district of Rhode Island. Defendant's defense, which prevailed in the circuit court, was that an officer of the established government operating under martial law, had the right to arrest an insurrectionist. Plaintiff, of course, claimed that since the adoption of the new constitution, the charter government was not the established government, and therefore did not have any rights in this regard.

Thus, by way of an action for trespass, the Court was faced with the question of determining whether the charter government of Rhode Island was a republican form of government as guaranteed to the states by the Constitution.[30] The Court refused to come to the merits of the case on the ground that this issue was political and, accordingly, non-justiciable. Mr. Chief Justice Taney, in an oft-quoted portion of his opinion, stated:

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28. 48 U.S. (7 How.) 1 (1849).

29. Id. at 35.

30. U.S. Const. art. IV, § 4.

> Under this article of the Constitution [Article 4 § 4] it rests with Congress to decide what government is the established one in a State. For as the United States guarantee to each State a republican government, Congress must necessarily decide what government is established in the State before it can determine whether it is republican or not. And when the senators and representatives of a State are admitted into the councils of the Union, the authority of the Government under which they are appointed, as well as its republican character, is recognized by the proper constitutional authority. And its decision is binding on every other department of the government, and could not be questioned in a judicial tribunal.[31]

Upon examination, it appears obvious that the Chief Justice is invoking the separation of powers doctrine to decide that the issue is a political question. The Constitution has not delegated the matter to the courts, but rather to the Congress.[32] As such, the Court must follow the decision of the Congress.

But the Chief Justice was also quite evidently influenced by considerations of expediency. Thus, in the same case, he also wrote:

> For, if this court is authorized to enter upon this inquiry as proposed by the plaintiff, and it should be decided that the charter government had no legal existence during the period of time above mentioned—if it had been annulled by the adoption of the opposing government—then the laws passed by its legislature during this time were nullities; its taxes wrongfully collected; its salaries and compensation to its officers illegally paid; its public accounts improperly settled; and the judgment and sentences of its courts in civil and criminal cases null and void, and the officers who carried their decisions into operation answerable as trespassers, if not in some cases as criminals.
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> When the decision of this court might lead to such results, it becomes its duty to examine very carefully its own powers before it undertakes to exercise jurisdiction.[33]

Dorr's cause was a popular one of the time. As far as the nation was concerned, the issue was whether or not the people had the right to change, in their own way, their form of government. The Democratic Party and the Democratic press were in full support of Dorr's position, and the issue had split the country. It has even been suggested that armed conflict might have resulted had the Supreme Court decided the case on the merits.[34] While this point was not made explicit in the opinion, the fact may well have been present in the Court's mind, and hence have made a contrary decision even less expedient.

31. 48 U.S. (7 How.) at 42.

32. Note, however, that the language of Art. IV, section 4 of the Constitution says, "The United States shall guarantee," rather than, "Congress shall guarantee."

33. 48 U.S. (7 How.) at 38.

34. Frank, op. cit. supra note 1, at 40.

Thus, either analysis will explain this case, and as a matter of fact, this Court used both. It has been noted that the judicial self-limitation theory is less doctrinaire than the separation of powers theory, and is probably more reflective of the judicial process as it takes place in the courts.[35] The separation of powers implicit in the federal constitution was antedated by numerous English cases which applied the doctrine of the Act of State—the English parallel to the political question.[36]

It may well be that the theory of judicial self-limitation is merely a more sophisticated version of the separation of powers theory. For when a court has decided that a certain case is not a proper one for judicial consideration, has it not decided that the function in question is or should be the subject of executive or legislative, rather than judicial action? And in making such a decision, has not the court weighed the expediencies? Notwithstanding the unresolved argument as to whether either theory, standing alone, offers a satisfactory rationale, there is little doubt that the doctrine of the political question is firmly entrenched in our judicial system.

Whatever reasons a court may advance for its use of the doctrine, it is apparent that there are many questions which courts cannot, or at any rate, should not, decide. Notable among these are questions that involve the making of the foreign policy of the United States, where it would be disastrous for the government to speak with two voices. On the other hand, there is one class of cases which courts have consistently refused to consider, that can and should be resolved by judicial determination. These are the political malapportionment cases of which *Colegrove v. Green*[37] is the leading example.

In this famous case, plaintiffs alleged that the vastly unequal congressional districts in Illinois caused their vote to be so diluted as to deny them equal protection of the law under the fourteenth amendment. Plaintiffs asked the district court to declare the districts invalid and to enjoin defendants from using them in the forthcoming congressional election. The district court dismissed the complaint on grounds other than that of the political question. The Supreme Court affirmed the lower court's decision, but went further, and declared that "the appellants ask of this Court what is beyond its competence to grant."[38] The case has been cited as standing for many things, due in

35. Note, Constitutional Objections To The Appointment Of A Member Of A Legislature To Judicial Office, 6 Geo. Wash. L. Rev. 46, 61 n.68 (1937).

36. Nabob of the Carnatic v. East India Co., 1 Ves. Jr. 370, 30 Eng. Rep. 391 (1791); 2 Ves. Jr. 56, 30 Eng. Rep. 521 (1793); The Duke of York's Claim to the Crown, 5 Rotuli Par. 375 (1460).

37. 328 U.S. 549 (1946).

38. Id. at 552.

part to the unusual way the Court aligned itself on the issues. Only seven Justices heard the case and split 4-3. The majority opinion, written by Mr. Justice Frankfurter, stated that the Court had no jurisdiction since "The basis for the suit is not a private wrong, but a wrong suffered by Illinois as a polity."[39] The opinion concludes with a statement that the responsibility in this area of the law belongs to "the people . . . exercising their political rights."[40] The three dissenting Justices argued that the Court had jurisdiction and favored the granting of the injunction. The deciding vote was cast in a concurring opinion by Mr. Justice Rutledge, who agreed with the minority that the Court had jurisdiction to decide the case on the merits, but felt that the Court should refrain from exercising its equity powers because of the damage a decree might inflict on the delicate and fragile area of federal-state relationships.[41] Thus, although the Court dismissed the action, a majority felt that the Court *did* have jurisdiction to hear the case.

In a subsequent case, *MacDougall v. Green*,[42] the Progressive Party asked for an injunction in a federal court against the enforcement of an Illinois statute requiring candidates of a new political party to present petitions signed by 25,000 qualified voters, including 200 signatures for each of at least 50 counties in the state. The petitioners obtained 75,000 signatures, but they did not meet the geographical requirements. In praying for an injunction that the law be declared invalid, plaintiffs alleged the violation of the due process, privileges and immunities, and equal protection clauses of the fourteenth amendment. The Supreme Court affirmed a denial of the injunction, but the decision was rendered on the merits, rather than on the ground that the issue presented was a political question. Since the basic issues in the two cases are very similar, it would appear that the decision in the *MacDougall* case is somewhat of a withdrawal from the political question position taken in the *Colegrove* case.

A third case which is continually cited for the proposition that apportionment is a political question is *South v. Peters*.[43] Here again an injunction was sought in a federal court, this time to restrain the enforcement of the Georgia county-unit statute, which greatly diluted the vote of the urban population.[44] The Court, in a per curiam opinion

39. Ibid.

40. Id. at 556.

41. Id. at 565.

42. 335 U.S. 281 (1948).

43. 339 U.S. 276 (1950).

44. This system provides that in a primary election, the candidate receiving the highest vote in a county is entitled to its entire electoral vote, which ranges from six for the most populous counties to two for most of the counties.

citing *Colegrove,* affirmed the dismissal of the petition, and declared the issue to be political. The dissenting opinion of Mr. Justice Douglas, with whom Mr. Justice Black concurred, however, reasoned by implication that the expediency or separation of powers theories could not be argued to label the issue political.[45]

In recent years there have been four cases in federal district courts which are worthy of note. *Perry v. Folsom*[46] and *Radford v. Gary*[47] involved situations where the federal courts were asked to compel state legislatures to reapportion the voting districts of the state as required by the state constitutions. The courts in both cases sustained motions to dismiss on the ground that the issue was political. In both of these cases there appears to be strong judicial opinion that if the courts were to take jurisdiction they would be invading the hallowed ground of states' rights, an improper thing for a federal court to do. In a third case, *Remmey v. Smith,*[48] the court held that the case was premature in that the Pennsylvania legislature was in session and might reapportion in that term. While the court expressly refused to rule on its jurisdiction, there is a strong expression in the case that had it so ruled the issue would have been regarded as political.[49]

The remaining case, although not the most recent case, seems to represent a far more modern approach. In *Dyer v. Kazuhisa Abe*[50] the district court of Hawaii ruled that it had jurisdiction to hear a case in which the plaintiff requested that the court cause the Territory of

45. Moreover, no decree which we need enter would collide with Congress or with the election. Georgia need not be remapped politically. The Georgia legislature need not take new action after our decree. There is no necessity that we supervise an election. There need be no change or alteration in the place of the election, its time, the ballots that are used, or the regulations that govern its conduct. . . . The impact of the decree would be on the tallying of votes and the determination of what names go on the general election ballot. . . . [C]onsiderations, which led Mr. Justice Rutledge to conclude in *Colegrove v. Green* that the Court should not exercise its equity powers in that election, are lacking here. There is a time to act. . . . Relief can be certain. No conflict with any policy of Congress is possible. There is no overhauling of the State's electoral process. 339 U.S. at 280-81 (1950).

46. 144 F. Supp. 874 (N.D. Ala. 1956).

47. 145 F. Supp. 541 (W.D. Okla. 1956), aff'd per curiam, 352 U.S. 991 (1957).

48. 102 F. Supp. 708 (E.D. Pa. 1951).

49. To interpolate into these provisions [Section 1 of the fifteenth amendment of the U.S. Constitution and section 31 of Title 8, U.S.C.] the right that an individual's vote in an election for state offices should not be diluted by unequal apportionment but should be equal in weight to each other vote cast in the state would be legislative action by judicial pronouncement. Id. at 712.

50. 138 F. Supp. 220 (D. Hawaii 1956), rev'd per curiam, 256 F.2d 728 (9th Cir. 1958), because amendment of Organic Act made the question moot.

Hawaii to be reapportioned in accordance with the law. Chief Judge McLaughlin distinguished the case from *Colgrove* on the ground that no federal-state relationship existed between the United States and the Territory of Hawaii. Although two of the previously discussed cases[51] distinguished the *Dyer* case on this point, there is no doubt that Chief Judge McLaughlin's language reflects a growing opinion that the courts must intervene in this area, regardless of historical precedent. As he states in the opinion:

> Reasons of delicacy should no longer stay the judicial hand. . . . We are not saying each citizen must always have the same vote. Political institutions may invoke geographic representation. However, where the fundamental law provides for equal rights of suffrage each citizen should have the right of judicial redress if the law is violated.[52]

It does not appear that any practical grounds exist for the application of the political question doctrine in these malapportionment cases. Mr. Justice Frankfurter suggested in the *Colgrove* case that the Court was not competent to remap the districts of Illinois. Of course, there is no question that this is a correct statement; however, as Mr. Justice Black pointed out in his dissent in *Colegrove,*[53] the Court was being asked to declare a state apportionment bill invalid, a declaration which it had willingly made when so asked in an analogous case, *Smiley v. Holm.*[54] If the Court had given relief, the election of representatives could have been held at large. If, as Mr. Justice Frankfurter says, this is a problem for the people to solve by exercising their political rights, is it not possible that the courts should provide for judicial redress in those situations where the exercise of political rights has been abrogated by maldistricting? And, of course, expecting the legislators to redistrict themselves out of office is political naïveté.

Modern democracy has no room for the "rotten borough." If we must weigh the usefulness of the political question doctrine, as applied in this case on the one hand, against the eradication of the rotten borough on the other, the political question doctrine must retreat.

If, as has been suggested heretofore, the doctrine of political question should not be applied to the malapportionment cases, neither should it be applied to the analogous situation found in *Gomillion v. Lightfoot.*[55]

As Judge Brown points out in his dissent in *Gomillion,* this is a case of first impression.[56] No other case has been found where a Negro

51. Perry v. Folsom, supra note 46, and Radford v. Gary, supra note 47.
52. Note 50 supra, at 236.
53. 328 U.S. at 566.
54. 285 U.S. 355 (1932).
55. 270 F.2d 594 (5th Cir. 1959).
56. Id. at 606.

has been absolutely denied the right to vote by the device of a gerrymander. It is submitted, however, that the situation in this case is merely an extension of the situation found in the malapportionment cases. In the latter cases the votes of the aggrieved parties were diluted to the extent that they were partially disenfranchised. The *Gomillion* case carries the disenfranchisement one step further and makes it total. For the court to refuse jurisdiction because the statute does not discriminate on its face, is to be blind to the statute's effect and to ignore the oft-repeated maxim that the court condemns sophisticated as well as simple-minded methods of discrimination.

In one of the "white primary" cases, *Nixon v. Herndon*,[57] Justice Holmes refused to entertain the argument that the right to vote was a political question. No doubt states, acting through their legislatures, should ordinarily not be questioned as to the wisdom and reasonableness of their enactments. But the fourteenth and fifteenth amendments of the Constitution will have little meaning if they cannot be judicially protected from discriminatory encroachment by biased legislatures.

Nor does this case present any practical grounds for the application of the political question doctrine. The court, of course, is not competent to remap Tuskegee, but it could declare the act invalid, which would have the effect of restoring the former boundaries.

A long line of cases in the federal courts have declared the sanctity of the voting right.[58] That the court should countenance its abridgement by one of the oldest and most disreputable instruments of political opportunism, the gerrymander, is intolerable. As stated so well by the court in *Dyer v. Kazuhisa Abe*,[59] "The whole thrust of today's legal climate is to end unconstitutional discrimination."[60]

The Supreme Court has granted certiorari in this case.[61] It is earnestly hoped that *Gomillion* will serve as an apt vehicle for the court to modify its stand on the political question doctrine as stated in *Colegrove v. Green*[62] and *South v. Peters*.[63]

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57. 273 U.S. 536 (1927).

58. See, e.g., United States v. Saylor, 322 U.S. 385 (1944); Smith v. Allwright, 321 U.S. 649 (1944); United States v. Classic, 313 U.S. 299 (1941); Nixon v. Condon, 286 U.S. 73 (1932); Nixon v. Herndon, 273 U.S. 536 (1927); Guinn v. United States, 238 U.S. 347 (1915).

59. 138 F. Supp. 220 (D. Hawaii 1956).

60. Id. at 236.

61. 362 U.S. 916 (1960).

62. 328 U.S. 549 (1946).

63. 339 U.S. 276 (1950).