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CONSTITUTIONAL LAW-EQUAL PROTECTION-STATE RESTRICTIONS IN NOMINATIONS OF CANDIDATES

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CONSTITUTIONAL LAW—EQUAL PROTECTION—STATE RESTRICTIONS IN NOMINATIONS OF CANDIDATES—The Progressive Party, unable to qualify as a political party for purposes of the Illinois primary election,[1] sought to nominate candidates for state and national offices by petition. The Illinois Election Code[2] provides that such nominating petitions shall include the signatures of at least 200 qualified voters from each of at least 50 counties in the state. Of the state's registered voters, 87 per cent reside in the 49 most populous counties. The State Officers Electoral Board found that the petitions were insufficient, and the Illinois Supreme Court denied a motion for leave to file a petition of mandamus to compel certification of the party's nominees.[3] An injunction against the enforcement of

[1] Ill. Rev. Stat. (1947) c. 46, § 10-2.
[2] Ibid.
[3] N.Y. TIMES, Sept. 15, 1948, p. 24:1.

the statute was denied by a three-judge federal district court.[4] Upon appeal to the Supreme Court of the United States, *held*, affirmed by a per curiam opinion. Justice Rutledge concurred; Justices Douglas, Black, and Murphy dissented. *MacDougall v. Green*, (U.S. 1948) 69 S.Ct. 1.

The federal courts have recently been torn between a realization of the inequities of some state election laws and a hesitancy to overturn state legislative classifications.[5] The reluctance to declare unconstitutional nonracial state voting classifications has generally been paramount,[6] although the bases of decision have recently been somewhat ambiguous. An antiquated Illinois Apportionment Act was upheld in *Colegrove v. Green*[7] by the vote of only four judges. Three members of the majority there felt that apportionment was a "political question" that was nonjusticiable.[8] Justice Rutledge concurred with the majority on the narrow basis that the peculiar facts of the *Colegrove* case made it proper to decline the discretionary injunctive relief prayed for. On the authority of the *Colgrove* case, a three-judge federal court refused to enjoin the palpably unequal Georgia county unit system of primary elections.[9] The appeal to the Supreme Court was denied without opinion.[10] Justice Rutledge, however, filed a separate opinion stating that the appeal should be heard on the merits, since the *Colegrove* case turned on

[4] N.Y. TIMES, Oct. 12, 1948, p. 22:3. The petitioners conceded that they had sufficient signatures in only 41 counties. On procedure, see 28 U.S.C. (1946) §§ 2281 and 2284.

[5] Concerning the general problem of apportionment, see Durfee, "Apportionment of Representatives in the Legislature: A Study of State Constitutions," 43 MICH. L. REV. 1091 (1945); Chafee, "Congressional Apportionment," 42 HARV. L. REV. 1015 (1929); Walter, "Reapportionment of Districts," 37 ILL. L. REV. 20 (1942); Smiley v. Holm, 285 U.S. 355, 52 S.Ct. 397 (1932).

An excellent survey of state laws in regard to obtaining a place on state ballots is found in 57 YALE L.J. 1276 (1948).

[6] See Blackman v. Stone, (C.C.A. 7th, 1939) 101 F. (2d) 500 (upholding the identical statutory provisions involved in the principal case); Ring v. Marsh, (D.C. N.J. 1948) 78 F. Supp. 914; Wood v. Broom, 287 U.S. 1, 53 S.Ct. 1 (1932). In the latter case the constitutional issue was ignored.

The Court exhibits no reluctance to overturn classifications that involve racial discrimination. Cf., United States v. Classic, 313 U.S. 299, 61 S.Ct. 1031 (1941); Nixon v. Herndon, 273 U.S. 536, 47 S.Ct. 446 (1927); Brown v. Baskin, (D.C. S.C. 1948) 78 F. Supp. 933.

[7] 328 U.S. 549, 66 S.Ct. 1198 (1946); rehearing denied before a full bench, 329 U.S. 828, 67 S.Ct. 199 (1946); See Burdette, "The Illinois Congressional Redistricting Case," 40 AM. POL. SCI. REV. 958 (1946); 45 MICH. L. REV. 368 (1947); 56 YALE L.J. 127 (1946).

[8] On the political question doctrine generally, see Coleman v. Miller, 307 U.S. 433, 59 S.Ct. 972 (1939); Field, "The Doctrine of Political Questions in the Federal Courts," 8 MINN. L. REV. 485 (1924); Dodd, "Judicially Non-Enforceable Provisions of the Constitution," 80 UNIV. PA. L. REV. 54 (1931).

[9] Turman v. Duckworth, (D.C. Ga. 1946) 68 F. Supp. 744 at 746. In the Georgia primary, Fulton County, with 84,550 votes was entitled to only six county unit votes, while Chattahoochee County was entitled to two unit votes for 265 primary votes. See also Cook v. Forston, (D.C. Ga. 1946) 68 F. Supp. 624.

[10] Cook v. Forston, 329 U.S. 675, 67 S.Ct. 21 (1946).

equitable discretion and would not necessarily apply to the Georgia case. The attack in the principal case on the Illinois nominating procedure brought very similar problems before the Court. The statutory provisions struck hard at minority parties with support concentrated in areas of heavy population. There were, however, serious practical difficulties to injunctive relief.[11] The per curiam opinion refrained from any mention of a "political question," or of discretionary abstention, the decision being based squarely on the ground that the Constitution does not deny the states the power to require candidates to have their support spread geographically. Justice Rutledge again concurred on the single ground that injunctive relief should be declined on the particular facts of the case. Justices Douglas, Black, and Murphy, the dissenters in the *Colegrove* case, again joined in the opinion that the Illinois statute was a dilution of political rights offensive to the equal protection clause of the Fourteenth Amendment. This decision, together with those in the *Colegrove* and Georgia cases, would seem to indicate that a clear majority of the present Court is unwilling to upset any present state election procedure as involving an unconstitutional classification. Justice Rutledge has yet to voice an opinion on the fundamental constitutional issues involved, and his attitude may well be an inarticulate major premise of the majority in feeling that the Court cannot normally provide a satisfactory answer to voting inequalities by injunctive relief.[12] However, this view would appear to lend an undesirable uncertainty to the entire field of election laws. Clearly, the vigorous minority has been unwilling to accept any state classifications in election procedures without searching inquiry, apparently assuming that election classifications involve a particular area of judicial competency.[13]

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[11] "The task [of preparing new ballots] would be gigantic. Even with the mobilization of every possible resource, it is gravely doubtful that it could be accomplished. . . . Even if it could for all except absentee voters, they would be disfranchised." Rutledge, J., concurring, principal case, at p. 4. One might wonder if an injunction against enforcement of the Illinois statute would allow any individual to insist on a right to appear on the ballot.

[12] Justice Rutledge is also showing allegiance to the often repeated principle that the Court should not pass upon the constitutionality of a statute unless absolutely necessary for the decision. See Ashwander v. Tennessee Valley Authority, 297 U.S. 288 at 346, 56 S.Ct. 466 (1936); United States v. Lovett, 328 U.S. 303 at 318, 66 S.Ct. 1073 (1946).

[13] Compare Justice Black's view of the incompetence of the judiciary in questions dealing with the amending process, and with state regulation of commerce. Coleman v. Miller, 307 U.S. 433 at 459, 59 S.Ct. 972 (1939); Southern Pacific Ry. Co. v. Arizona, 325 U.S. 761 at 784, 65 S.Ct. 1515 (1945).