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Cameron v. Johnson: Federal Question Abstention in Civil Rights Cases--The Disappearing Doctrine

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1934,[37] and is limited to wiretapping. Congress, if it were so inclined, could, by direct legislation exclude evidence obtained by electronic decives, but it is not within the province of the Supreme Court to so legislate by giving the fourth amendment a new meaning and interpretation.

Peter J. Bosch

CAMERON v. JOHNSON: Federal Question Abstention in Civil Rights Cases—The Disappearing Doctrine.

The doctrine that a federal court should refrain from entertaining an action in which it would be required to decide a substantial federal question turning upon the construction or interpretation of unsettled state law was launched in 1941 by Mr. Justice Frankfurter in *Railroad Commission of Texas v. Pullman Co.*[1] Since Justice Frankfurter's retirement in 1962, however, there have been far fewer instances in which the Court has held appropriate the application of his doctrine of convenience and comity.[2] It is in the area of civil liberties, particularly cases involving the alleged abridgment of free expression, that the Court has increasingly withheld application of the abstention doctrine.

The controversy presented to the United States Supreme Court in *Cameron v. Johnson*[3] grew out of civil rights protest

[37] 47 U.S.C. § 605 (1964). This section provides in part that: "[N]o person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; . . ."

[1] 312 U.S. 496 (1941).

[2] Note, *Federal Question Abstention: Justice Frankfurter's Doctrine In An Activist Era*, 80 HARV. L. REV. 604 (1967).

[3] 390 U.S. 611 (1968), *aff'g* 262 F. Supp. 873 (S.D. Miss. 1966).

demonstrations by the petitioners in Hattiesburg, Mississippi, in 1964. From January 23 through May 18 of that year, the petitioners, Negro citizens of Forrest County, were almost daily engaged in organized marches to and peaceful picketing of the county courthouse. Until April 9, the pickets confined their marching to a route around the courthouse marked out by the sheriff's office. On April 8, however, the state legislature passed an anti-picketing law[4] making it unlawful to obstruct or interfere with free ingress to or egress from any public building, or to obstruct or interfere with the free use of streets and sidewalks contiguous or adjacent to such buildings. The law became effective upon passage and was read by the sheriff to the pickets when they assembled the next day. The marchers picketed the courthouse again on April 10, using the same, though now unmarked route. Sev-

[4] MISS. CODE ANN. § 2318.5 (Supp. 1966), providing in part:

> An Act To Prohibit The Unlawful Picketing Of State Buildings, Courthouses, Public Streets And Sidewalks
>
> (1) It shall be unlawful for any person, singly or in concert with others, to engage in picketing or mass demonstrations in such a manner as to obstruct or unreasonably interfere with free ingress or egress to and from any public premises, State property, county or municipal courthouses, city halls, office buildings, jails, or other buildings or property owned by the State of Mississippi, or any county or municipal government located therein, or with the transaction of public business or administration of justice therein or thereon conducted or so as to obstruct or unreasonably interfere with free use of the public streets, sidewalks, or other public ways adjacent or contiguous thereto.
>
> (2) Any person guilty of violating this act shall be deemed guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than Five Hundred Dollars ($500.00), or imprisoned in jail not more than 6 months, or both such fine and imprisonment.

eral of the demonstrators were arrested. It was charged that they walked so close together that they blocked some of the entrances to the building.

The petitioners brought suit in a three judge district court for a judgment declaring the statute unconstitutional and for injunctive relief against their pending prosecutions in state court and against future enforcement of the law. In a split decision, the court dismissed the action on the basis that abstention was proper because the constitutionality of the statute was already before the state court by a motion to quash, and that appeal from the state courts to the Supreme Court of the United States was adequate protection for rights guaranteed by the United States Constitution.[5] The court found that the marchers had blocked certain entrances and were being prosecuted in good faith by the state. It also stated that the plaintiffs had failed to prove their charge that the passage and enforcement of the Act was part of a plan by the defendants to suppress the plaintiffs' right of free expression and deter their voter registration campaign.[6]

Although presented with the question of whether it could enjoin the state proceeding in the face of the federal anti-injunction statute[7], the court avoided expressly deciding the

[5] Cameron v. Johnson, 244 F. Supp. 846 (S.D. Miss. 1964), *vacated per curiam,* 381 U.S. 741 (1965). Plaintiffs attacked the law as unconstitutional on its face on the ground that it was (1) so broad in its sweep, so vague and indefinite in its definition and characterization of the prohibited activity, that it failed to meet the minimal standards of the first and fourteenth amendments; (2) void as violative of the fifteenth amendment and the due process clause of the fourteenth amendment; and (3) contrary to to the first amendment in that it attempted to limit the right to picket by connecting it with vague and indefinite standards. *Id.* at 850.

[6] *Id.* at 848-49.

[7] 28 U.S.C. § 2283 (1964):

A court of the United States may not grant an in-

matter. The majority indicated only that the policy of comity between federal and state courts disfavored such an interference without a demanding exigency.[8] They held that the circumstances of the case did not warrant equitable intervention, and especially so since they believed the statute constitutional on its face.[9]

The Supreme Court vacated the judgment in a rather ambiguous per curiam opinion.[10] The case was remanded with instructions to the district court to reconsider the case "in light of *Dombrowski v. Pfister*,"[11] which had just recently been decided.[12] The Court directed the judges to consider first whether the federal statute barred an injunction in the case, and if not, then to determine whether relief "was proper in light of the criteria set forth in *Dombrowski*."[13]

On remand the district court held a full evidentiary hearing. Again in a split decision, the court dismissed the case with prejudice.[14] The court determined: (1) that section 2283 barred an injunction against the pending prosecutions and that section 1983 of the Civil Rights Act[15] was not an ex-

> junction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

[8] 244 F. Supp. at 851-53.

[9] *Id.* The court relied principally upon Douglas v. City of Jeannette, 319 U.S. 157 (1943), in which the Court held it proper to abstain from restraining the future enforcement of a state statute declared unconstitutional on first amendment grounds in a companion case, because there was no reason to suppose that state courts would not follow and apply the decision as laid down by the Supreme Court.

[10] 381 U.S. 741 (1965) (5-4 decision).

[11] 380 U.S. 479 (1965).

[12] 381 U.S. at 741.

[13] *Id.*

[14] 262 F. Supp. at 873.

[15] 42 U.S.C. § 1983 (1964):

> Every person who, under color of any statute, or-

press exception; (2) that the anti-picketing statute was constitutional on its face being neither vague nor overbroad in its sweep; and (3) that even in the light of *Dombrowski* the facts and circumstances of the case did not justify injunctive or declaratory relief as to future enforcement of the law.[16]

The Supreme Court took the appeal and affirmed the decision of the district court.[17] The majority, speaking through Mr. Justice Brennan, agreed that the lower court was correct in rendering a judgment declaring the statute constitutional. Citing the decisions in *Cox v. Louisiana*[18] and *Schneid-*

> dinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, *suit in equity,* or other proper proceeding for redress. (Emphasis added)

[16] 262 F. Supp. at 877-81. The court followed Baines v. City of Danville, 337 F.2d 579 (4th Cir. 1964), *cert. denied,* 381 U.S. 939 (1965), in deciding the scope of the anti-injunction statute and the effect of § 1983. The court in the *Baines* case considered § 2283 at some length in a reasoned and well substantiated opinion.

[17] 390 U.S. at 611.

[18] 379 U.S. 536 (1965), in which the Court overturned the conviction of demonstrators under a Louisiana law because of the unfettered discretion allowed local officials in the regulation of marching and picketing. However, the Court did state:

> The constitutional guarantee of liberty implies the existence of an organized society maintaining public order, without which liberty itself would be lost in the excesses of anarchy. The control of travel on the streets is a clear example of governmental responsibility to insure this necessary order. A restriction in that relation, designed to promote the public convenience, in the interest of all, and not

er v. New Jersey[19] the Court stated that picketing and parading, though intertwined with free expression and association, were subject to regulation. It pointed out that the Mississippi law did not prohibit picketing unless it obstructed or interfered with access to the courthouse. The Court held that a prohibition having only that effect did not abridge constitutional liberty but rather vindicated an important societal interest.[20]

The Supreme Court declined to pass on the ruling of the lower court that section 2283 barred restraint of the pending prosecutions, and that section 1983 created no exception.[21] Insofar as relief against future enforcement was sought the Court was less equivocal. They found that this case, unlike *Dombrowski*, presented no likelihood that the Mississippi act would be applied in bad faith for the purposes of harassment or discouraging protected activities. The Court concluded, therefore, that the comity considerations prevailing in *Douglas v. City of Jeanette*[22] dictated that the federal court abstain from interfering with the state's good faith administration of its criminal laws.[23]

> susceptible to abuses of discriminatory application, cannot be disregarded by the attempted exercise of some civil right which in other circumstances, would be entitled to protection. *Id.* at 554.

[19] 308 U.S. 147 (1939). In *Schneider*, a town ordinance requiring written permission from the police chief for door to door canvassing and solicitation was held invalid on first amendment grounds as applied to a Jehovah's Witness. In its discussion of rights in general the Court said that persons in the exercise of liberties could not interfere with traffic or block public ways, and that there was a duty upon municipalities to keep streets open for the primary purpose to which they were dedicated. Legislation to that end was deemed proper so far as it did not interfere with a lawful exercise of liberty. *Id.* at 160.

[20] 390 U.S. at 617.

[21] *Id.* at 614-15 n.3.

[22] 319 U.S. 157 (1943).

[23] 390 U.S. at 618-19.

In the view of this writer, the Court, by affirming the decision below, emphasized the ambiguity of its earlier per curiam opinion — an ambiguity strongly confirmed by the force of certain facts drawn from a consideration of the litigation as a whole. First, the district court on remand in no way disturbed the findings of fact made upon the first hearing. Secondly, the Court found it unnecessary to resolve the issue of the anti-injunction statute, though that issue occupied a rather significant place in the instructions on remand. And lastly, the final decision of the Court rested upon essentially the same grounds put forward so strenuously by those justices who would have affirmed the first decision.

Why then was the case remanded on the first appeal? The language of the per curiam opinion read in the light of subsequent events suggests that at the time *Cameron* was first before it, the Court's attitude towards the long standing policy of self-restraint in the exercise of its jurisdiction was in a state of unresolved transition. The decision and opinion in *Cameron* are the evidence that whatever scruples there may have been, they were resolved in favor of increased activism.

The one important ingredient missing from the first decision of the district court was a declaratory judgment as to the constitutionality of the anti-picketing statute. In the final opinion in the case, the Supreme Court, by way of a footnote, identified that deficiency as the most important though previously unarticulated reason for the initial remand.[24] With reference to the refusal of the district court in the first instance to pass upon the validity of the statute the Court cites *Zwickler v. Koota*.[25] In the *Zwickler* case the Court held it error for a district court to abstain and thereby refuse to render a declaratory judgment on a state statute attacked as overbroad on its face. That opinion went even further,

[24] *Id.* at 615 n.5.
[25] 389 U.S. 241 (1967).

saying that "a request for a declaratory judgment that a statute is overbroad on its face must be considered independently of any request for injunctive relief against the enforcement of that statute."[26]

In deciding *Zwickler* the Court made a thorough examination of a large number of cases in which the abstention doctrine had been in issue before it. It considered cases in which the doctrine had been applied, and others in which it had been held inapplicable. In reaching the broad ruling in *Zwickler* that it was error in the absence of special circumstances to abstain from rendering a declaratory judgment when a statute was attacked for overbreadth, the Court relied principally on *Dombrowski v. Pfister*[27] and a doctrine best epitomized by the statement that "the abstention doctrine is inappropriate for cases . . . where statutes are *justifiably attacked* on their face as abridging free expression."[28]

The Court did not then, nor has it since, defined the term "justifiably attacked." If, however, the meaning is to be taken by example from the cases, including *Dombrowski,* on which the Court relies in *Zwickler* to demonstrate that abstention is inappropriate when the challenge is for repugnance to the first and fourteenth amendments, then the suggestion is that the statute must in fact be unconstitutional on its face.[29] Clearly *Cameron* is not such a case, nor is *Zwickler.* Though the Court in *Zwickler* found that no narrowing construction of the challenged statute was possible, it intimated no view

[26] *Id.* at 254; *accord,* Cameron v. Johnson, 390 U.S. 611, 615 n.5 (1968).

[27] 380 U.S. 479 (1965).

[28] *Id.* at 490; *accord,* Zwickler v. Koota, 389 U.S. 241, 254 (1967).

[29] *See* Keyishian v. Board of Regents, 385 U.S. 589 (1966); Dombrowski v. Pfister, 380 U.S. 479 (1965); Baggett v Bullitt, 377 U.S. 360 (1964); McNeese v. Board of Education, 373 U.S. 668 (1963); Turner v. City of Memphis, 369 U.S. 350 (1962).

as to its validity.[30] Yet in both cases abstention was deemed inappropriate.

The *Zwickler* decision extends the *Dombrowski*-type exception to the abstention doctrine by moving beyond the especially flagrant circumstances presented in that case. Still the ties to *Dombrowski* in language and rationale are strong.[31] The position taken by the Court in *Cameron* that abstention was inappropriate in that case, supported directly by *Zwickler*, cuts the tie to *Dombrowski* and the other cases in which abstention was inappropriate because the statute was "justifiably attacked" on its face.[32]

It would seem that the "chilling effect" doctrine[33] has effectively frozen abstention out of the area of first amendment rights. *Cameron* must be considered as meaning that *whenever* a state statute is *alleged* to be unconstitutionally vague and overbroad in its sweep in the area of rights protected by the first amendment, abstention from rendering a declaratory judgment on the statute is inappropriate and the fact that the question is already before a state court is not a special circumstance sufficient to divest a federal court of that responsibility.

The effect of such a rule upon the anti-injunction statute may be surmised. What course is left a federal court which takes a case challenging a statute for vagueness and overbreadth when that same question is part of a criminal proceeding already being heard before a state tribunal, and the judgment of the federal court is against the statute? If the state court reaches the opposite conclusion would the federal court have any alternative but to stay the state proceeding in order to effectuate its judgment? Such a situation would cause the very confrontation and friction between state and

[30] 389 U.S. at 250, 255.
[31] *Id.* at 254.
[32] Cases cited note 29 *supra.*
[33] *See* 389 U.S. at 252.

federal authority that Congress must have sought to avoid by enacting the anti-injunction statute. Certainly the decision in *Cameron v. Johnson* further diminishes the role of state judiciaries as functionaries in the administration of justice under the Constitution of the United States.

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