DePaul Law Review

Volume 12
Issue 1 *Fall-Winter 1962*

Article 11

Constitutional Law - Federal Judicial Control of State Reapportionment - Baker v. Carr, 369 U.S. 186 (1962)

DePaul College of Law

aid to religion regardless of the fact that the prayer may be nondenominational. He sums the point up when he states:

> It is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by the government.[19]

It certainly appears that the court's opinion is in keeping with the *Everson* test. Here we have a religious exercise, the saying of a prayer, conducted by the government at government expense. The expense is that of the teacher who must read the prayer aloud. It amounts to nothing less than government financing of a religious exercise. This, of course, is the main prohibition laid down by the *Everson* test. Justice Douglas in writing a concurring opinion stated the issue as "whether the government can constitutionally finance a religious exercise."[20] Phrasing the issue in this way is exactly in keeping with the *Everson* test and its reaffirmance by the court in holding the prayer unconstitutional simply follows the philosophy that government may not finance religious exercises which philosophy has been formalized and sustained in the *Everson*, *McCollum* and *Zorach* cases. The *Engel* decision could not have been decided otherwise unless the court had been prepared to abandon the philosophy which precedent dictated.

The lone dissenter in the *Engel* case, Justice Stewart, held that this nondenominational "expression of religious faith in and reliance upon a Supreme Being"[21] did not violate the "Establishment Clause" because it follows "the deeply entrenched and highly cherished spiritual traditions of our nation."[22] He also states that if the "Establishment Clause" meant that government could not finance religious exercises, then the payment of chaplains' fees in various areas of government would be unconstitutional. By implication, he holds that the "Establishment Clause" does not prohibit government financing of religious exercises. Justice Stewart, thus, is willing to abandon the philosophy of the *Everson* test which has been established by precedent. The majority of the court, as has been shown, was unwilling to abandon this precedent.

[19] Engel v. Vitale, 370 U.S. 421, 425 (1962).

[20] *Id.* at 437.

[21] *Id.* at 450 (footnote 9).

[22] *Id.* at 450.

CONSTITUTIONAL LAW—FEDERAL JUDICIAL CONTROL OF STATE REAPPORTIONMENT

The Constitution of the State of Tennessee vests the legislative power of that state in a General Assembly consisting of a House of Representatives and a Senate. Each county of the state is to have senators and rep-

resentatives according to their proportionate populations to be determined by a decennial census. After this census the statutes to effect proper reapportionment are to be passed.[1] This procedure was followed through 1901 when statutes were passed to reapportion the state according to the federal census, but since then all subsequent proposals for re-districting have failed to pass the General Assembly. Since 1901 both the gross population and the number of qualified voters have increased by approximately one and one-half million, and the relative standing of the various counties with respect to the proportion of qualified voters has changed drastically.[2] Plaintiffs in this cause, all voters qualified to vote for members of the Tennessee Legislature in their respective counties, brought suit in the United States District Court for the Middle District of Tennessee to have the 1901 apportionment act declared unconstitutional as violating the Fourteenth Amendment, and for an injunction to restrain the defendant state officials from proceeding further thereunder. More particularly it was alleged: (1) that the 1901 statute reapportioned the state in an arbitrary and capricious manner without regard to the constitutional formula; (2) that the change in the population of the state has rendered this statute obsolete and unconstitutional; (3) that because of the composition of the state legislature, redress in the form of state action is impossible; (4) that as a result plaintiffs are denied equal protection of the law by the debasement of their votes. A three-judge district court convened to hear the case, dismissed the complaint on defendants' motion holding that[3] it lacked jurisdiction of the subject matter and that the complaint failed to state a claim upon which relief could be granted. It was not denied that a great injustice was being done, but the court stated that on the basis of the decisions of the Supreme Court of the United States,[4] the question of the distribution of political strength for legislative purposes within a state was not one of which the federal courts would take cognizance. On appeal the Supreme Court of the United States, two justices dissenting and one not taking part, reversed and remanded[5] holding that the district court had

[1] TENN. CONST. art. 2, § 3, 4, 5, and 6.

[2] Justice Clark's concurring opinion in the instant case contains an exhaustive statistical survey of the apportionment problem in Tennessee.

[3] 179 F. Supp. 824 (1959).

[4] Radford v. Gray, 352 U.S. 991 (1957); Kidd v. McCanless, 352 U.S. 920 (1956); Anderson v. Jordan, 343 U.S. 912 (1952); Remmey v. Smith, 342 U.S. 916 (1952); South v. Peters, 339 U.S. 276 (1949); MacDougall v. Green, 335 U.S. 281 (1948); Colegrove v. Barrett, 330 U.S. 804 (1947); Cook v. Fortson, 329 U.S. 675 (1946); Turman v. Duckworth, 329 U.S. 675 (1946); Colegrove v. Green, 328 U.S. 549 (1946).

[5] Justices Brennan wrote the opinion of the court; Justices Douglas, Clark and Stewart concurred in separate opinions; Justices Frankfurter and Harlan dissented; Justice Whittaker did not participate.

jurisdiction of the subject matter, that a justiciable cause of action was stated and that the plaintiffs had standing to challenge the 1901 Tennessee reapportionment statute. *Baker v. Carr*, 369 U.S. 186 (1962).

Justice Brennan was meticulous in specifying the issues raised by the appeal. Three were settled upon: (1) whether the district court had jurisdiction of the subject matter of the case, (2) whether the plaintiffs had standing to challenge the Tennessee statute and (3) whether this subject matter presented a justiciable cause of action. These first two are dismissed with remarkable brevity.

Federal courts have jurisdiction of cases "arising under this Constitution, the Laws of the United States, and Treaties made or which shall be made, under their Authority. . . ."[6] It was first held that because the complaint alleged a deprivation of equal protection under the Fourteenth Amendment it stated a cause of action which plainly was within this provision. Dismissal for lack of jurisdiction, therefore, would have been justified only if the claim was so unsubstantial as to be absolutely devoid of merit. No such situation was found. A series of cases is then cited either upholding jurisdiction of the subject matter in voting cases[7] or deciding them on the merits and thus assuming or implying such jurisdiction.[8] The majority even finds that *Colegrove v. Green*,[9] the landmark case on this topic until the instant case and the subsequent *per curiam* decisions[10] based thereon, recognize by implication that there is jurisdiction of the subject matter.

The question of standing to sue is treated in the same summary manner. A citizen's right to vote without arbitrary impairment by state action is established as a principle of prior cases.[11] Again reference is made to prior apportionment cases[12] deciding the issues on their merits and thus im-

[6] U.S. CONST. art. III, § 2.

[7] Smiley v. Holm, 285 U.S. 355 (1932); Koenig v. Flynn, 285 U.S. 375 (1932); Wood v. Broom, 287 U.S. 1 (1932); Mahan v. Hume, 287 U.S. 575 (1932); Davis v. Hildebrant, 241 U.S. 565 (1915).

[8] Radford v. Gray, 353 U.S. 911 (1957); Kidd v. McCanless, 352 U.S. 920 (1956); Remmey v. Smith, 342 U.S. 916 (1952); Cox v. Peters, 342 U.S. 936 (1951); Colegrove v. Barrett, 330 U.S. 804 (1947); Cook v. Fortson, 329 U.S. 675 (1946); Turman v. Duckworth, 329 U.S. 675 (1946).

[9] 328 U.S. 549 (1946).

[10] Radford v. Gray, 352 U.S. 981 (1957); Kidd v. McCanless, 352 U.S. 920 (1956); Anderson v. Jordan, 343 U.S. 912 (1952); Remmey v. Smith, 342 U.S. 916 (1952); South v. Peters, 339 U.S. 276 (1949); MacDougall v. Green, 335 U.S. 281 (1948); Colegrove v. Barrett, 330 U.S. 804 (1947).

[11] United States v. Saylor, 322 U.S. 385 (1943); United States v. Classic 313 U.S. 299 (1941); United States v. Mosley, 238 U.S. 383 (1914); Ex Parte Siebold, 10 U.S. 371 (1879).

[12] Smiley v. Holm, 285 U.S. 355 (1932); Koenig v. Flynn, 285 U.S. 375 (1932); Carrol v. Becker, 285 U.S. 380 (1932); Wood v. Broom, 287 U.S. 1 (1932).

pliedly recognizing that the parties had standing to sue. *Colegrove v. Green*[13] is this time taken squarely to hold that there is standing.

In contrast to the treatment of these first two issues, justiciability is analysis in minute detail since the entire case turns on whether a voter's challenging of his state's legislative apportionment involves a non-justiciable "political question." As a preliminary consideration, Justice Brennan emphasizes that no rigid set of fact situations, except those falling under the Guaranty Clause,[14] are held to involve political questions; each case requires its own analysis and just because a controversy involves one's political rights does not mean it involves a political question.[15] A survey is made of the cases in which political questions are found: foreign relations, dates of duration of hostilities, the validity of enactments, the status of the Indian tribes, and cases arising under the Guaranty Clause.[16] A cross-sec-

[13] 328 U.S. 549 (1946). Until the instant decision, Colegrove v. Green was the leading case on federal interference in state apportionment. The case arose when a group of citizens in Illinois attempted to enjoin the election of federal congressmen under the Illinois apportionment act. With regard to the degree of discrimination and the contentions of the plaintiffs, it was almost identical to the instant case. Only seven judges were involved in the decision. Justice Frankfurter, with the concurrence of Justices Burton and Reed, held that the case involved a political question since Congress was the branch of the federal government that supervises the election of congressmen. But going further, he held that the courts should not get involved in matters of politics such as the case presented and thus diluted his opinion by equating politics with "political questions." Justice Rutledge concurred with this result but on grounds which had no relation to the existence of a political question. Justices Douglas, Black and Murphy dissented on the grounds that a political question did not exist and that it was immaterial anyway since every citizen was guaranteed the right to vote and states cannot discriminate against or in favor of one group of voters.

Because four out of seven justices concurred in the result, the dismissal of the complaint by the district court was affirmed and Justice Frankfurter's opinion became the opinion of the Court. Therefore, there is a question as to the weight to be placed on this opinion. The two cases can also be distinguished on the grounds that in Colegrove the question dealt with was the election of federal congressmen which admittedly Congress does control. In the instant case, no other branch of the federal government is involved. As a result, both cases may remain law in their respective fields and fact situations although on the surface, and according to Justice Frankfurter's dissenting opinion in this case, they involve the same issues and concepts.

[14] U.S. CONST. art. IV, § 4. "The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence."

Luther v. Borden, 48 U.S. 1 (1849) is the case which first determined that actions based on the Guaranty Clause involved, as of their nature, a political question. Since that time, the Supreme Court has refused to take jurisdiction over cases arising under this clause, delegating all authority under it to the Executive branch. The only part that this clause plays in the instant case is a determination that the cause of action alleged by the plaintiffs is not based thereon and that as a result it does not involve a political question by reason thereof.

[15] Nixon v. Herndon, 273 U.S. 536 (1926).

[16] 369 U.S. 186, 211–26 (1961).

tion of the cases in these areas is discussed to show that in some instances political questions arise, and in others not.

As a result of this distillation, and taking into consideration the leading case on the topic of political questions of *Coleman v. Miller*,[17] a number of criteria and characteristics of political questions are elucidated: (1) the concept results from an attempt to preserve a separation of powers within the federal government and does not involve the relationship of the federal government to the states; (2) no "judicially discoverable standards"[18] for resolving the conflict exist, and it is thus not amenable to the judicial process of settling disputes; (3) in some situations no result is possible without an initial policy determination which is not of a judicial nature or within judicial discretion; (4) at times there is some requirement for an unquestioning adherence to a prior political decision; (5) embarrassment may result from multiple determinations of the same question by various departments of the government. Thus, the court has established objective criteria from past decisions, and by applying them to specific fact situations we should be able to determine whether the issues in any other case involve a non-justiciable political question. Such application in this case leads Justice Brennan to find none.

> The question here is the consistency of state action with the Federal Constitution. We have no question decided or to be decided, by a political branch of government coequal with this Court. Nor do we risk embarrassment of our government abroad, or grave disturbances at home if we take issue with Tennessee as to the constitutionality of her action here challenged. Nor need the appellants, in order to succeed in this action, ask the Court to enter upon policy determinations for which judicially manageable standards are lacking. Judicial standards under the Equal Protection Clause are well developed and familiar, and it has been open to courts since the enactment of the Fourteenth Amendment to determine, if on the particular facts they must, that a discrimination reflects *no* policy, but simply arbitrary and capricious action.[19]

What are the consequences of this decision? Aside from the holdings on jurisdiction, standing and justiciability, the case would seem to have no other legal significance. Yet in effect, this decision removes the last obstacle from the paths of the federal courts in controlling states' legislative apportionment. This was not accomplished by a change in the basic policy or philosophy of constitutional law, but by a legalistic evaluation of the facts involved and a stare decisis application of case law; no sweeping judicial policy was announced and no new interpretation of the basic concepts involved was made. Whether this decision shows a change in these areas cannot be determined at this time.

One of the reasons for Justice Frankfurter's refusal in the *Colegrove*

[17] 307 U.S. 433 (1938).

[18] 369 U.S. 186, 217 (1961).

[19] 369 U.S. 186 at 226 (1961).

case to allow the federal judiciary in this field was that after diligent search and discussion he could find no guidelines to assist the federal district courts in determining how to reapportion a state. Yet Justice Brennan dismisses the subject without consideration, stating that

> Beyond noting that we have no cause at this stage to doubt the District Court will be able to fashion relief if violations of constitutional rights are found, it is improper now to consider what remedy would be most appropriate if appellants prevail at the trial.[20]

It will be interesting to see whether the federal district courts' experiences in solving this problem will result in a future policy reversal or a major change in the political character of a majority of the states in the union.

[20] 369 U.S. 186 (1961) at 198.

CONSTITUTIONAL LAW–INSURANCE REGULATION–EXTRATERRITORIAL JURISDICTION OF STATES

Todd Shipyards Corporation, a New York corporation not domiciled in Texas but doing business and owning property there, was taxed pursuant to Article 21.38 of the Texas Insurance Code. This article[1] requires that a five per cent tax on gross premiums be paid by resident insureds on policies of insurance purchased by them from "unauthorized insurers."[2] Todd insured its Texas property in New York City with Lloyd's of London and Institute of Lloyd's Underwriters, both unauthorized insurers within the meaning of the Code. Each of the insurance transactions involved took place entirely outside the State of Texas. The policies were negotiated, paid for, and issued outside Texas and all losses arising under the policies were adjusted and paid for outside the state. The insurers had no office or place of business in Texas, did not solicit business in Texas, had no agents in Texas, and did not investigate risks or claims in Texas.

Todd Shipyards Corporation paid the required five per cent tax under protest and brought an action against the State Board of Insurance to re-

[1] 14 VERNON'S TEX. CIV. STAT. art. 21.38, § 2(e) (Supp. 1961). Section 2(e) states: "If any person, firm, association or corporation shall purchase from an insurer not licensed in the State of Texas a policy of insurance covering risks within this State in a manner other than through an insurance agent licensed as such under the laws of the State of Texas, such person, firm, association or corporation shall pay to the Board a tax of five per cent (5%) of the amount of the gross premiums paid by such insured for such insurance. Such tax shall be paid not later than thirty (30) days from the date on which such premium is paid to the unlicensed insurer."

[2] An "unauthorized insurer" in the State of Texas is any insurance company not licensed by the State Board of Insurance to do business in that State. 14 VERNON'S TEX. CIV. STAT. art. 21.38, § 2(a) (Supp. 1961).