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Constitutional Law—One Foot In, One Foot Out: The Political Thicket

ONE FOOT IN, ONE FOOT OUT: THE POLITICAL THICKET

The venturings of the federal judiciary into the "political arena" have been, at best, a difficult course to chart. *Cousins v. City Council*[1] was yet another attempt by a lower federal court to apply the standards set out by the United States Supreme Court. Plaintiffs in *Cousins* alleged that the redrawing of the aldermanic ward lines in Chicago[2] was a gerrymander, working an invidious discrimination upon the black, Puerto Rican and independent voters of the city. The black voters claimed that the redistricting concentrated their voting strength in the ghetto wards in such a way that they became a minority in the fringe wards.[3] Puerto Rican plaintiffs claimed that the ward lines were drawn in such a manner as to fragment their ghetto into three separate wards, none of which had a Puerto Rican majority.[4] The independent voters also alleged a similar gerrymander.[5]

The district court had held that the independent voters did not have standing to sue,[6] and that they had failed to prove any substantive injury.[7] As to the claims of the black and Puerto Rican plaintiffs, the district court reached the merits and held that the ordinance reapportioning the wards did not violate either the fourteenth or the fifteenth amendment to the Constitution.[8]

The United States Court of Appeals for the Seventh Circuit affirmed the dismissal of the claims advanced by the independent voters, based not upon standing or failure to prove a substantive injury, but upon

1. 466 F.2d 830 (7th Cir.), *cert. denied,* 409 U.S. 893 (1972).

2. The city of Chicago is divided into 50 wards each represented by an alderman who sits on the City Council and has one vote. 466 F.2d at 831.

3. *Id.* at 834.

4. *Id.*

5. *Id.*

6. Cousins v. City Council, 322 F. Supp. 428, 435 (N.D. Ill. 1971).

7. *Id.* The district court stated as a "Conclusion of Law" that "the issue of political gerrymandering . . . is non-justiciable." Yet the court chose to base its decree, dismissing the complaint of the Independent Voters of Illinois and the Committee for an Effective City Council, upon lack of standing and failure to prove substantive injury. *Id.* at 434, 435.

8. *Id.* at 436.

the ground that the claims presented a nonjusticiable political question.[9] The court of appeals disagreed with the conclusions drawn by the district court in regard to the assertions of the black and Puerto Rican plaintiffs, and remanded the case for a fuller adjudication of the merits.[10] Court of appeals Judge Stevens entered a dissent, concluding that the claims of the independent voters were justiciable;[11] but that on the merits all three groups (independents, blacks and Puerto Ricans) had failed to prove their allegations.[12]

The Supreme Court's first affirmative plunge into the "political arena" came in 1960 with *Gomillion v. Lightfoot*.[13] The Court held that the denial of the voting rights of the black petitioners had violated the fifteenth amendment.[14] Justice Whittaker filed a separate concurrence in which he said: "It seems to me that the decision should be rested not on the Fifteenth Amendment, but rather on the Equal Protection clause of the Fourteenth Amendment to the Constitution."[15] The decision was limited to racial discrimination in voting rights cases because it rested upon the fifteenth amendment.[16] By using the fourteenth amendment, as advocated by Justic Whittaker, the *Gomillion* decision would have been broader in scope.

The Supreme Court appeared to throw the floodgates wide open with their decision in *Baker v. Carr*.[17] The Court held that the failure of the Tennessee legislature to reapportion itself presented a justiciable question under the equal protection clause of the fourteenth amendment.[18] In one sweeping motion the Court lifted the reappor-

9. 466 F.2d at 844.

10. *Id.*

11. *Id.* at 847-48 (dissenting opinion).

12. *Id.* at 848.

13. 364 U.S. 339 (1960). The Court dealt with an act of the Alabama legislature that redrew the boundaries of the city of Tuskegee "to remove from the city all save four or five of its 400 Negro voters while not removing a single white voter or resident." *Id.* at 341. The Court concluded that such a blatant racial gerrymander lifted "this controversy out of the so-called 'political' arena and into the conventional sphere of Constitutional litigation." *Id.* at 346-47.

14. *Id.* at 339, 346.

15. *Id.* at 349 (concurring opinion).

16. U.S. CONST. amend. XV, § 1: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."

17. 369 U.S. 186 (1962).

18. Specifically, the Court stated that: "[A]ppellants' claim that they are being denied equal protection is justiciable and if 'discrimination is sufficiently

tionment controversy out of the "political arena" and into the "judicial arena."[19] The Court indicated that judicially manageable standards were present and could be found under the equal protection clause.[20] Over the ensuing years the Court has refined its position and clarified its standards. In *Wesberry v. Sanders*[21] it held that: "[W]hile it may not be possible to draw congressional districts with mathematical precision, that is no excuse for ignoring our Constitution's plain objective of making equal representation for equal numbers the fundamental goal . . . ."[22] This line of clarification was continued in *Reynolds v. Sims*.[23] In that case the Court held that voting districts must be substantially equal in population[24] in order to prevent dilution of votes.[25] The decision was based upon the fourteenth amendment.[26] In addition to voting districts being of equal population, they must be contiguous and compact.[27] These two standards appear to be the ones that a federal court will look to when judging the validity of a reapportionment plan. If they are met, the reapportionment is presumed valid.

The Court apparently made its position on political gerrymandering clear when it affirmed, in a per curiam decision, a district court's

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shown, the right to relief under the equal protection clause is not diminished by the fact that the discrimination relates to political rights.' " (Citation omitted.) *Id.* at 209-10. *See* Note, *The Supreme Court in its Political Milieu,* 46 B.U.L. REV. 375, 383 (1966); 30 GEO. WASH. L. REV. 1010 (1962).

19. "We hold that this challenge to an apportionment presents no nonjusticiable 'political question.' " 369 U.S. at 209.

20. *Id.* at 226.

21. 376 U.S. 1 (1964).

22. *Id.* at 18.

23. 377 U.S. 533 (1964).

24. *Id.* at 579.

25. "[T]he right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." *Id.* at 555. *See* Lucas v. The Forty-Fourth Gen. Assembly, 377 U.S. 713 (1964); Roman v. Sincock, 377 U.S. 695 (1964); Davis v. Mann, 377 U.S. 678 (1964); Maryland Comm. for Fair Representation v. Tawes, 377 U.S. 656 (1964). All these cases were reapportionment cases decided the same day as *Reynolds.*

26. "Diluting the weight of votes because of place of residence impairs basic constitutional rights under the fourteenth amendment . . . ." 377 U.S. at 566.

27. *Id.* at 578-79. This requirement is also decreed by Illinois state law: ILL. ANN. STAT. ch. 24, §§ 21-36 (Smith-Hurd 1961). Most states have such a requirement. *See* Note, *Political Gerrymandering: The Law and Politics of Partisan Districting,* 36 GEO. WASH. L. REV. 144, 146-49 (1967).

holding that political gerrymandering was a nonjusticiable political question.[28] Justice Harlan wrote a short concurrence in which he declared: "[I]t [the district court] rejected contentions that apportioning on a basis of . . . partisan 'gerrymandering' may be subject to federal constitutional attack under the Fourteenth Amendment. In affirming this decision, the Court necessarily affirms . . . [this] eminently correct principle[s]."[29] The Supreme Court and the lower federal courts have consistently adhered to this position.[30] Thus, if a group is to convert a nonjusticiable political question into a justiciable constitutional question, the group must allege some type of gerrymander other than a political gerrymander. The group must have a common denominator based on racial, ethnic, or economic background.[31]

The dissent in *Cousins* points out that there is ultimately no real substantive difference between a racial gerrymander and a political gerrymander. The only reason a political incumbent would want to dilute the votes of a racial or ethnic group (or any other group) is because of the political power they could wield if they voted as a bloc rather than as individuals: "The mere fact that a number of citizens share a common ethnic, racial, or religious background does not create the need for protection against gerrymandering. It is only when their common interests are strong enough to be manifested in political action that the need arises."[32] If any group can establish that they are likely to vote as a bloc, and that the political "ins" reapportion to either concentrate[33] or fragment[34] that voting bloc, then there

28. WMCA, Inc. v. Lomenzo, 238 F. Supp. 916 (S.D.N.Y.), *aff'd per curiam,* 382 U.S. 4 (1965) (WMCA was a taxpayer's association).

29. 382 U.S. at 6.

30. See Ferrell v. Oklahoma *ex rel.* Hall, 339 F. Supp. 73 (W.D. Okla.), *aff'd,* 406 U.S. 939 (1972): "The issue of political gerrymandering . . . is nonjusticiable . . . ." 339 F. Supp. at 82. Grivetti v. Illinois State Electoral Bd., 335 F. Supp. 779 (N.D. Ill. 1971); Kilgarlin v. Martin, 252 F. Supp. 404 (S.D. Tex. 1966), *rev'd on other grounds sub nom.,* Kilgarlin v. Hill, 386 U.S. 120 (1967): "This court concludes that plaintiffs' allegation of political gerrymandering does not state a claim upon which relief may be granted . . . ." 252 F. Supp. at 434; Meeks v. Avery, 251 F. Supp. 245, 250-51 (D. Kan. 1966). All of these cases involved an alleged gerrymander based on partisan politics.

31. *See* Wright v. Rockefeller, 376 U.S. 52 (1964); Cousins v. City Council, 466 F.2d 830, 852 (7th Cir.), *cert. denied,* 409 U.S. 893 (1972); Cousins v. City Council, 322 F. Supp. 428, 436 (N.D. Ill. 1971).

32. 466 F.2d at 852.

33. The black plaintiffs in *Cousins* were claiming just such a concentration. The "ghetto" wards that had a black majority were virtually 100% black and the "fringe" wards that had black voters contained few blacks. *Id.* at 834.

34. The Puerto Rican plaintiffs in *Cousins* were alleging that they had been

is a violation of the fourteenth amendment.[35] Since the coverage of the equal protection clause of the fourteenth amendment[36] is not limited to violations based upon racial or ethnic background, as is the fifteenth amendment,[37] it would be a violation of the fourteenth amendment to deny independent voters the opportunity to prove that a reapportionment was intentionally directed to affect their voting strength. The Supreme Court now reads *Gomillion* and other racial discrimination cases as resting on the fourteenth, *not* the fifteenth amendment,[38] thus strengthening the position of the independent voters.

The group asserting the constitutional violation should be a clearly definable group. In the city of Chicago the independent voters are just such a group.[39] If the independents, however, are recognized as a definable group and their allegations are considered justiciable, then it follows that the Republicans and the Democrats must be allowed to sue. The Supreme Court has by implication rejected this contention.[40] If the major political parties were allowed to present justiciable questions, then the judiciary would be further entangled in the "political thicket." Recent decisions indicate that the Supreme Court

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fragmented. Based on the 1970 census they should have had a majority in two wards, yet the ward lines were drawn in such a manner as to place the Puerto Rican "ghetto" into three different wards, none of which had a Puerto Rican majority. *Id.* at 834.

35. Indeed, this is the reasoning of the majority in *Cousins*. The evidence established a probability that this was the purpose of the Democratic majority in the city when they redrew the ward lines. *Id.* at 843.

36. U.S. CONST. amend. XIV, § 1: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

37. U.S. CONST. amend. XV, § 1: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."

38. Whitcomb v. Chavis, 403 U.S. 124, 149 (1971); Williams v. Rhodes, 393 U.S. 23 (1968): "The Equal Protection clause of the Fourteenth Amendment permits the states to make classifications and does not require them to treat different groups uniformly. Nevertheless, it bans any 'invidious discrimination' .... That command protects voting rights and political groups ...." *Id.* at 39.

39. M. ROYKO, BOSS: RICHARD J. DALEY OF CHICAGO 13 (1971).

40. Whitcomb v. Chavis, 403 U.S. 124, 156 (1971).

is retreating from this area.[41] Thus it appears that the allegation of a fourteenth amendment violation in reapportionment by a group whose only common characteristic is political philosophy, is still among the nonjusticiable political questions. It is likely to remain so for the foreseeable future.

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41. Witness the Supreme Court's recent retreat from "one man-one vote" in the reappointment of the Virginia Legislature. Mahan v. Howell, 410 U.S. 315 (1973).