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Realignment Of Municipalitiesa Political Question?

is trying to discourage the use of confessions in evidence unless absolutely necessary. This would prevent the non-discovery or loss of probative evidence available prior to trial, and the unwarranted reliance[47] by state prosecutors upon confessions to secure convictions.

While there is much to be said for the decisions excluding coerced confessions, there are those who feel that known criminals are being afforded too much protection, in view of the constantly increasing national crime rate. The sentiments of this group are well summarized by the attack of Senator Ervin of North Carolina on the merits of the *Mallory* decision:

> "Frankly, I believe that in recent years enough has been done for those who murder, rape, and rob; and that it is about time for Congress to do something for those who do not wish to be murdered, or raped, or robbed."[48]

The American system is accusatorial, rather than inquisitorial,[49] and an accused is presumed to be innocent until convicted. The law assures that he will be treated humanely, and "that no more force will be exercised upon him than sufficient to bring him to court.... In other words, a man ... is entitled to freedom from molestation, to food, water, opportunity to sleep, and humane treatment generally. He also may employ counsel.... The prisoner may be visited ... by relatives and friends."[50] Therefore, it seems that coerced confessions must be excluded in order to prevent fundamental injustices[51] to all persons accused of participation in crime, even though this may provide some undeserved protection to the guilty.

JOHN MICHAEL GARNER

REALIGNMENT OF MUNICIPALITIES— A POLITICAL QUESTION?

The term "Political Question" has generally been reserved by the courts for use when an issue is "of a peculiarly political nature and therefore not meet for judicial determination."[1] In this manner, the courts decide that they are without "jurisdiction," although a more precise statement would be that the "issue is non-justiciable." One

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[47]In Haley v. Ohio, 332 U.S. 596, 609 (1948), the dissenting opinion stated that "the ... undisputed facts left comparatively little need for such a confession ...."

[48]104 Cong. Rec. 17085 (daily ed. Aug. 19, 1958).

[49]Watts v. Indiana, 338 U.S. 49, 54 (1949).

[50]Report of Committee on Lawless Enforcement of Law, 1 Am. J. of Police Science 575, 576 (1930).

[51]See note 16 supra; Lisenba v. California, 314 U.S. 219, 236 (1941).

[1]Colegrove v. Green, 328 U.S. 549, 552 (1946).

of the areas that the Supreme Court has consistently held to be political in nature and therefore not justiciable is the exercise of control by state legislatures over the apportionment,[2] districting,[3] creation,[4] or diminution[5] of territories within the state. Nevertheless, a realignment suit presents a complex problem when the plaintiff alleges that the state action constitutes a violation of some provision of the United States Constitution.

This problem confronted the United States Court of Appeals for the Fifth Circuit in *Gomillion v. Lightfoot*.[6] In this class suit brought by Negroes in the federal District Court of Alabama against several defendants,[7] it was alleged that a realignment of the boundaries of the City of Tuskegee deprived the plaintiffs of their privilege to vote in the municipal elections of that city. The plaintiffs maintained that this realignment violated the fourteenth and fifteenth amendments.[8] The District Court, in dismissing the complaint upon defendants' motion, stated that it had "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

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[2]Ibid.; Radford v. Gary, 145 F. Supp. 541 (W.D. Okla. 1956), aff'd per curiam, 352 U.S. 991 (1957).

[3]Colegrove v. Green, 328 U.S. 549 (1946); Wood v. Broom, 287 U.S. 1 (1932). See also Wise v. Bigger, 79 Va. 269 (1884).

[4]"Trusts of great moment ... are confided to such municipalities; and, in turn, they are required to perform many important duties, as evidenced by the terms of their respective charters. Authority to effect such objects is conferred by the legislature; but it ... does not divest itself of any power over the inhabitants of the district which it possessed before the charter was granted. Unless the Constitution otherwise provides, the legislature still has authority to amend the charter of such a corporation, enlarge or diminish its power, extend or limit its boundaries, divide the same into two or more, consolidate two or more into one, overrule its action whenever it is deemed unwise, impolitic, or unjust, and even abolish the municipality altogether, in the legislative discretion." Commissioners of Laramie County v. Commissioners of Albany County, 92 U.S. 307, 308 (1876); see Hunter v. City of Pittsburgh, 207 U.S. 161 (1907) (consolidation).

[5]City of Pawhuska v. Pawhuska Oil & Gas Co., 250 U.S. 394 (1919).

[6]270 F.2d 594 (5th Cir. 1959).

[7]Gomillion v. Lightfoot, 167 F. Supp. 405 (M.D. Ala. 1958). Defendants: Lightfoot, Mayor; Edwards, Gregory, Olsin, Thompson and Vaughan, Members of the City Council of Tuskegee; Hodnett, Chief of Police; Leslie, Huddleston, Dyson, Thompson and Guthrie, Members of the Board of Revenue of Macon County; Hornsby, Sheriff of Macon County; Varner, Judge of Probate of Macon County; City of Tuskegee, Municipal Corporation.

[8]"[T]he Act in question excludes 99 per cent of the 400 Negro voters from the City of Tuskegee and ... not one single one of the 600 white voters ...." 270 F.2d at 608. In addition to the denial of the right to vote, plaintiffs alleged that they had been deprived of police protection, street improvements, and the right to participate in municipal affairs. 270 F.2d at 595. Only the denial of voting rights is considered in this comment.

in the State of Alabama."[9] In affirming, the Court of Appeals for the Fifth Circuit relied on *South v. Peters*,[10] which held that "the Federal Constitution does not take from states the right to set up their own internal organizations and prescribe the manner of state elections."[11] Applying this principle to the *Gomillion* case, the court decided that "in the absence of any racial or class discrimination appearing on the face of the statute, the courts will not hold an act, which decreases the area of a municipality by changing its boundaries, to be invalid as violative of the Fourteenth and Fifteenth Amendments to the United States Constitution. . . ."[12]

In the dissenting and specially-concurring opinions, two questions are raised which must be considered in an analysis of the problem: (1) What attitude have the courts developed toward political questions? (2) What effect does the alleged violation of constitutional amendments have upon the non-justiciability of the issue?

It is fairly well settled that the theoretical basis of a political question is the "Separation of Powers" concept of the Constitution.[13] This concept stems from the construction of the Constitution, *i.e.*, the separation of articles I, II and III, rather than from the substantive matter therein. In *Kelley v. Marron*,[14] the New Mexico Supreme Court summarized the doctrine as applied in the United States in these words:

> "Our Constitution, and in fact the Constitution of the United States and each of the states, have provided for three great branches of government, all of equal dignity and power within their proper spheres, and each independent of the other. Certain duties of government are confided to each of these de-

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[9]Gomillion v. Lightfoot, 167 F. Supp. 405, 410 (M.D. Ala. 1958).

[10]89 F. Supp. 672 (N.D. Ga. 1950), aff'd 339 U.S. 276 (1950) (upheld the county organization in Georgia).

[11]Id. at 680.

[12]270 F.2d at 598.

[13]Post, The Supreme Court and Political Questions, The John Hopkins University Studies 12 (1936). See Field, The Doctrine of Political Question in the Federal Courts, 8 Minn. L. Rev. 485, 511 (1924); Weston, Political Questions, 38 Harv. L. Rev. 296 (1925); Comment, 17 La. L. Rev. 593, 601 (1957). But see Finkelstein, Judicial Self-Limitation, 37 Harv. L. Rev. 338 (1924) supplemented by Finkelstein, Further Notes on Judicial Self-Limitation, 39 Harv. L. Rev. 221 (1925).

The derivation of the separation of powers concept has been traced to the English common law (Comment, 17 La. L. Rev. 593, 601 (1957)), and even to Aristotle (II Pound, Jurisprudence 323 (1959)). Thus, although the doctrine was apparently introduced to the United States by our Constitution, it well antedated that document.

[14]21 N.M. 239, 153 Pac. 262 (1915).

> partments, which it is required and authorized to exercise, within constitutional limitations, without any interference from either of the others. Upon the legislative branch of government is cast the duty of enacting such laws as are deemed calculated to promote the prosperity and happiness of the people and provide for the general welfare. The judicial department is created and endowed with the power to construe and interpret the laws and administer justice, between state and citizen, citizen and citizen, or citizen and stranger.... The executive executes the laws, and performs certain duties which the Constitution and law impose upon it...."[15]

If the separation of powers doctrine is engrained within our Constitution as a fundamental barrier to despotism, any case or controversy in which a court has occasion to limit this doctrine must be adjudicated with careful regard for the resultant manifestations of the decision.[16] Absolute separation is obviously impossible, but at least the initial separation as set forth in the Constitution must be maintained; and, to this end, each branch must have plenary powers within its own sphere of delegated activity. It would appear that the judicial branch has attempted to respect this view, for whenever it has been asked to decide a question in this area, it has refused by characterizing the issue as political.[17]

The United States Supreme Court has established the following subjects as political: attempts to enforce the constitutional guarantee to the states of a "republican form of government";[18] questions involving relations with the Indian tribes;[19] questions involving the commencement and termination of war;[20] decisions regarding inter-

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[15]Id. at 263.

[16]3 Willoughby, Constitutional Law of the United States 1616 (2d ed. 1929).

[17]Id. at 1326-27.

[18]Mountain Timber Co. v. Washington, 243 U.S. 219 (1917); Ohio ex rel. Davis v. Hildebrandt, 241 U.S. 565 (1916); Pacific States Tel. & Tel. Co. v. Oregon, 223 U. S. 118 (1912); Georgia v. Staunton, 73 U.S. (6 Wall.) 50 (1867); Luther v. Borden, 48 U.S. (7 How.) 1 (1848). But see Coyle v. Smith, 221 U.S. 559 (1910); Texas v. White, 74 U.S. (7 Wall.) 700 (1868).

[19]"Plenary authority over tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government." Lone Wolf v. Hitchcock, 187 U.S. 553, 565 (1903); The Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831); Field, The Doctrine of Political Questions in the Federal Courts, 8 Minn. L. Rev. 485, 511 (1924).

[20]Brown v. Hiatts, 82 U.S. (15 Wall.) 177 (1872); United States v. One Hundred and Twenty-Nine Packages, 27 Fed. Cas. 284 (No 15941) (E.D. Mo. 1862). For additional cases see Field, The Doctrine of Political Questions in the Federal Courts, 8 Minn. L. Rev. 490 nn.24 & 25.

pretation of treaties;[21] determinations of jurisdiction over territory;[22] recognition of states;[23] and the disposition of aliens.[24] The functions performed by state governments with regard to legislative apportionment, consolidation, redistricting and dissolution have also been held to be political questions by the Supreme Court.[25] These decisions, in recognizing the inability and undesirability of the federal judiciary exercising authority in an area which is constitutionally left to another body, establish unequivocably that any remedy for problems in these areas must be forthcoming from the other body.[26]

Even though the Supreme Court has decided that the redistricting of municipalities is a political question, the Court must still determine whether the alleged violation of a Constitutional provision may convert a political—and hence non-justiciable—issue into a justici-

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[21]Terlinden v. Ames, 184, U.S. 270, (1902); Doe v. Braden, 57 U.S. (16 How.) 635 (1853); Ware v.Hylton, 3 U.S. (3 Dall.) 199 (1796); Taylor v. Morton, 23 Fed. Cas. 784 (No. 13799) (C.C.D. Mass. 1855), aff'd 67 U.S. (2 Black) 481 (1862).

[22]In re Cooper, 143 U.S. 472 (1892); Jones v. United States, 137 U.S. 202 (1890); Foster v. Neilson, 27 U.S. (2 Pet.) 253 (1829). For additional cases and discussion see 3 Willoughby, Constitutional Law of the United States, 1329 (2d ed. 1929); Field, The Doctrine of Political Questions in the Federal Courts, 8 Minn. L. Rev. 485, 494 (1924).

[23]Kennett v. Chambers, 55 U.S. (14 How.) 38 (1852); Agency of Canadian Car & Foundry Co. v. American Can Co., 253 Fed. 152 (S.D.N.Y. 1918).

[24]"It is pertinent to observe that any policy towards aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government. Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference." Harisiades v. Shaughnessy, 342 U.S. 580, 588-89 (1952); Fong Yue Ting v. United States, 149 U.S. 698 (1893); Field, The Doctrine of Political Questions in the Federal Courts, 8 Minn. L. Rev. 485, 492 (1924).

[25]See notes 2-5 supra; Lewis, Legislative Appointment and the Federal Courts, 71 Harv. L. Rev. 1057 (1958); Comment, 17 La. L. Rev. 593 (1957); See also, Comment, 8 Wash. & Lee L. Rev. 190 (1951).

[26]"The Oklahoma law may exact a needless, wasteful requirement in many cases. But it is for the legislature, not the courts, to balance the advantages and disadvantages...." Williamson v. Lee Optical of Oklahoma, Inc., 348 U.S. 483, 487 (1955). "[W]e do not sit as a super-legislature to weigh the wisdom of legislation nor to decide whether the policy which it expresses offends the public welfare." Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421, 423 (1952). "If there is political wrong, the remedy is in the State Legislature...." South v. Peters, 89 F. Supp. 672, 680 (N.D. Ga. 1950). "For protection against abuses by legislatures the people must resort to the polls, not to the courts." Munn v. Illinois, 94 U.S. 113, 134 (1876).

"In determining whether a question falls within that [political question] category, the appropriateness under our system of government of attributing finality to the action of political departments and also the lack of satisfactory criteria for a judicial determination are dominant considerations." Coleman v. Miller, 307 U.S. 433, 454 (1939).

In many instances state courts have exercised dominion over problems in these areas and based their decisions on unreasonable exercise of power. Lewis, Legislative Appointment and the Federal Courts, 71 Harv. L. Rev. 1057, 1066 (1958).

able one. In considering this question, it would appear that two basic theories may be used to understand and reconcile the Supreme Court decisions concerning the problem.[27]

The first of the theories might be called the "absolute political question" concept. It stems from the separation of powers doctrine and therefore adheres to the proposition that a bona fide political question is per se non-justiciable, regardless of whether an asserted constitutional violation is strong, weak or nonexistent. This bona fide or truly political question can never come within the dominion of the federal courts. Such questions are normally reserved to the "political" branches of the government, *i.e.*, the legislative and executive;[28] they involve non-justiciable issues and have been characterized as political questions by the Supreme Court. To assert jurisdiction over these functions of government would invade a constitutional delegation of power and violate the separation of powers doctrine.[29]

On the other hand, those non-justiciable issues which have *not* previously been characterized as political questions may become justiciable because of the violation of a constitutional guarantee. The court must balance the basis for the non-justiciability with the right which has been violated.[30] The dissenting opinion in *Gomillion*[31] sug-

[27]For the purpose of this comment, it is assumed that reconciliation is desired, although it is recognized that the Supreme Court occasionally overrules a prior decision. The desirability of reconciliation and its correlative, stare decisis, is pointedly illuminated by Mr. Justice Roberts' dissent in Smith v. Allwright, 321 U.S. 649, 669 (1944). "[T]he instant decision, overruling that announced about nine years ago, tends to bring adjudications of this tribunal into the same class as a restricted railroad ticket, good for this day and train only."

[28]Dodd, Judicially Non-Enforceable Provisions of Constitutions, 80 U. Pa. L. Rev. 54, 84 (1931).

[29]Examples of acts which are truly political: the seating of new members of a legislature; the issuance of a declaration of war; the signing of a treaty; and the issuance of mandamus to an executive official to do a discretionary act. Many authorities separate the discretionary act category from other political questions. See, e.g., Field, The Doctrine of Political Questions in the Federal Courts, 8 Minn. L. Rev. 485 (1924).

[30]It is in this area that the explanation is found for such cases as Brown v. Board of Education, 347 U.S. 483 (1954) and Smith v. Allwright, 321 U.S. 649 (1944). In Brown, the issue was education; in Smith, voting in a state primary. Both of these would seem to have been reserved to the states by the Tenth Amendment. Neither, however, was called a political question and both were decided by the Supreme Court in favor of the plaintiffs. Thus, it would seem that in Brown the Supreme Court held that the reserved rights of the state to educate must yield to the overpowering equal protection clause of the Fourteenth Amendment. Note, however, that when the rights of a class to be on a jury conflict with the privilege of peremptory challenges, the right to challenge generally wins as the more crucial right unless the one asserting the right is a member of that class. 31 Am. Jur. Jury § 113 (1958). See note 32 infra.

[31]270 F.2d at 602.

gests that certain areas normally reserved to the states by the tenth amendment fall within the purview of the federal judiciary when the violation of a specific constitutional provision is asserted. It appears that the dissent fails to recognize this important distinction; that is, that some issues present truly political questions and are forever non-justiciable, whereas other types of merely non-justiciable issues may become justiciable because of the violation of a constitutional provision. Thus, under the absolute political question concept, the *prior characterization by the Supreme Court is determinative,* and only if the nonjusticiable issue has not been characterized as a truly political question is there an opportunity for balancing.[32]

Under the second theory, which might be labeled the "superior right" concept, the presence or absence of *prior characterization by the Supreme Court has no bearing whatsoever on the result.* Under this view, *all* political questions are relative; and if the attack upon the political question is strong enough, the non-justiciable nature of the issue must yield to the justiciable right being asserted.[33] If a question is strongly political, *e.g.,* the power of Congress to seat its members,[34] or the wisdom of decisions of Congress concerning expenditures,[35] the issue may only be attacked if the violation of a vital constitutional provision is alleged.[36] The powers of the judiciary with regard to these issues is limited to deciding whether Congress had the power to pass a particular Act, rather than looking to the propriety of the Act.[37] To

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[32]Another possibility is suggested by Smith v. Allright, 321 U.S. 649 (1944). In that case, the issue had been categorized as non-state action by Grovey v. Townsend, 295 U.S. 45 (1935). Smith overruled Grovey and characterized the issue as state action. It would seem that political questions might be subject to similar treatment. See note 27 supra.

[33]This is not a novel idea; see 3 Willoughby, Constitutional Law of the United States § 855 (2d ed. 1929). It is also suggested by one passage from Colegrove v. Green, 328 U.S. 549, 552 (1946), wherein Mr. Justice Frankfurter said, "the basis for the suit is not a private wrong, but a wrong suffered by Illinois as a polity."

Note that this is the same procedure used under the "absolute political question" theory when the issue has not been characterized as political.

[34]Pacific States Tel. & Tel. Co. v. Oregon, 223 U.S. 118, 147 (1912); Luther v. Borden, 48 U.S. (7 How.) 1, 42 (1848).

[35]Massachusetts v. Mellon, 262 U.S. 447 (1923).

[36]Compare Tileston v. Ullman, 318 U.S. 44 (1943), wherein it was held that a physician did not have a sufficient interest—when based on danger to his patients' health—to attack a statute which prohibited professional advice in the use of contraceptives, with Barrows v. Jackson, 346 U.S. 249 (1953), in which it was said that persons defending a breach of racial restrictions suit could assert the interest of unidentified non-Caucasians.

[37]E.g., if Congress were empowered to pass Act "A" and subsequently elected to pass Act "A," no complaint could be heard by the judiciary unless some other superior right were asserted.

decide whether the power existed, the courts must look to either the Act itself or its application.[38] If a constitutional provision is violated, and this violation concerns a vital right, the court may assert jurisdiction. In this way a question which has been non-justiciable becomes justiciable. When the question involved is less intensive in its political nature, the violation of a lesser right may occasion the acceptance by the court of jurisdiction. Such a balancing is not new in the law.[39]

It would appear that the two concepts advanced are distinguishable, and it is this distinction that could determine the result in the *Gomillion* case. Under the "absolute political question" concept, the determination of the existence of a political question would be crucial. Since redistricting was characterized as a political question by *Wood v. Broom*[40] and *Colegrove v. Green*,[41] the Supreme Court would have no difficulty classifying the act of the Alabama Legislature as political. Once this is ascertained, no further inquiry need be made, and the court should refuse jurisdiction. Under the "superior right" concept, however, the strength of the political nature of the question must be balanced against the strength of the constitutional provision allegedly violated. In the *Gomillion* case, an individual right of the most fundamental nature, *i.e.*, the right of a citizen to vote,[42] must be balanced against one of the most fundamental political questions, *i.e.*, the right of a state legislature to redistrict its municipal corporations.[43] When two fundamental principles conflict, as in this instance, the "superior right" concept requires the court to determine which is superior, rather than permitting it to dodge behind a categorical name which in itself decides the issue.[44]

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[38]To some extent, this is a matter of semantics. An act by itself is merely a group of words. No meaning exists until its results are considered. This, in essence, is application of the Act. Therefore, the two are inseparable.

[39]See, e.g., McClintock, Equity, 189 (2d ed. 1948) (balancing equities); Prosser, Torts, 122 (2d ed. 1955) (balancing gravity against utility).

[40]287 U.S. 1 (1932).

[41]328 U.S. 549 (1946).

[42]"The [Fifteenth] Amendment bans racial discrimination in voting by both state and nation. It thus establishes a national policy, obviously applicable to the right of Negroes not to be discriminated against as voters in elections to determine governmental policies or to select public officials, national, state, or local." Terry v. Adams, 345 U.S. 461, 467 (1953). "The United States is a constitutional democracy. Its organic law grants to all citizens a right to participate in the choice of elected officials without restriction by any State because of race." Smith v. Allwright, 321 U.S. 649, 664 (1944).

[43]See note 4 supra.

[44]"Such a balancing has been done with regard to other questions considered by the Supreme Court. In Smith v. Allwright, 321 U.S. 649, 657 (1944), the Court said, "Texas is free to conduct her elections and limit her electorate as she may deem wise, save only as her action may be affected by the prohibitions of the

The fact that the court in this instance must look behind the words of the act to find the disenfranchisement based upon color does not preclude judicial determination of the question. As summarized by the syllabus in *Norris v. Alabama*,[45] "Whenever a conclusion of law of a state court as to a federal right is so intermingled with findings of fact that the latter control the former, it is incumbent upon this Court to analyze the facts in order that the enforcement of the federal right may be assured."[46]

It would appear, therefore, that a distinction may be found between *Colegrove v. Green*,[47] *Wood v. Broom*[48] and the instant case. In *Colegrove*, the Court dismissed a complaint attacking as unconstitutional gross disparities in the population of Illinois' congressional districts; and in *Wood*, the Court held that, absent a federal statute, the state need not create congressional districts composed of compact and contiguous territory having as nearly as practicable the same number of inhabitants. Thus, in both *Colegrove* and *Wood* the asserted violations were not of such import as to overthrow the reserved rights of the states, whereas in *Gomillion* the individual right is so fundamental that the state right to redistrict may well fall before it. As the Supreme Court stated in *Lane v. Wilson*,[49] "The [Fifteenth] Amendment nullifies sophisticated as well as simple-minded modes of discrimination. It hits onerous procedural requirements which effectively handicap exercise of the franchise by the colored race although the abstract right to vote may remain unrestricted as to race."[50]

If the forthcoming decision of the Supreme Court,[51] handed down after reviewing the *Gomillion* case, is considered in light of either of the theories presented, the previously decided cases of the Supreme Court may be reconciled. A decision in the plaintiff's favor will represent nothing more than another instance in which a state right has conflicted with and given way before a superior federal right, while a decision in favor of the defendants will only reflect a strict adherence to the prior characterization made by the Court.

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United States Constitution . . . ." In Breedlove v. Suttles, 302 U.S. 277, 283 (1937), the Supreme Court remarked in upholding Georgia's poll tax that the state's freedom to "condition suffrage as it deems appropriate" is subject to the provisions of the Federal Constitution.

[45]294 U.S. 587 (1935).

[46]Ibid.

[47]328 U.S. 549 (1946).

[48]287 U.S. 1 (1932).

[49]307 U.S. 268 (1939).

[50]Id. at 275.

[51]Cert. granted, 362 U.S. 916 (1960).