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## WHEN IS A POLITICAL QUESTION JUSTICIABLE?

By IVAN C. RUTLEDGE\*

*Thompson v. Talmadge*<sup>1</sup> may go down in state history as the final scene of an opera bouffe situation, written with dignity and judicial courage by the present incumbents of the Highest Bench. On the other hand, if the stripe of historian known as a debunker becomes popular again, as in the Harding-Coolidge-Hoover era, it may be expected that the judicial cause celebre of this year in Georgia will be characterized as the political coup which was decisive because of the superstitious reverence of the populace for the judiciary.

The political question doctrine is frequently enmeshed with other doctrines in the judicial mind. Probably its nearest relative is the doctrine of the separation of powers, which teaches in its most extreme and absurd form that the legislature alone must only legislate, the judiciary alone must only adjudicate, and the executive alone must only execute.<sup>2</sup> The political question doctrine then becomes: the political branches must determine policy and decide political questions, but the judiciary, not being a political branch, must not decide political questions.<sup>3</sup> Another related doctrine is that of the independence and autonomy of the three branches of government. It teaches that neither branch of the government is subject to control by another branch but each has supreme governmental power within its own sphere.<sup>4</sup> Of course where matters of constitutional right are involved this doctrine vanishes and the judiciary are supreme, as final expounders of the constitution, which is theoretically supreme.<sup>5</sup> Indeed the Constitution of Georgia expressly confers upon the judiciary such power over "legislative acts."<sup>6</sup> Supposing, then, that a question is at once political and constitutional, the theories are at odds with each other. Therefore, when a court refuses to decide a question on the ground that it is political it discovers a limitation on the doctrine of judicial review. In short it may be said that a political question is not justiciable when its subject matter is of such a nature that the general rule of judicial review is inapplicable.

It should be pointed out that other obstacles of justiciability exist, such as lack of jurisdiction of the subject matter<sup>7</sup> or parties,<sup>8</sup> or the

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1. *Thompson v. Talmadge*, 41 S.E. 2d 883.

2. *Kilbourn v. Thompson*, 103 U. S. 168 (1880).

3. *Fong Yue Ting v. U. S.*, 149 U. S. 698 (1893).

4. *Merrill v. Sherburne*, 1 N.H. 199 (1818).

5. *Marbury v. Madison*, 1 Cranch 137 (1803).

6. Art. I. Sec. IV. Par. II.

7. *Marbury v. Madison*, supra note 5.

8. *Pennoyer v. Neff*, 95 U. S. 714 (1877).

fact that the controversy is not presented in a form traditional for adjudication by a court or a form prescribed by the legislature,<sup>9</sup> or the lack of interested parties,<sup>10</sup> or the lack of a real controversy.<sup>11</sup> It should also be made clear that the existence of a political question in a controversy does not ipso facto deprive the court of jurisdiction over the case. Its presence may simply conclude some of the issues in the case.<sup>12</sup>

The federal courts have refused to decide certain questions on the ground that they are political in the sense that they turn on relationships arising from the federal union of the United States, such as: interstate rendition;<sup>13</sup> the guaranty of a republican form of government;<sup>14</sup> and the political status of a state.<sup>15</sup> Other examples are to be found in questions which impinge upon the conduct of foreign affairs, such as validity of acts of foreign governments,<sup>16</sup> determination of the sovereignty to which a territory belongs,<sup>17</sup> or the date a war began.<sup>18</sup> In the state courts typical questions held not meet for determination arise from claims of irregularity in the process of policy formation by the people of the state or their agents. For example, an attack may be made upon a statute on the ground that it was not enacted according to procedures prescribed by the constitution<sup>19</sup> or that the legislature which purported to enact it was not properly constituted.<sup>20</sup>

What basis can be derived from these cases of judicial self-limitation which will serve as an explanatory generalization or principle? It has been suggested that the unreliability of evidence,<sup>21</sup> or the lack of rules of law,<sup>22</sup> or judicial fear of the consequences of adjudication<sup>23</sup> are reasons. On the other hand it has been pointed out that expediency or judicial timorousness are not only unsatisfactory as principles of law but are inaccurate.<sup>24</sup> Undoubtedly the vagueness of the contours of the problem provides the judiciary with a convenient bomb shelter. Be that as it may, a new formulation is herewith proposed. The business of a court is primarily the determination of private rights and the extent of individual interests under the law. By "the law" is meant in this connection the extent to which

9. *Nashville, Chattanooga & St. Louis Ry. v. Wallace*, 288 U. S. 249 (1932).

10. *Massachusetts v. Mellon*, 262 U. S. 447 (1923).

11. *Muskat v. U. S.*, 219 U. S. 346 (1911).

12. *Prize Cases*, 2 Black 635 (1863).

13. *Kentucky v. Dennison*, 24 How. 66 (1860).

14. *Pacific States Tel. & Tel. Co. v. Oregon*, 223 U. S. 118 (1912).

15. *Georgia v. Stanton*, 6 Wall. 50 (1868).

16. *Oetjen v. Central Leather Co.*, 246 U. S. 297 (1918).

17. *Williams v. Suffolk Ins. Co.*, 13 Pet. 415 (1839).

18. *The Protector*, 12 Wall. 700 (1871).

19. *MacFeeley v. Williams*, 186 Ga. 145 (1938).

20. *Macon & Augusta R. Co. v. Little*, 45 Ga. 370 (1872).

21. *IV Wigmore on Evidence* (3rd ed. 1940) 699, Sec. 1350.

22. Field, "The Doctrine of Political Questions in the Federal Courts," 8 *Minn. L. Rev.* 485 (1924).

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

24. Weston, "Political Questions," 38 *Harv. L. Rev.* 296 (1924).

the organs of the state have provided that a given interest which comes before the court in a concrete case shall be recognized by the officials of the state. If there are any doubts as to this "extent of recognition" there are questions of law. If there are any doubts as to the quality or quantum of the "interest" there are questions of fact. In courts of law the resolution of these questions in the Anglo-Saxon tradition is to be made on the basis of a reasoned morality<sup>25</sup> as applied to the fact situation in which the parties before the court are found. On the other hand the judicial forum is not the only governmental organ for the determination of issues in which the state is interested. Other forums that might be suggested are the legislature, the ballot box, and the councils of the executive branch. These agencies are called political. The basis for decision in these precincts is now one consideration and now another. It may be morality, or the forces of adjustment of competing groups, or expediency. At bottom it is a matter of power, expressing itself through public opinion and in part through force or the threat of force, especially in foreign affairs. What would be irrelevant in a court of law here becomes at times controlling. Information that would not be available to a court of law for the very reason that the value of the information would be lost by making it public does not have to be made public in a political forum. Decisions can be based on secret reasons or facts known only to the representative of the public. A political decision connotes an exercise of the will in the interest of the decider or his principal; a judicial decision connotes an exercise of the faculty of reason appealing to standards of right and wrong in the ethical sense. A judge decides as between the parties to the litigation; a political decision may be made on the basis of conserving or advancing the power of a person or group—which may be indeterminate and inarticulate—on whose behalf the decision is made. Consequently the rationalization of judicial self-limitation is frequently made with the separation of powers as the starting point, supplemented by the doctrine of the independence of the departments of government, the presumption of regularity of official action,<sup>26</sup> the rule that mandamus will not lie to control official discretion,<sup>27</sup> the construction of constitutional provisions as directory rather than mandatory,<sup>28</sup> the doctrine that equity will not interfere with elections,<sup>29</sup> and the refusal to consider the constitutionality of an act long acquiesced in when affairs of state have been carried on under it.<sup>30</sup>

The line of demarcation outlined above is most clearly demon-

25. See Pound, "The Theory of Judicial Decision, Pt. III," 36 Harv. L. Rev. 940 (1923).

26. U. S. v. Fletcher, 148 U. S. 84 (1893).

27. Work v. U. S. ex rel. Rives, 267 U. S. 175 (1925).

28. Fergus v. Marks, 321 Ill. 510, 152 N.E. 557 (1926).

29. Colegrove v. Green, ..... U. S. ...., 30 L. Ed. 1242 (1946).

30. State ex rel. Warson v. Howell, 92 Wash. 540, 546, 159 Pac. 777, 779 (1916).

strated in a situation which presents a logical difficulty which cannot be surmounted. This situation occurs when a revolution has taken place. Obviously a court which survived the revolution or one newly created cannot be asked to adjudicate that the revolution has, or has not taken place because the wrong decision would involve a necessary determination that the court is not a court, wherefore it cannot decide wrongly and only one conclusion is possible, the one which affirms the existence of the court. Whether the current regime should command the continued loyalty of the people is beside the point as a legal question, whatever its merits as a moral or political proposition.<sup>31</sup>

Coming now to the Georgia case which has focussed the attention of the bar on this area of constitutional law it clearly may be affirmed that whether an individual is or is not the governor of a state is not analogous to the situation outlined above. A change in the incumbency of an office, even that of chief magistrate of a constitutional government does not raise the question of the legitimacy of the governmental regime.<sup>32</sup> Its residuum of power analogous to that of the English Crown, if anywhere in an organ of government with separation of powers, is in the legislature, to the extent that it has been formally conferred by the people.<sup>33</sup>

On the other hand, courts are sometimes faced with questions of private right which turn on issues that would be non-justiciable if they had been previously determined by the political branch. In such a case they make an independent determination based on considerations traditionally employed by courts of law, as for example in foreign affairs the principles of international law rather than, say, the advantage of the sovereign, are employed to decide the issue.<sup>34</sup> Public office, however, even the highest office, is not strictly speaking a typical subject of a claim of private right. "That a public office is the property of him to whom the execution of its duties is intrusted is repugnant to the institutions of our country . . . Public officers are . . . but the agents of the body politic . . ." <sup>35</sup> In *Taylor and Marshall v. Beckham*<sup>36</sup> all the Justices except Mr. Justice Harlan agreed that whatever right a claimant to, as distinguished from a rightful incumbent of an office has must be measured by the means provided for ascertaining the fact of his election or appointment to

31. Cf. Weston, op. cit., at pp. 302-304, where he discusses The Duke of York's Claim to the Crown (1460).

32. Cf. Luther v. Borden, 7 How. 1 (1849).

33. See I Cooley's Constitutional Limitations (8th ed. 1927) 173-179. With Macon & Augusta R. Co. v. Little, supra n. 21, compare Prince v. Skillin, 71 Maine 361 (1880), the former holding that the legality of a legislative session is not open to judicial question, the latter that the courts must recognize one or the other of two legislatures each claiming legitimacy.

34. Ware v. Hylton, 3 Dall. 199 (1796). See the opinion of Mr. Justice Iredell at p. 261.

35. Quoted prof State ex rel. Savannah v. Dews in Walton v. Davis, 188 Ga. 56, 58 (1939).

36. 178 U. S. 548 (1900).

the office. The conclusion to be drawn, therefore, is that the question of who has acceded to public office is at best a matter of private right only to the extent that ascertainment of that fact is committed by law to the courts. It follows then that questions which might be non-justiciable because of their political character may be made justiciable by a process of political self-limitation comparable to judicial self-limitation. Indeed one of the mainstays of progress in creating an orderly civilization is the ability of society to remove matters from the policy area to the area of the rule of law. A single example of this process will suffice to point up the discussion: Boundary disputes between states are justiciable under Article III of the Constitution of the United States,<sup>37</sup> but the same question would seem to be non-justiciably political insofar as the tribunals of the states affected are concerned.<sup>38</sup>

In what sense may the question of who is the rightful incumbent of an elective office be said to be political? Viewed from the standpoint of the public interest in the question the matter is political both in the sense of partisan politics<sup>39</sup> and in the broader meaning that the selection of one individual as opposed to another is an expression of the will of the electorate as to what kind of policies are desired. To this extent the question is quite comparable to the question of the validity of a statute when challenged on the ground of non-compliance with procedural provisions in a constitution. To this extent also, the determination of which of two contenders is successful is a determination of policy in its effect, no matter how judicial the court may be, or how much traditional legal materials are used in reaching the determination. This viewpoint is recognized in the provisions of Art. V, Sec. I, Par. IV of the Georgia Constitution which commit the matter of election of a governor to the legislature at least when no majority is voted in the general election. It is also apparent in the provisions for contested elections if not in the provisions for canvassing the votes, neither of which is directly committed to a court.<sup>40</sup> At least insofar as quo warranto is concerned the legislature has prohibited its use to test the right of a person to occupy the office of governor.<sup>41</sup>

37. *New Jersey v. New York*, 5 Pet. 284 (1831).

38. *Bedel v. Loomis*, 11 N. H. 2 (1840).

39. *Turman v. Duckworth*, 68 F. Supp. 744 (D. C. N. D. Ga. 1946), appeal dismissed, 67 S. Ct. 21 (1946), rehearing denied 67 S. Ct. 296 (1946).

40. Art. V, Sec. I, Par. III-V, Sec. II, Par. I. It may be questioned whether "legislative acts" which the judiciary shall declare void (supra n. 6) include the election of a governor or other actions which are not acts of legislation. Cf. *Cooley*, loc. cit. supra n. 34, for the proposition that a state legislature has the general power of governing consistent with power to adjudicate in the courts and power to execute the laws in the executive branch, and subject to express constitutional limitations or deprivations of private right inconsistent with free government or natural justice.

41. *Georgia Code*, 1933, Secs. 64-208, 64-209. But the Georgia Declaratory Judgments Act, Ga. Laws, 1945 p. 137 seems to have the effect of reopening the question by another route under the recent decision unless that case be regarded not as a test of title to the office but under the doubtful category of judicial assistance to preserve executive authority. Cf. *U. S. v. Debs*, 64 Fed. 724 (Cir. Ct. N. D. Ill. 1894).

Under the present state of the law of the Constitution of Georgia not only are acts of the General Assembly violative of express constitutional limitations void and subject to judicial review, but any action of the General Assembly not a matter of internal procedure would seem to be subject to judicial inspection to determine whether there was power to act. That is to say, limitations upon its power which may be judicially enforced include not only express constitutional limitations but restrictions arising from a judicial determination that there is no constitutional warrant for the action. The Court held that it had before it the fundamental question of whether the legislative decision to proceed to elect a governor was within constitutional limits of legislative power, and that determination of such a question is within the prerogatives of the judiciary. It held that title to the office is a matter of private right which raises the question of whether the legislative act of election is contrary to the Constitution. Based on the contentions of counsel, the Court expressly determined the question on the same basis as if the former incumbent had not resigned, so that the "right" involved was that of the prior incumbent. In addition, public interest in having a decision was mentioned as an additional reason for adjudication. The Court did not decide that the election was an infringement of the powers of the executive or judicial branches; but it emphatically held that it was the exercise of a power not conferred upon it by the Constitution and therefore was an infringement of the power residing in the people, in short, an act of usurpation.

As to the precise question involved, the General Assembly can elect a governor when and only when no person receives a majority of the votes cast in the general election. On the other hand it appears that if the majority vote were cast at successive elections for persons who because of death, or possibly ineligibility, could not be seated, the prior incumbent could even attain life tenure as governor. It would seem that only a constitutional amendment could alter this situation and that the prior incumbent has a constitutional right to have the courts protect his incumbency. Consequently a statute withdrawing the question from the courts similar to the statute prohibiting the use of *quo warranto* would be unconstitutional. Of course the possibility of a governor with life tenure can be dismissed as too slight to be considered, as well as the temptation to friends of the incumbent to assassinate the governor-elect, but the continued decline of the prestige of legislative bodies must give pause. Is the art of popular government so much in eclipse that representatives elected to the highest deliberative assembly cannot be trusted to stay within the bounds of their power?

Whether in a given circumstance the political power has limited itself and committed a question to judicial determination may be clear by virtue of a constitutional or statutory provision. On the other hand, if the meaning of the provision itself is not clear, the question of whether such renunciation of power to act politically has taken place will itself have a political flavor in the sense that its determination is based upon the desires and preferences of the public. In the case of *Thompson v. Talmadge* the relative lack of political disturbance resulting from the decision may be regarded at least as confirmation of the accuracy of the political judgment of the majority of the Court in deciding to adjudicate and at most as a correct legal determination that the people intended that the action of the General Assembly should be subject to review by the judiciary. The very existence of popular uncertainty as to the effect of the legislative election is some slight token<sup>42</sup> that under the circumstances the question although political was in the popular mind justifiable. If the succession of the lieutenant-governor is left out of the discussion, the tendency of the decision is on the one hand favorable to popular election but on the other contrary to political change. This tendency is in accord with the new Constitution, which lengthens gubernatorial terms<sup>43</sup> and provides for a popularly elected successor in case of vacancy in the office.<sup>44</sup>

There are two external checks upon a court which undertakes adjudication of a political question which has not been committed to the courts. One of them is political action within the area of legality: the enactment of restrictive constitutional or statutory provisions. The other is extra-legal political action: the refusal of the other branches of government or the people to carry out the mandate of the court. If the latter occurs the result is the unpleasant necessity of drawing a conclusion that either the court or the political organ violated the law.<sup>45</sup> Such considerations may at times stimulate judicial self-limitation in the interest of the dignity of the courts and over the long run in the interest of the integrity of the rule of law.

There is no inherent improbability in a situation where the legislature decides contested<sup>46</sup> and plurality<sup>47</sup> elections but the courts decide what happens when the governor-elect dies. On the other hand it is

42. It would be difficult to judge the relative proportions of popular uncertainty, and dissatisfaction with the result on the part of the political opposition. Compare the discussion of this phenomenon under the heading of estoppel in *Turman v. Duckworth*, supra n. 40.

43. Constitution of Georgia, Art. V, Sec. I, Par. I.

44. *Ibid.*, Par. VII.

45. Cf. *Ex parte Merryman*, Fed. Cas. No. 9, 487 (Cir. Ct. D. Md. 1861).

46. Constitution of Georgia, Art. V, Sec. I, Par. V.

47. *Ibid.*, Par. IV. The language of the paragraph concludes: ". . . and in all cases of election of a Governor by the General Assembly, a majority of the members present shall be necessary to a choice," rather than: ". . . and in such case, a majority of the members present shall be necessary to a choice."

doubtful that this situation is ineluctably dictated by the Constitution of Georgia.

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