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The Supreme Court and the Political Question: Affirmation or Abdication?*

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Scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question.—De Tocqueville, Democracy in America.

Although more than 100 years have elapsed since the young Frenchman Alexis De Tocqueville made this observation, its accuracy has not been disproved by a century of American democracy at work. Indeed, the truth of his remark may have prompted Justice Frankfurter to express "disquietude that the line is often very thin between cases in which the Court felt compelled to abstain from adjudication because of their 'political' nature, and the cases that so frequently arise in applying the concepts of 'liberty' and 'equality'."[1]

Today that line has been worn even thinner. Recent Supreme Court decisions seem actually to have erased the line for all practical purposes by placing certain aspects of the political question in a position of subservience to concepts of individual liberty and equality. The significance of these decisions lies not only in new substantive norms which have been created but also in the crippling blow that has been dealt to what is perhaps the most ancient and "potentially the widest and most radical avenue of escape from adjudicaion" in the federal courts.[2]

In terms of age the political question claims an ancestry which began prior to the birth of the American institution of judicial review.

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[1] Frankfurter, *John Marshall and the Judicial Function*, 69 HARV. L. REV. 217, 227-28 (1955).

[2] The quoted portion is taken from Bickel, *Foreword: The Passive Virtues*, 75 HARV. L. REV. 40, 45 (1961).

In *Hayburn's Case*[3] the Court took under advisement an attempt to mandamus a federal circuit court to accept pension applications of disabled war veterans, war orphans and widows and to recommend eligible applicants to the Secretary of War as provided by an act of Congress.[4] Although the case was never decided by the Supreme Court because Congress subsequently amended the statute, letters and memoranda of the circuit court judges reported in a note to the report of *Hayburn's Case* question the constitutionality of the statute. The justices emphasized that the division of the federal government into three independent and distinct branches forbade encroachment by one branch upon the duties of another. It was felt that the act assigned duties to the circuit courts which they could not constitutionally perform because the duties were not judicial tasks; subsequent review by another branch of government was thought to be inconsistent with the very nature of judicial power.[5]

Although *Hayburn's Case* was not technically a political question case, refusal by the federal courts to perform a function thought to be committed by the Constitution to another department of government is strongly reminiscent of the political question. Furthermore, the concern expressed for preservation of separation of powers has been the traditional explanation for the political question.

Ten years after the decision in *Hayburn's Case* the political question doctrine received express recognition in *Marbury v. Madison*[6] when Chief Justice Marshall stated that the federal courts will not adjudicate political questions even though such questions involve actual controversies. Thus, by the time the institution of judicial review was established, the doctrine that an issue is nonjusticiable because its determination is committed to one of the so-called political departments of government—the executive or legislative—was given content.[7]

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[3] 2 U.S. (2 Dall.) 409 (1792).

[4] Act of March 23, 1792, ch. 11, § 1, 1 Stat. 243. The act suspended prior acts of Congress which barred certain claims for pensions and made additional provision for pensions for certain disabled veterans. Application was to be made to the federal circuit courts which were to determine the degree of disability and to certify the information to the Secretary of War who was at liberty to disregard a name placed on the pension list by a court.

[5] The justices of the circuit court for the district of New York agreed to administer the act in the capacity of commissioners while the justices for the districts of North Carolina and Pennsylvania refused to proceed in any capacity.

[6] 5 U.S. (1 Cranch) 137, 164-66 (1803).

[7] The roots of the political question reach deep into English law. Development of the doctrine probably began with the Duke of York's Claim to the Crown (1460) (reported in 1 Wambaugh, Cases on Constitutional

Establishment of the political question doctrine as a part of American constitutional law, however, is only the beginning of the story. The generality of a doctrine forbidding justiciability because it is the prerogative of another branch of government to make the determination has proved to be readily adaptable to a great variety of circumstances. Moreover, the political question has tended to lend itself to a general policy of judicial self-restraint.

As a consequence of its general applicability and the negative results that flow from its use, the political question has been applied broadly to a variety of seemingly unrelated subject matter. These have ranged from the exclusion and deportation of aliens to the legal status of Indian tribes and to the apportionment of governments. Thus, it is not surprising that the amorphism of the doctrine has provoked a barrage of critical commentary. As one writer has charged, "[t]he term 'political question' is . . . one of the least satisfactory terms known to law. The origin, scope and purpose of the concept elude all attempts at precise statement."[8]

It is in this setting that recent decisions of an activist court have eliminated the doctrine as an obstacle in some areas while reducing its significance in others. *Bond v. Floyd*[9] is perhaps the most current decision having negative implications for the political question doctrine. Julian Bond, a Negro, was duly elected as representative to the Georgia House of Representatives from the 136th House district. A civil rights organization of which Bond was a member

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Law 1 (1915)) in which the judges refused to consider the Duke's suit to have himself declared the rightful heir to the throne.

Perhaps the most significant English case having bearing on the political question was *Nabob of the Carnatic v. East India Co.*, 1 Ves. Jr. 370 (1791), 2 Ves. Jr. 56 (1793). Suit was brought against the East India Company for having breached a contract with the Nabob. The court reasoned that the East India Company was acting as a delegate of the sovereign power of England in making contracts with potentates and for this reason the matter could not be decided by a court of law. More than any other decision the *Nabob of the Carnatic* is said to have established the political question doctrine as part of English law. *See* Finkelstein, *Judicial Self-Limitation,* 37 HARV. L. REV. 338 (1924).

The influence of the English decisions must have been felt in the development of the American counterpart to the doctrine, as the *Nabob* is cited in Luther v. Borden, 4 U.S. (7 How.) 1 (1849) which is one of the earliest of the leading American cases applying the doctrine of judicial non-interference with political questions. The *Borden* decision was the first of a long line of cases from which emerged the rule that the constitutional guarantee of a republican form of government is not enforceable in the courts. A subsequent portion of this paper is devoted to these cases.

[8] FRANK, POLITICAL QUESTIONS, IN SUPREME COURT AND SUPREME LAW 80 (Cahn ed. 1954).

[9] 385 U.S. 116 (1966).

and officer issued a statement criticizing United States Government policy in Vietnam and United States draft laws; Bond publicly endorsed the statement.

Before the Georgia House convened, House members challenged Bond's right to be seated. A special committee appointed to hear the matter concluded that Bond did not support the Constitution of the United States or of the state of Georgia, that he adhered to the enemies of the state of Georgia and gave comfort to the enemies of the United States, that his statements violated the Selective Service laws of the United States, and that his statements would bring discredit and disrespect to the Georgia House. When the House adopted the committee report and voted not to allow Bond to take the oath of office or to be seated as a House member, Bond brought an action in the appropriate federal district court for injunctive relief and a declaratory judgment that the House action was not authorized by the Georgia constitution and violated his rights under the first amendment to the Federal Constitution. Two members of the three-judge federal district court concluded the action of the Georgia House was proper, and Bond appealed directly to the United States Supreme Court.

Reversing the three-judge court, a unanimous Supreme Court rejected the state's argument that there should be no judicial review of a state legislature's power to judge whether or not a prospective member may conscientiously take the oath required by the state and Federal Constitutions and concluded that the controversy was justiciable. Addressing itself to the merits of the controversy, the Court held that disqualification on account of statements Bond had made violated the free speech provisions of the first amendment which are made applicable to the states by the fourteenth amendment.[10]

The *Bond* case is significant because it represents the first time in American constitutional history that a federal court has interferred with a state legislature's decision regarding membership in the legislature. Such questions were heretofore considered nonjusticiable because of separation of powers conceptualism; *i.e.*, decisions of a legislature pertaining to its membership have tradi-

[10] The Court stated that "[l]egislators have an obligation to take positions on controversial political questions so that their constituents can be fully informed by them, and be better able to assess their qualifications for office; also so they may be represented in governmental debates by the person they have elected to represent them." *Id.* at 136.

tionally been considered nonjusticiable political questions.[11] Thus, the *Bond* case is unique; yet it is not surprising because the groundwork had already been laid for it by the Court, notably in the landmark decision of *Baker v. Carr.*[12]

Baker held justiciable a suit under the equal protection clause of the fourteenth amendment to compel reapportionment of a state legislature in which representation was not based on numerical equality in voting power. In deciding *Baker* the Court was confronted with a respectable line of adverse precedent which was anchored to the political question doctrine.

As a result of the Court's treatment, the future of the political question doctrine will probably be confined primarily to conflicts between the federal judiciary and coordinate branches of the federal government. Partly for this reason the recent refusal of the House of Representatives to seat Representative Adam Clayton Powell is likely to be treated as a political question in the event the case is decided by the Supreme Court.[13] According to the Court, the relationship between state governments and the federal judiciary cannot raise a political question unless judicially discoverable standards are found to be lacking, and, as the *Bond* and *Baker* cases illustrate, the Court has little difficulty discovering standards where concepts of individual liberty and equality are involved.

Given the tendency of the present Court to limit the application of the political question doctrine, it seems appropriate to consider what distinguishes nonjusticiable political issues from justiciable issues. Is the political question doctrine required by the Constitution or is it a mere technique of avoidance by which the Court screens cases which it deems appropriate for decision by other departments of government? Or is there a more subtle quality to the doctrine

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[11] 13 U.C.L.A. L. REV. 1317 (1966). In 1920 five New York socialists were suspended from the New York Legislature because of their opposition to United States participation in World War I. When the Bond story became news, a writer for the *New York Times* interviewed Louis Waldman (one of the five) and inquired why no redress had been sought in the courts. He received this reply: "We regarded the concept of separation of powers . . . as far more important than our own case . . . . If judges can decide who can sit in the legislature, they can decide who shouldn't sit. This would be a much greater offense to democratic government than anything a stupid majority might do in an individual case." N. Y. Times, Jan. 12, 1966, at 18, col. 1 (city ed.).

[12] 369 U.S. 186 (1962).

[13] The *Powell* case is discussed in greater detail in a subsequent portion of this paper beginning at page 132.

which is somehow related to the role which courts should play in a democracy?

EXPLANATION AND PURPOSE OF THE DOCTRINE

The Classical Explanation

As previously mentioned, the political question has traditionally been explained in terms of judicial respect for the principle of separation of powers.[14] For Professor Wechsler this means that, "all the doctrine can defensibly imply is that the courts are called upon to judge whether the Constitution has committed to another agency of government the autonomous determination of the issue raised, a finding that itself requires an interpretation."[15] According to Wechsler, a judicial decision not to adjudicate the merits of a particular controversy conforms with *Marbury v. Madison* in that it amounts to a constitutional adjudication that the matter in question is vested in the uncontrolled discretion of another department of government.

Wechsler does concede the Court's discretion to grant or to deny review of judgments of lower courts whenever the jurisdictional statute permits certiorari but fails to provide for an appeal. Even so, he is quick to note that the Court has defined standards for the exercise of its discretion[16] and argues for "their faithful application."[17] Beyond this, Wechsler would favor greater elimination of the Court's discretion through revision of the applicable jurisdictional statutes. Thus, he finds comfort in the following dicta in *Cohens v. Virginia*:

> It is most true that this court will not take jurisdiction if it should not; but it is equally true, that it must take jurisdiction if it should. The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the Constitution. We cannot pass it by because it is doubtful, with whatever doubts, with whatever difficulty, a case may be attended. We must decide if it be brought before us. We have no more right

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[14] *See, e.g.*, Weston, *Political Questions*, 38 HARV. L. REV. 296 (1925). Weston describes a political question as "one which is by law for the determination of the executive or legislative departments, or possibly of the people themselves. . . . [T]he line between judicial and political questions . . . is the line drawn by the constitutional delegation, and none other." *Id.* at 331.

[15] Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 7 (1959).

[16] U.S. SUP. CT. R. 19.

[17] Wechsler, *supra* note 15, at 11.

> to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the Constitution.[18]

As examples of proper judicial abstention resulting from acts of constitutional interpretation, Wechsler mentions the Senate's constitutional power to try impeachment cases, the power of each House of the Congress to seat or to expel members[19] and the guarantee of a republican form of government. An additional example is the constitutional power of Congress to make or alter state regulations of the "[m]anner of holding Elections for Senators and Representatives"[20] which operates to exclude courts from considering constitutional objections to state gerrymanders.[21]

Wechsler's explanation of the political question doctrine is wedded to an elaboration of the so-called classical theory of judicial review which denies judicial discretion to withhold judgment upon a matter properly before the Court.[22] In articulating the classical theory,

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[18] 19 U.S. (6 Wheat.) 264, 404 (1821).

[19] Wechsler, *supra* note 15, at 8. One writer has suggested quite properly that these examples are unique because the functions to be performed pursuant to the grants of power are essentially adjudicative. Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 YALE L.J. 517, 539 (1966). The recent expulsion of Representative Adam Clayton Powell by the House of Representatives may test Wechsler's assertion that actions of either house of Congress in seating or expelling members are political questions. The relevant constitutional language is as follows: "Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members. . . . Each House may determine the Rules of its Proceedings, punish its members for disorderly Behaviour, and, with the Concurrance of two thirds, expel a Member." U.S. CONST. art. 1, sec. 5. The *Powell* case is dealt with in more detail in the concluding portion of this paper.

[20] U.S. CONST. art. I, § 4.

[21] Wechsler, *supra* note 15, at 8. Whatever validity there once may have been in this proposition, it is today in serious need of qualification. Gomillion v. Lightfoot, 364 U.S. 339 (1960) invalidated state racial gerrymandering used to deprive Negroes of the right to vote in a municipal election. More recently, the Court decided the merits of a claim alleging that voting districts created by the New York legislature were motivated by racial considerations. Wright v. Rockfeller, 376 U.S. 52 (1964). Although the relief prayed for by the plaintiffs was denied, the result did not rest on the political question doctrine but upon the insufficiency of evidence to prove the allegations.

[22] The classical theory draws heavily upon the following language in *Marbury v. Madison*:

> It is, emphatically, the province and duty of the judicial departments to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each. So, if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case, conformable to the law, disregarding the constitution; or conformable to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case: this is of the very essence of judicial duty. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

Wechsler was responding in part to Judge Hand's assertion that the Court is free to adjudicate a constitutional objection or to decline to do so when a case is properly before the Court, according to "how importunately the occasion demands an answer."[23] In fact, Judge Hand viewed the political question as an illustration of the kind of discretion he thought was involved in judicial review[24] and alluded to the doctrine as a "stench in the nostrils of strict constructionists."[25]

The Political Question and the "Passive Virtues"

Concurring with Judge Hand's disagreement with Wechsler is Professor Bickel who declares that it is a play on words to say that the broad discretion which the Court has exercised may be explained solely in terms of constitutional interpretation.[26] Bickel's emphasis, however, differs from Hand's. For Professor Bickel, judicial review is justified by the value to society with results from the Court's capacity to define and pronounce principles of the community.[27]

The thrust of the Bickel analysis is upon "passive virtues"—techniques employed by the Court to avoid the exercise of judicial review, whenever, in the Court's prudential judgment, a principled decision on the merits is not possible. Among these techniques the political question occupies the seat of honor. Stated in Bickel's words: "[t]he culmination of any progression of devices for withholding the ultimate constitutional judgment of the Supreme Court—and in a sense their sum—is the doctrine of political questions."[28]

According to Bickel, the political question doctrine "resists being domesticated" in the fashion suggested by Professor Wechsler:

> There is something different about it, in kind, not in degree, from the general 'interpretative process'; something greatly more flexible, something of prudence, not construction and not principle. And it is something which cannot exist within the four corners of *Marbury v. Madison*.[29]

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[23] L. HAND, THE BILL OF RIGHTS 15 (1958).
[24] *Id.* at 15-18.
[25] *Id.* at 15.
[26] Bickel, *Foreword: The Passive Virtues*, 75 HARV. L. REV. 40, 46 (1961).
[27] A. BICKEL, THE LEAST DANGEROUS BRANCH 23-28 (1962). For a criticism of Professor Bickel's thesis, see Gunther, *The Subtle Vices of the "Passive Virtues"—A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1 (1964).
[28] A. BICKEL, *supra* note 27, at 463.
[29] Bickel, *supra* note 26, at 46.

Bickel does not deny that the political question may sometimes be adequately explained as an act of constitutional interpretation. His point of departure, however, is Wechsler's insistence that constitutional interpretation is "all the doctrine can defensibly imply."[30]

A "Functional" Analysis

While in general agreement with the Bickel thesis that the passive virtues are legitimate "because they make possible performance of the Court's grand function as proclaimer and protector of goals,"[31] Professor Scharpf has expressed the opinion that the political question cannot be justified in the same manner.[32] This is so because the political question is uniquely distinguishable from other techniques of avoidance such as standing and ripeness.

In contrast to other "passive virtues," when the Court refuses to decide an issue because it is political and leaves it for determination by another department of government, its purpose is not to postpone decision until the time is ripe for a truly principled decision on

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[30] Other critics of the constitutional quality of the political question include Maurice Finkelstein, who has recorded the following description of the doctrine:

> It [the political question] applies to all those matters of which the court, at a given time, will be of the opinion that it is impolitic or inexpedient to take jurisdiction. Sometimes this idea of inexpediency will result from the fear of the vastness of the consequences that a decision on the merits might entail. Sometimes it will result from a feeling that the Court is incompetent to deal with the particular type of question involved. Sometimes it will be induced by the feeling that the matter is 'too high' for the courts. But always there will be a weighing of considerations in the scale of political wisdom. Finkelstein, *supra* note 7, at 344.

Mention should also be made of Mr. Field's laudable attempt to review the political question cases; his conclusion was that "the true basis of a political question is the lack of legal principles for the courts to apply in their consideration of cases involving certain types of subject matter. . . ." Field, *The Doctrine of Political Questions in the Federal Courts*, 8 MINN. L. REV. 485, 513 (1924). The Field analysis has been labeled a "cognitive" theory of the political question. Scharpf, *supra* note 19, at 555.

It has been said that a great variety of considerations, acting alone or in various combinations, contribute to the conclusion that a question is political. H. M. HART & H. WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 192 (1953). Among these considerations the following are salient:

> the inability of courts to secure facts necessary for decision; the need for discretion in decision and the courts' inability to develop or apply controlling principles of law; the superiority of political checks as guides to decisions; the existence of special dangers, as for example in foreign relations of having the government speak with more than one voice; the inability of courts to deal with the possible consequences of decision, such as would follow, for example, a holding that an entire state government was unconstitutional; the push of express constitutional provisions; etc., etc.

[31] A. BICKLE, *supra* note 27, at 71.

[32] Scharpf, *supra* note 19, at 534-35.

the merits (as Bickel suggests). On the contrary, the Court relinquishes all responsibility to decide the issue, unless, of course, the Court later overrules or distinguishes a political question.[33] In short the contention is that the political question doctrine cannot be explained satisfactorily in terms of a procedural or jurisdictional technique of avoidance.[34]

Instead, Professor Scharpf would explain the political question "in functional terms, as the Court's acknowledgment of the limitations of the American judicial process."[35] He enumerates several functional factors and considerations which, in various combinations, are likely to convince the Court that decision of a particular issue would transgress "the limits of its own responsibility."[36] The first factor or consideration which may cause the Court to invoke the political question doctrine is difficulty in gaining access to information.[37] This factor may be manifest in cases dealing with foreign affairs in which decision depends upon evaluation of a foreign fact-situation, especially if relevant information is in the special competence of the executive department.

A second factor or consideration which may be germane in determining whether an issue is a nonjusticiable political question is the need for uniformity of decision.[38] This factor has been operative in cases in which the Court has respected determinations by the political departments establishing the duration of war. As a third factor, Professor Scharpf lists deference by the Court to the wider responsibility of the political departments.[39] This has been a salient factor in many of the cases in which the Court has found the issue to be political for the reason that judicial interference would be embarrasing to another branch of government.

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[33] The political question should also be distinguished from other rules of self-restraint which the Court has, from time to time, imposed upon itself. See for example the self-imposed rules enumerated by Brandeis, J., concurring in Ashwander v. T.V.A., 297 U.S. 288 (1936). These rules have a procedural quality, the thrust of which is to postpone decision of the constitutional question that is raised.

[34] Scharpf, *supra* note 19, at 535-38.

[35] *Id.* at 566. Professor Scharpf defines the term "functional" to refer to the "interrelationship between the nature of the task which the Court is performing and the means which it can employ for the performance of this task. If its ordinary means prove inadequate for a particular task, the Court may react either by enlarging its arsenal of means or by limiting the tasks which it will perform." *Id.* at 523, n.21.

[36] *Id.* at 567.

[37] *Id.*

[38] *Id.* at 573.

[39] *Id.* at 578.

On the other hand, the political question has not invariably provided the technique by which the Court has seemingly deferred to the wider responsibility of the political departments. Thus, in *Korematsu v. United States*[40] a majority of the Court upheld the exclusion of American citizens of Japanese extraction from designated areas of the West Coast as a valid exercise of the war power, even as applied to a citizen of Japanese extraction whose loyalty to the United States was unquestioned. The Court rejected the contention that it was sanctioning an obvious racial discrimination in violation of the fifth amendment as well as the deprivation of other constitutional rights.[41]

A final consideration is characterized by Scharpf as the normative limitations of the political question. That is, except for the cases in which the Court has applied the political question doctrine to allow exclusion and deportation of aliens in spite of appealing due process claims, the Court has refused to apply the doctrine to the guarantees of the Bill of Rights.[42] So also has the doctrine been held inapplicable when the Court was presented with "conflicting claims of competence among the departments of the federal government, or between the federal government and the states."[43]

In regard to the Wechsler-Bickel dichotomy, Scharpf suggests that the political question has provided a "touchstone for the validity of competing theories of judicial review."[44] Concluding that the doctrine cannot satisfactorily be explained in terms of a

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[40] 323 U.S. 214 (1944).

[41] Three justices filed separate dissenting opinions. Justice Murphy said the exclusion not only amounted to racial discrimination depriving persons of Japanese ancestry of equal protection of the laws as guaranteed by the fifth amendment but that "[i]t further deprives these individuals of their constitutional rights to live and work where they will, to establish a home where they choose and to move about freely. In excommunicating them without benefit of hearings, this order also deprives them of all their constitutional rights to procedural due process." *Id.* at 235.

[42] Scharpf, *supra* note 19, at 583-84. An additional qualification of this generalization is suggested in Justice Jackson's dissenting opinion in Korematsu v. United States, 323 U.S. 214, 242 (1944). While agreeing with his fellow dissenters that the military order directing the exclusion exceeded permissible constitutional limits, Justice Jackson concluded that the civil courts should refuse to enforce such an order. He counseled against sustaining the order under the due process clause, for to do so "is a far more subtle blow to liberty than the promulgation of the order itself," and said that to lead the people to rely on the Court for review was "wholly delusive." By intimating that restraint should be imposed upon the military through the political processes and not through the judicial process, Justice Jackson was favoring what amounted to the political question doctrine; *i.e.*, by refusing to adjudicate, the Court could avoid legitimating an order repugnant to the Constitution.

[43] *Id.* at 585.

[44] Scharpf, *supra* note 19, at 517.

consistent interpretation of constitutional grants of power or as a discretionary retreat to avoid an unprincipled decision, he advances a "functional" explanation—acknowledgment by the Court of the limitations of the judicial process. In support of this he adumbrates functional factors or considerations which have made the acknowledgment necessary in a number of cases.

Conceding that the factors which Scharpf lists have been prominent in a number of cases, one wonders whether or not he has been successful in divorcing the explanation from theories of judicial review in the American system. If the bulk of the political question cases represents no more than an acknowledgment by the Court of the limitations of the judicial system, perhaps Scharpf has done little more than state a theory of judicial self-limitation.

As the debate over the meaning of the political question illustrates, the doctrine contains an evanescent quality which evades precise articulation. Evaluation of the doctrine is further complicated by the staggering number of cases in which it has been involved. For this reason exhaustive treatment of the cases, though desirable, is beyond the scope of this article. Short of this, however, an effort will be made to examine significant areas of the doctrine with emphasis on current decisions.[45]

SCOPE OF THE DOCTRINE

Promulgation and Adoption of Constitutional Amendments

Coleman v. Miller[46] is noteworthy for its holding that the validity of a state legislature's ratification of a proposed amendment to the Federal Constitution is a political question to be left to the determination of the Congress in exercising its control over the promulgation of the adoption of amendments. Factually, the case revolved around the child labor amendment which Congress had proposed in 1924. The following year the Kansas Legislature adopted a

[45] Limitations of time and space have made it necessary to eliminate discussion of categories of the political question relating to the duration of war, the legal status of Indian tribes, foreign affairs and the deportation of aliens. For commentary on these subjects see, Note, *Judicial Determination of the End of War*, 47 COLUM. L. REV. 255 (1947); Hudson, *The Duration of War Between the United States and Germany*, 39 HARV. L. REV. 1020 (1926); POST, THE SUPREME COURT AND THE POLITICAL QUESTION 112-17 (1936); Dickinson, *Law of Nations as National Law: "Political Questions,"* 104 U. PA. L. REV. 451 (1956); Bullit, *Deportation as a Denial of Substantive Due Process*, 28 WASH. L. REV. 205 (1953); Note, *Resident Aliens and Due Process: Anatomy of a Deportation*, 8 VILL. L. REV. 566 (1963).

[46] 307 U.S. 433 (1939).

resolution rejecting the proposed amendment, and a certified copy of the resolution was sent to the United States Secretary of State. Twelve years later—in 1937—the Kansas Legislature passed a resolution ratifying the proposed amendment by a narrow margin. There was a tie vote in the state senate which was broken when the presiding officer cast an affirmative vote.

Thereafter, members of both houses of the state Legislature brought a mandamus proceeding in the state supreme court to compel legislative officials to declare that the bill had not passed and to restrain them from authenticating it. A majority of the United States Supreme Court affirmed dismissal of the writ by the highest court in Kansas. Although the Court was divided to the point of indecision with rspect to the question whether or not the power of the Lieutenent Governor, as presiding officer of the state Senate, to break a tie vote should be considered a political question, another aspect of the political question was decisive. The Court said the efficacy of the ratification was committed to Congress as part of its authority in exercising its control over the promulgation of the adoption of amendments.[47]

It was argued that Congress, having set no time limit within which the proposed amendment could be ratified, had in effect said that ratification must take place within a reasonable time to be determined by the Supreme Court. The Court, however, was unpersuaded and expressed concern that relevant criteria for making a judicial determination were absent.[48] As the Court stated it:[49]

> In short, the question of a reasonable time in many cases would involve . . . an appraisal of a great variety of relevant conditions, political, social and economic, which can hardly be said to be within the appropriate range of evidence receivable in a court of justice and as to which it would be an extravagant extension of judicial authority to assert judicial notice as the basis of deciding a controversy. . . . On the other hand, these conditions are appropriate for the consideration of the political departments of Government. The questions they involve are essentially political and not justiciable.

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[47] *Id.* at 450.

[48] The Court said that in determining whether a question is political and not justiciable, "the appropriateness under our system of government of attributing finality to the action of the political departments and also the lack of satisfactory criteria for a judicial determination are dominant considerations." *Id.* at 454-55.

[49] *Id.* at 453-54.

Notwithstanding the theme of judicial abstention in the majority opinion, Mr. Justice Black in a concurring opinion criticized the Court for not expressly disapproving the conclusion in an earlier decision (*Dillion v. Gloss*)[50] that the Constitution impliedly required ratification of a proposed amendment within a reasonable amount of time. The Court distinguished the *Dillion* case as deciding only that Congress *might* fix a reasonable time for ratification, but Justice Black argued that it should be overruled. Characterizing the entire amendment process as political, he said the process was subject to no judicial review because article V of the Constitution grants power over the amending of the Constitution to Congress alone.[51]

To regard the reasonable time question as having complete immunity from judicial review seems the preferable position. In the first place, the problem invites application of Professor Jaffe's observation that for many problems "[w]e may believe that the job is better done without rules, or that even though there are applicable rules, these rules should be only among the numerous relevant considerations."[52] Although little difficulty would be involved in devising rules defining a reasonable time, this problem is one for which we do not want rules. As the Court pointed out, a determination of the vitality of a proposed amendment requires evaluation of a broad range of conditions in society. These give rise to sharply contested issues of social policy (such as the child labor law) which cut deeply into society and which are not always susceptible to reasoned elaboration. Such issues are more appropriately resolved by the legislature whose members are directly responsible to the electorate.

Secondly, there is a certain tension between the institution of judicial review and the democratic principle of majority rule. To the extent that judicial review is counter-majoritarian it is essentially undemocratic.[53] Thus, it is one thing to attempt to justify

[50] 256 U.S. 368 (1921) (congressional resolution proposing the eighteenth amendment which contained a specification declaring the proposed amendment inoperative unless ratified within seven years held to be a reasonable amount of time).

[51] Coleman v. Miller, 307 U.S. 433, 459 (1939) (Black, J. concurring).

[52] Jaffe, *Standing to Secure Judicial Review: Public Actions*, 74 HARV. L. REV. 1265, 1303 (1961). Professor Bickel adopts the Jaffe formula in developing his thesis. See A. BICKEL, *supra* note 27, at 183-198.

[53] For a discussion of whether or not judicial review is compatible with democracy, see McCleskey, *Judicial Review in a Democracy: A Dissenting Opinion*, 3 HOUSTON L. REV. 354 (1966). The writer concludes that "tradi-

judicial annulment of legislation as an expression of community principle—the "sober second thought," as Bickel has put it—yet it is entirely another thing to allow the Court to hold a reasonable time has expired and thereby frustrate the very process by which the community may wish to reverse what the Court has done.

On the other hand, to regard the *entire* amendment process as being subject to *no* review is to ignore important functions which the Court might legitimately perform. Redress for irregularities or fraud in obvious disregard of explicit constitutional requirements could be sought in court. For example, assuming there are no questions concerning the efficacy of a state's ratification such as were involved in *Coleman v. Miller,* if Congress should declare an amendment adopted which plainly had not been approved by three-fourths of the states as required by the Constitution, the Court's doors should not be closed. Although the likelihood of such a patent violation of the Constitution is improbable, the possibility of judicial relief should not be foreclosed.[54] The Court could declare the amendment void or refuse to enforce it because approval of the requisite number of states had not been secured. As the Court's order would be framed in the negative, compliance would not present a significant problem.

When, however, one passes from the more outrageous violations of article V, nice questions are presented. A potential problem is illustrated by current attempts to secure applications of two-thirds of the state legislatures requesting Congress to call a convention for the purpose of proposing amendments in regard to the apportionment of state governments. Segments of the community, unhappy

tion, and sentiment, and some really spendid rhetoric, have blinded us to 'the essential reality that judicial review is a deviant institution in the American democracy.' " *Id.* at 366.

[54] A more likely situation would be a judicial contest of congressional certification that three-fourths of the states had approved a proposed amendment. Assuming the approval is authenticated by the proper officers, what evidence, if any, would be admissible to impeach their authentication? Two early cases dealing with legislation cut in different directions. Field v. Clark, 143 U.S. 649 (1892) held that it is incompetent to show from committee reports or the journals of either house of Congress that a bill, which was signed by the presiding officers of each house and the President, was not the one actually passed by the Congress. *But cf.* Gardner v. Barney, 73 U.S. (6 Wall) 499 (1868) in which the Court held it was proper to resort to extrinsic evidence show that the date affixed to a bill signed by the President was defective. "[W]henever a question arises in a court of law of the existence of a statute, or of the time when a statute took effect, or of the precise terms of a statute, the judges who are called upon to decide it, have a right to resort to *any* source of information which in its nature is capable of conveying to the judicial mind a clear and satisfactory answer to such questions. . . ." *Id.* at 511 (dictum) (emphasis supplied).

with the Court's conception of one-man, one-vote, have set into motion the cumbersome amending process. If two-thirds of the states should apply to Congress to call such a convention, would the Court review a congressional refusal or failure to comply?

If the Court decides the merits, it must interpret the explicit language of article V which uses the word "shall" in connection with the duty of Congress to call such a convention. However, as the Court's interpretation of the rendition clause of article IV, section 2 exemplifies, mandatory language is not always construed to create an enforceable duty.[55] Thus, the Court might well hold that the congressional duty to call a convention is not used in the mandatory or compulsory sense but is only declaratory of a moral duty created by the Constitution. Such a construction would avoid a head-on confrontation with Congress and compliance problems growing out of the affirmative action which a contrary construction might necessitate.

On the other hand, the Court could accomplish the same result by applying the political question and thus refusing to decide the merits. Besides avoiding hostile confrontation with the legislative branch, use of the political question would help preserve the prestige and public confidence on which the Court's ultimate authority rests. By refusing to legitimate or sanction congressional non-compliance with a constitutional directive, the Court will emerge from the fray unscarred and final solution of the question will be left to the political processes.

The Politics of the People: The Apportionment Cases

> *The Court's authority—possessed of neither the purse nor the sword—ultimately rests on sustained public confidence in its moral sanction. Such feeling must be nourished by the Court's complete detachment, in fact and in appearance, from political entanglements and by abstention from injecting itself into the clash of political forces in political settlements.—Frankfurter, J., dissenting in Baker v. Carr, 369 U.S. 186, 267 (1962).*

Considering the wide range of issues to which the political question has been applied, it is not surprising that it should have raised its head in suits to compel reapportionment where state legislative and congressional representation was based on considerations other than numerical equality at the ballot box. As the justiciability of malapportionment claims has important social, political and economic consequences, this has proved to be one of the most active and most controversial categories of the political question. Thus,

[55] Kentucky v. Dennison, 65 U.S. (24 How.) 66 (1860).

it may be more than a matter of mere coincidence that the earliest apportionment suits were commenced at the threshold of an era in American history which subjected American institutions to a serious re-evaluation.

After the 1930 census, approximately two-thirds of the states were affected by congressional reapportionment. States with increasing and with decreasing populations were affected, and many state legislatures were reapportioned.[56] Voters instituted suit challenging the new districts, and several of the cases ultimately reached the Supreme Court.

In one of these cases the two houses of the Minnesota Legislature had passed a congressional districting bill and had sent it to the Governor who had returned it without approval. The Minnesota constitution provided that a bill should become law upon approval by the Governor or in the absence of his approval by two-thirds vote of each House. Even though the necessary two-thirds approval had not been obtained, the bill was deposited with the state Secretary of State to become effective as law.

Alleging (1) that the bill had not been repassed by the Legislature and (2) that the proposed congressional districts were not compact and did not contain an equal number of inhabitants as required by the congressional Reapportionment Act of 1929, the plaintiff sought to enjoin all proceedings pursuant to the bill. The Supreme Court held for the plaintiff on the ground that there is nothing in article 1, section 4 of the Constitution to allow a state legislature to enact law except in accordance with the method set forth in its own constitution.[57]

The Court was confronted with what in effect had been the plaintiff's second contention in *Wood v. Broom*.[58] The 1911 congressional Reapportionment Act specified that each district should have, among other things, as nearly as practicable the same number of inhabitants, and a federal district court declared a Mississippi statute invalid for failure to comply with this requirement. Reversing, the Supreme Court held that the provision of the 1911 act relied upon by the district court had expired and was not included in the

[56] Dixon, *Legislative Apportionment and the Federal Constitution*, 27 LAW & CONTEMP. PROB. 329 (1962).
[57] Smiley v. Holm, 285 U.S. 355 (1932). *Accord*, Carrol v. Becker, 285 U.S. 380 (1932); Koenig v. Flynn, 285 U.S. 375 (1932).
[58] 285 U.S. 1 (1932).

1929 congressional Reapportionment Act.[59] Four justices, however, thought the only ground for dismissing the bill was want of equity.

Precedent against the justiciability of apportionment claims continued to mount and reached its high water mark with the decision of *Colegrove v. Green.*[60] A divided Court dismissed a complaint under the federal Declaratory Judgment Act for a decree declaring Illinois' statutes apportioning the state into congressional districts invalid on the theory that the districts lacked compactness of territory and approximate equality of population. The prevailing opinion was written by Justice Frankfurter who thought *Wood v. Broom* was controlling.[61] Moreover, he hinted that lack of jurisdiction was the basis for the decision because the Constitution grants to Congress the exclusive authority to regulate congressional elections.

The actual ground of the decision, however, proceded on the assumption that the judiciary is incompetent to entertain claims based on unequal voting power. Thus:

> We are of the opinion that the appellants ask of this Court what is beyond its competence to grant. [Such a demand on judicial power] must be resolved by considerations on the basis of which this Court, from time to time, has refused to intervene in controversies. It has refused to do so because due regard for the effective working of our Government revealed this issue to be of a peculiarly political nature and therefore not meet for judicial determination.
>
> . . . .
>
> Courts ought not to enter this political thicket.[62]

At the heart of *Colegrove* was Justice Frankfurter's conviction that excessive reliance on courts weakens the responsibility of the electorate in a democracy. One thought, more than any other, permeates the opinion: "It is hostile to a democratic system to involve the judiciary in the politics of the people."[63]

In an opinion by Justice Black, three dissenters took a different view of the role of courts in a democracy. The dissenters emphasized that the plaintiffs lived in congressional election districts with popu-

[59] *Accord,* Mahan v. Hume, 287 U.S. 575 (1932).
[60] 328 U.S. 549 (1946).
[61] Three justices dissented, and one justice was of the opinion that the bill should be dismissed for want of equity.
[62] Colegrove v. Green, 328 U.S. 549, 552-56 (1946).
[63] *Id.* at 553. For an article challenging both the legatlity and practicality of *Colegrove,* see Lewis, *Legislative Apportionment and the Federal Courts,* 71 HARV. L. REV. 1057 (1958).

lations three to four times as great as other such districts; and that state legislators were chosen on the basis of state election districts apportioned in a manner similar to the congressional election districts, which had not been reapportioned for approximately forty years. The interdependence between state and congressional apportionment made it in the self-interest of state legislators to perpetuate the inequalities in voting power. Given this situation, the dissenters felt it was the duty of the Court to declare the existing Illinois apportionment act "a wholly indefensible discrimination against appellants and all other voters in heavily populated districts" in violation of the equal protection clause of the fourteenth amendment.[64]

Following the *Colegrove* decision, the Court continued to remain aloof from the political thicket and dismissed a number of apportionment claims in short *per curiam* decisions.[65] While reflecting the *Colegrove* philosophy to a degree, an additional concept appeared to justify non-intervention:

> To assume that political power is a function exclusively of numbers is to disregard the practicalities of government. . . . It would be strange indeed, and doctrinaire, for this Court, applying such broad constitutional concepts as due process and equal protection of the laws, to deny to a State the power to assure a proper diffusion of political initiative as between its thinly populated counties and those having concentrated masses. . . . The Constitution—a practical instrument of government—makes no such demands on the States.[66]

On the other hand, the same Court which declared nonjusticiable malapportionment claims based on the equal protection clause of the fourteenth amendment had considerably less difficulty striking down racially motivated legislation which created a disparity in voting power. Thus, Justice Frankfurter who wrote the opinion in *Colegrove v. Green* spoke for the Court in *Gomillion v. Lightfoot.*[67]

[64] Colegrove v. Green, 328 U.S. 549, 569 (1946) (Black, J., dissenting).

[65] Matthews v. Handley, 361 U.S. 127 (1959); Hartsfield v. Sloan, 357 U.S. 916 (1958); Radford v. Gray, 352 U.S. 991 (1957); Kidd v. McCanless, 352 U.S. 920 (1956); Anderson v. Jordan, 343 U.S. 912 (1952); Cox v. Peters, 342 U.S. 936 (1952); Remmey v. Smith, 342 U.S. 916 (1952); Tedesco v. Board of Supervisors of Elections, 339 U.S. 940 (1950); South v. Peters, 339 U.S. 276 (1950); MacDougall v. Green, 335 U.S. 281 (1948); Colegrove v. Barret, 330 U.S. 804 (1946); Cook v. Fortson (Turner v. Duckworth), 329 U.S. 675 (1946). Only a few of these decisions were by a unanimous Court.

[66] MacDougall v. Green, 335 U.S. 281, 283-84 (1948).

[67] 364 U.S. 339 (1960).

The plaintiffs in *Gomillion* were Negro citizens who sought an injunction in a federal district court in Alabama to restrain the enforcement of a state statute which altered the boundaries of the city of Tuskegee. According to the allegations in the bill, the act eliminated practically all of the city's 400 Negro voters without eliminating any white voters,[68] and the plaintiffs argued that the effect of the statute was to disenfranchise them solely for racial reasons. More specifically, the alleged effect of the act was "to deprive the Negro petitioners discriminatorily of the benefits of residence in Tuskegee, including, *inter alia,* the right to vote in municipal elections."[69] Reversing the district court's dismissal of the bill, the Court said that if the allegations were proved, the effect of the act would be to deprive Negroes of the right to vote on account of race in violation of the fifteenth amendment.

Attempting to distinguish *Colegrove v. Green,* Mr. Justice Frankfurter pointed out that *Colegrove* involved a complaint based on discriminatory apportionment of congressional districts in the form of legislative inaction over a period of years resulting in a dilution of the strength of the plaintiff's votes. In contrast, the complaint in *Gomillion* centered around affirmative legislation which was racially inspired. As Justice Frankfurter expressed it:

> In no case involving unequal weight in voting distribution that has come before the Court did the decision sanction a differentiation on racial lines whereby approval was given to unequivocal withdrawal of the vote solely from colored citizens. Apart from all else, these considerations lift this controversy out of the so-called "political" arena and into the conventional sphere of constitutional litigation.[70]

Although *Gomillion* did involve a kind of apportionment problem in that the contested legislation in effect deprived the plaintiffs of the right to vote in municipal elections, the distinction drawn by Justice Frankfurter seems correct. In the first place, there was ample precedent in support of the result in *Gomillion,*[71] while there

[68] It was alleged that the act altered the shape of the city from a square to an irregular twenty-eight sided figure.

[69] Gomillion v. Lightfoot, 364 U.S. 339, 341 (1960).

[70] Gomillion v. Lightfoot, 364 U.S. 339, 346-47 (1960).

[71] Guinn v. United States, 238 U.S. 347 (1915) and Myers v. Anderson, 238 U.S. 368 (1915) held so-called Grandfather clauses—statutes fixing the qualifications of voters based on the right of the voter or his ancestor to vote at a date prior to the adoption of the fifteenth amendment—void because in violation of the fifteenth amendment. In Nixon v. Herndon, 273 U.S. 536 (1927) the Court held unconstitutional under the equal protection

was no precedent permitting justiciability where the sole claim was numerical inequality in voting strength. Secondly, the force of history presented an appealing argument for finding justiciability in *Gomillion* while denying it in *Colegrove*: perhaps the principal purpose behind the fifteenth amendment was enfranchisement and legal equality for the Negro. Thirdly, judicial abstention in *Colegrove* could co-exist with judicial interference in *Gomillion* because "apportionment is necessarily a very high percentage of politics with a very small admixture of definable principle. In race relations the proportions are reversed."[72] For this reason the political question was not even mentioned in the school segregation cases.[73]

In this state of the art, the apportionment issue appeared to have been placed beyond the competence of the federal judiciary. There were few warnings in the Court's opinions that *Baker v. Carr*[74] was on the horizon. It should be noted, however, that a majority of the Court had never been able to agree upon the reasons for holding apportionment suits nonjusticiable. In addition, only four of the judges who sat on the Court at the time *Colegrove v. Green* was decided remained when *Baker* was argued, and two of them—Justices Black and Douglas—had dissented in *Colegrove*. Just prior to Baker these two justices had reiterated their positions by way of a memorandum dissent in which they were joined by Chief Justice Warren and Justice Brennan.[75]

Actually there was nothing new or innovating in the claim set forth in the complaint in *Baker*. The Tennessee Constitution provided for representation in proportion to the number of qualified

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clause of the fourteenth amendment a Texas statute making Negroes ineligible to participate in a primary election of a political party. Speaking for the Court Mr. Justice Holmes said, "[t]he objection that the subject matter of the suit is political is little more than a play upon words." *Id.* at 540.

A majority of the Court in Smith v. Allwright, 321 U.S. 649 (1944) found that exclusion of Negroes from voting in a Democratic primary election to select nominees for a general election constituted state action in contravention of the fifteenth amendment, even though membership in the party was limited to white persons by resolution of a state convention. More recently, eight of nine members of the Court thought the fifteenth amendment was violated because Negroes were not allowed to vote in primary elections of a Texas county political organization which placed the names of its nominees on the regular Democratic primary ballot. Terry v. Adams, 345 U.S. 461 (1953).

[72] A. BICKEL, *supra* note 27, at 193.

[73] *Id.*

[74] 369 U.S. 196 (1962).

[75] Hartsford v. Sloan, 357 U.S. 916 (1958). (involving an attack on the Georgia county unit system). *See* Neal, *Baker v. Carr: Politics in Search of Law*, 1962 SUP. CT. REV. 252.

voters in the state. Suit was instituted in a federal district court in which the plaintiffs alleged that the state legislature had failed to apportion since 1901 and that the Supreme Court of Tennessee had declined jurisdiction in a similar case. For these reasons plaintiffs claimed denial of the equal protection of the laws guaranteed by the fourteenth amendment.

Agreeing that the claim presented a justiciable controversy, six members of the Court amassed four separate opinions. Justices Frankfurter and Harlan dissented. Although Mr. Justice Stewart in his concurring opinion stressed that the Court decided only the questions of jurisdiction, justiciability and standing, subsequent decisions have made it unequivocally clear that the political question is no longer an impediment to justiciability in apportionment litigation.[76]

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[76] After *Baker*, the Court, in a series of decisions, overturned the line of cases dating from *Smiley v. Holm* and *Wood v. Broom* in 1932. Thus, in Gray v. Sanders, 372 U.S. 368 (1963), the Court struck down use of Georgia's county unit system in primary elections for state-wide officers. According to Mr. Justice Douglas, "[t]he conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing—one person, one vote." *Id.* at 381. In like manner the Court invalidated a Georgia statute creating congressional districts because the statute abridged the guarantee of article I, section 2 of the federal constitution, providing that congressmen shall be chosen "by the People of the several States."

By 1964 the Court had come full circle, Reynolds v. Sims, 377 U.S. 533 (1964) held the existing and two proposed apportionment plans allowing substantial variances between population and representation for the Alabama Legislature unconstitutional. The dominant theme of the opinion was, of course, equal protection: "We hold, that as a basic constitutional standard, the Equal Protection Clause requires that the seats in *both* houses of a bicameral state legislature must be apportioned on a population basis." *Id.* at 568 (emphasis supplied). As for the political question: "We are cautioned about the dangers of entering into political thickets and mathematical quagmires. Our answer is this: a denial of constitutionally protected rights demands judicial protection; our oath and our office require no less of us." *Id.* at 566.

On the same day *Reynolds v. Sims* was decided—June 15, 1964—the Court held the legislatures of five other states had been unconstitutionally apportioned. Lucas v. Forty-Fourth General Assembly, 377 U.S. 713 (Colorado); YMCA, Inc. v. Lomenzo, 377 U.S. 633 (New York); Maryland Committee for Fair Representation v. Tawes, 377 U.S. 656 (Maryland); Davis v. Mann, 377 U.S. 678 (Virginia); Roman v. Sincock, 377 U.S. 695 (Delaware). Shortly after these cases were decided, the Court found apportionments in nine additional states unconstitutional; they are reported beginning at 378 U.S. 553.

But cf., Fortson v. Morris 385 U.S. 231 (1966), where the Court by a five-four decision upheld a provision of the Georgia Constitution allowing members of the Georgia General Assembly to elect the governor in the event no candidate receives a majority of the popular votes cast in a general election. The Court refused to enjoin the Georgia Legislature from proceeding to elect a Governor even though the Legislature was malapportioned.

In holding that the challenge to an apportionment presents no nonjusticiable political question, Mr. Justice Brennan, who wrote the majority opinion, found it necessary to review the contours of the political question doctrine. He sidestepped the *Colegrove v. Green* line of precedent upon which the district court had relied in dismissing the suit by saying "[t]he cited cases do not hold to the contrary."[77] He said that a review of the cases revealed that in the political question cases, "it is the relationship between the judiciary and the coordinate branches of the Federal Government, and not the federal judiciary's relationship to the States, which gives rise to the 'political question.' "[78] Furthermore, he listed a number of variables which distinguish a political question and which, at the same time, identify it as essentially a function of separation of powers. As Mr. Justice Brennan expressed it:

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.
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> Unless one of these formulations is inextricable from the case at bar, there should be no dismissal for nonjusticiability on the ground of a political question's presence.[79]

As Professor McCloskey has pointed out,[80] with the exception of the formulation described as "a lack of judicially discoverable and manageable standards," Brennan's primary emphasis is upon the

[77] Baker v. Carr, 369 U.S. 186, 209 (1962). Brennan read *Smiley v. Holm* and the other 1932 cases as having "settled the issue in favor of justicability of questions of congressional redistricting," Such a reading seems questionable as the only questions decided in these cases were the applicability of the governor's veto power to a state redistricting and the expiration of the voter numerical equality requirement in the 1911 congressional Reapportionment Act.

[78] *Id.* at 210.

[79] Baker v. Carr, 369 U.S. 186, 209 (1962).

[80] McCloskey, *Foreword: The Reapportionment Case,* 76 HARV. L. REV. 54, 61 (1962).

intra-federal relationship. Not only are the variables which he lists concerned in the main with separation of powers at the federal level, but the precedents he considers in fields such as foreign affairs, duration of war and validity of enactments bear the same message. Although Brennan does not expressly foreclose application of the political question for want of judicially discoverable standards when the federal judiciary's relationship to the states is involved, it seems implicitly clear that this will seldom be an insuperable barrier. Thus, in *Baker* such a contention was disposed of in one sentence, and no breath was wasted on elaboration:

> Judicial standards under the Equal Protection Clause are well developed and familiar, and it has been open to the courts since the enactment of the Fourteenth Amendment to determine, if on the particular facts they must, that a discrimination reflects *no* policy, but simply arbitrary and capricious action.[81]

More recently the Court in the Julian Bond case had little difficulty discovering free speech standards by which actions of the Georgia Legislature were invalidated.

Mr. Justice Brennan's treatment of the political question has been praised for several reasons. First, some crystalization of such an amorphous concept is desirable, and there is a strong implication that his list of specific elements which make an issue into a political question is exclusive. Even if the list is not exclusive, it has confined the doctrine to more manageable proportions.[82] Secondly, as a by-product of enumerating the elements of the political question, Mr. Justice Brennan has assembled the political question cases with an orderliness of doctrine that previous majority opinions lacked.[83] At the same time, however, he seems to have rejected blanket application of the doctrine to any one broad area and to have emphasized the need for case by case development.[84]

On the other hand, this undertaking has not escaped criticism. Thus, he has been accused of engaging in "a type of logomachical legerdemain without squarely facing the more fundamental problem; namely, the distinction between *law* and *politics*."[85] Another com-

[81] Baker v. Carr, 369 U.S. 186, 226 (1962).
[82] *See* Emerson, *Malapportionment and Judicial Power*, 72 YALE L.J. 64 (1962).
[83] McKay, *Political Thickets and Crazy Quilts: Reapportionment and Equal Protection*, 61 MICH. L. REV. 645 (1963).
[84] Emerson, *supra* note 82.
[85] Tollett, *Political Questions and the Law*, 42 U. DET. L.J. 439, 441 (1965).

mentator has advanced a similar observation, although in more practical language: "The Court seems to have decided justiciability in such a generalized context as to amount to judicial adventuring on the high seas of politics with no assurance of a safe return to shore."[86] Perhaps the most stinging criticism, however, was voiced by Mr. Justice Frankfurter who was of the opinion that the Court's decision not only reversed a "uniform course of decision established by a dozen cases" but amounted to a "massive repudiation of the experience of our whole past."[87]

Part of the past experience Justice Frankfurter thought the Court had repudiated was the *Colegrove* doctrine. While admitting there had been no unanimity of agreement on the reasoning behind *Colegrove,* he said that the political question in the *Colegrove—Baker* type of case embodied a confluence of the following considerations: (1) a concern with avoiding involvement of the judiciary in matters traditionally left to legislative policy; (2) difficulty of devising judicial standards to determine the precise role of numerical equality in the allocation of political power; (3) difficulty of finding appropriate kinds of relief. Each of these considerations converged to make the *Colegrove—Baker* kind of controversy nonjusticiable. "To classify the various instances as 'political questions' is rather a form stating this conclusion than a revealing of analysis."[88]

Emanating from his dissenting opinion was the Frankfurter philosophy of complete judicial detachment from the politics of the people. To embroil the Court in the apportionment controversy would be "hostile to a democratic system"[89] because apportionment lies at the heart of the political process.

> Apportionment . . . [involves] considerations of geography, demography, electoral convenience, economic and social cohesions or divergencies among particular local groups, communications, the practical effects of political institutions like the lobby and the city machine, ancient traditions and ties of settled usage, respect for proven incumbents of long experience and senior status, mathematical mechanics, censuses compiling relevant data, and a host of others.[90]

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[86] Dixon, *supra* note 56, at 355.

[87] Baker v. Carr, 369 U.S. 186, 266-67 (1962) (Frankfurter, J., dissenting).

[88] *Id.* at 280-81.

[89] Colegrove v. Green, 328 U.S. 549, 553 (1946).

[90] Baker v. Carr, 369 U.S. 186, 323 (1962) (Frankfurter, J., dissenting). As Professor Bickel has put it, "apportionment is a very high percentage of politics with a small admixture of definable principles." A. BICKEL, *supra* note 27, at 193.

Factors such as these make apportionment extraordinarily complex—so complex that equal protection provides no clear guide for judicial examination.

The Court simply had no answer for this argument, and it is suggested that the Frankfurter position is the preferable one. In the first place, precedent dating from *Colegrove v. Green* called for rejection of apportionment suits. Moreover, there was no compelling historical justification for making representation proportional to population; and what justification there was had not been initiated at the behest of the judiciary.[91] Secondly, conceding that the flexible language of equal protection lends itself to a formula of equality in numbers, there are still other relevant considerations—to return to Professor Jaffe's formula. Even though equal representation of qualified voters may be an ideal of American democracy, our political institutions have invariably found it necessary to compromise the ideal to conform with the practicalities of political life.

Different groups, regions and interests clamor for recognition. Strength of political parties depends to a degree upon which group of voters wields the most power at the polls. In short, the apportionment question is too "high," and "too nakedly power-oriented, and perhaps too explosive for judicial control."[92] By using the political question the Court can refrain from blessing or legitimating "the expedient arrangements made by political institutions."[93] Correction of these arrangements should be initiated at the grass roots level—by the people who exert ultimate control in a democracy.

The Guarantee of a Republican Form of Government

For more than a century article IV, section 4 of the Constitution, guaranteeing to each state a republican form of government, has consistently been held not to be enforceable through the courts. The grandfather of this long line of cases is *Luther v. Borden*,[94] which grew out of Dorr's rebellion of 1841. As the 1633 Charter of Rhode Island contained no provision for amendment and allowed only limited suffrage, dissatisfied citizens elected representatives to attend a constitutional convention, which, in turn, drew up a pro-

[91] Representation proportional to population was not a prevalent practice in colonial times, at the time the Constitution was adopted, or at the time the fourteenth amendment became part of the Constitution; nor was it employed by a large number of states at the time *Baker v. Carr* was argued. Baker v. Carr, 369 U.S. 186 (1962) (Frankfurter, J., dissenting).

[92] McCloskey, *supra* note 80, at 62.

[93] A BICKEL, *supra* note 27, at 194.

[94] 48 U.S. (7 How.) 1 (1849).

posal for a new state government. The new government was adopted by a majority vote of the adult male population, and its Governor-elect Dorr tried unsuccessfully to uphold its authority by force. Thereafter, issue was joined in a trespass action on the question whether or not officials of the charter government had acted pursuant to martial law to suppress an insurrection against the state government. Thus, the ultimate issue was which of the two competing governments was legitimate and lawful. Describing the question as political, the Supreme Court refused to decide the matter.

The Court pointed out that the guarantee clause guaranteed to each state not only a republican form of government but protection against domestic violence upon application of the legislature or the executive (when the legislature cannot be convened). In accordance with the latter guarantee, the Congress had enacted a statute in 1795 empowering the President to curb insurrection within a state upon request by the proper state governmental authority. Thus, the President would necessarily have to determine which government was legitimate before he could exercise his statutory power. As events would have it, the militia was not summoned in the *Luther* case, although the President did in fact recognize the Governor of the charter government. The Court bowed to the President's decision and declared that the political departments had the sole power to determine which of the two competing state governments was legitimate.[95]

Although the actual holding of the *Luther* case was rather narrow, the decision has been the cornerstone in the development of a line of decisions establishing the principle that the federal courts will not enforce guarantee clause claims. Particularly important has been the following dictum:

> Under [the guarantee clause] it rests with Congress to decide what government is the established one in a State. . . . Congress must necessarily decide what government is established in the State before it can be determined whether it is republican or not. And when the senators and representatives of a State are admitted into the councils of the Union, the authority of the government under which they are appointed, as well as its republican character, is recognized by the proper constitutional authority. And its decision is binding on every other department

[95] *See* Bonfield, *The Guarantee Clause of Article IV, Section 4: A Study in Constitutional Desuetude,* 46 MINN. L. REV. 513 (1962).

of the government, and could not be questioned in a judicial tribunal.[96]

This dictum has been taken for granted in a number of decisions,[97] notably *Pacific States Tel. & Tel. Co. v. Oregon.*[98] After the Oregon Constitution was amended in 1902 to provide for the initiative and referendum, the initiative was used in 1906 to enact a law taxing certain classes of corporations. In a proceeding brought by the state to enforce the tax, the taxpayer's two principal contentions were that the initiative and referendum violated the guarantee of a republican form of government and that the tax measure was forbidden by the equal protection clause of the fourteenth amendment. The Court reasoned that the taxpayer's sole objection to the tax was based on its guarantee clause claim and therefore the matter was nonjusticiable on the authority of *Luther v. Borden.*

One could read the *Pacific States* decision rather narrowly to mean only that the republicanism of a mode of statutory enactment cannot be asserted as a defense to resist enforcement of the statute created under it.[99] Such an interpretation, however, has been rejected as subsequent decisions demonstrate, and the *Pacific States* decision has bulked large in a number of instances where efforts have been made to enforce the guarantee clause. More specifically, the Court has declared all issues raised under the guarantee clause to be political primarily on the authority of *Pacific States;* [100] enforcement of the guarantee is said to be for the Congress and not for the Courts.

In contrast with the central role played by the equal protection clause of the fourteenth amendment in decisions of the present Court such as the school segregation decisions and the reapportionment decisions, the Court in *Pacific States* regarded the taxpayer's

[96] Luther v. Borden, 48 U.S. (7 How.) 1, 42 (1849).

[97] During the Reconstruction era the Court refused to enjoin the operation of statutes dividing former confederate states into military districts. As such matters affected the structure of a state's government, they were political and not justiciable. See *e.g.,* Georgia v. Stanton, 73 U.S. (6 Wall.) 50 (1867); Mississippi v. Johnson, 71 U.S. (4 Wall.) 475 (1866).

[98] 223 U. S. 118 (1912).

[99] Bonfield, *supra* note 95.

[100] *See, e.g.,* Highland Farms Dairy, Inc. v. Agnew, 300 U.S. 608, 612 (1937) (attack on a statute establishing a state commission to regulate the licensing, sales, prices and market areas of milk producers held nonjusticiable); Ohio *ex rel.* Bryant v. Akron Metropolitan Park Dist., 281 U.S. 74, 79-80 (1930) (challenge to a constitutional provision requiring the concurrence of all but one of the justices on the state supreme court to invalidate a statute held nonjusticiable); other cases in which attacks based on guarantee clause have been declared nonjusticiable are collected in Bonfield, *supra* note 95.

equal protection claim as mere surplusage. In like manner the Court in *Taylor & Marshall v. Beckham (No. 1)*[101] avoided an alleged due process violation on rather technical grounds. The Kentucky Board of Election Commissioners declared two candidates—Taylor and Marshall—in a general election to have been elected Governor and Lieutenant Governor respectively. After they had been inducted into office, Goebel and Beckham, the opposing candidates, contested the election in the state's General Assembly, which the state constitution gave them the right to do, and the General Assembly awarded the election to them.

Shortly after the oath of office was administered, Goebel died and Beckham succeeded him as Governor. Beckham thereafter successfully sought a judgment of ouster against Taylor and Marshall in the state courts. On appeal to the United States Supreme Court, it was alleged that because the General Assembly had acted without evidence the judgment of ouster deprived Taylor and Marshall of due process of law and deprived the people of Kentucky of a government republican in form. The Court rejected the due process claim on the ground that an office in a state government was not property within the meaning of the fourteenth amendment; as for the latter claim, the Court felt that *Luther v. Borden* was controlling.[102]

It is quite probable that the outcome in the *Taylor* case would be different if it were decided by the present Court. In the first place, the Court in *Taylor* seems to have applied *Luther* almost indiscriminately without regard to what *Luther* did or said. Actually, the *Luther* Court abstained from deciding which of two competing governments was legitimate, and its dicta declared that Congress determines whether or not a state has a republican form of government by admitting Senators and Representatives to " the councils of the Union." If Congress determines a state's republicanism by seating its elected Representatives, it is difficult to see how *Luther* applies to the validity of a gubernatorial election. Neither the holding nor dicta in *Luther* embraces the manner in which a state governor is chosen.

Secondly, separation of powers between the federal judiciary and the states is no longer a formidable barrier to justiciability. Writing for the Court in *Baker v. Carr,* Justice Brennan was at pains to emphasize that it is the federal judiciary's relationship to co-

[101] 178 U.S. 548 (1900).
[102] Three justices dissented.

ordinate branches of the federal government that creates a political question. Since *Baker,* the Court's review of the Georgia Legislature's action in refusing to seat a newly elected member supplies further evidence that the federal judiciary's relationship to the states will not give rise to a political question.

In his dissenting opinion in *Baker v. Carr,* Justice Frankfurter analyzed many of the guarantee clause cases, although the *Taylor* case was not among them. He concluded that the combination of three discernible principles was responsible for the proposition that guarantee clause claims are nonjusticiable, namely: (1) refusal to decide when standards meet for judgment were lacking; (2) non-interference with state governmental matters in the absence of a clear mandate (such as the fifteenth amendment's mandate in *Gomillion v. Lightfoot*); (3) abstention from broad issues of political organization. Justice Frankfurter thought each of these elements was present in the *Baker* case and argued that the claim in *Baker* was, in effect, "a Guarantee Clause claim masquerading under a different label. . . . [W]here judicial competence is wanting, it cannot be created by invoking one clause of the Constitution rather than another.[103]

Justice Brennan's majority opinion, on the other hand, purported to leave the guarantee cluase cases undisturbed. Differing with Justice Frankfurter, he stated that, "it is the involvement in Guaranty Clause claims of the elements thought to define 'political questions,' and no other feature, which could render them nonjusticiable. Specifically, . . . such claims are not held nonjusticiable because they touch matters of state governmental organization."[104] Notwithstanding statements such as these, the substance of the complaint in *Baker*—that representation based on geographical units without regard to numerical equality violates the equal protection clause of the fourteenth amendment—is practically indistinguishable from a charge that the Tennessee government is not republican in form.[105]

[103] Baker v. Carr. 369 U.S. 186, 297 (1962) (Frankfurter, J., dissenting).

[104] *Id.* at 229. It has been observed that "[t]he Brennan-Frankfurter dichotomy was a salient illustration of Llewellyn's notion of 'leeways'—that is, . . . that the choice of applicable precedents to govern current cases, is one of the principal leeways of the law." Rosenblum, *Justiciability and Justice: Elements of Restraint and Indifference,* 15 CATH. U.L. REV. 141, 146 (1966); K. LLEWELLYN, JURISPRUDENCE: REALISM IN THEORY AND PRACTICE 120 (1962).

[105] According to one commentator, "the net conclusion of . . . [Brennan's] opinion seems to be that the issue presented in *Baker v. Carr* is justiciable when presented under the equal protection clause, but nonjusticiable when raised under the guarantee." Bonfield, *Baker v. Carr: New Light on the Constitutional Guarantee of Republican Government,* 50 CALIF. L. REV. 245 (1962).

That is, it is difficult to see how the Court could decide the equal protection issue without considering the republican form issue as a preliminary question for the reason that what violates equal protection depends upon the frame of government being used. As Justice Frankfurter put it, "since 'equal protection of the laws' can only mean an equality of persons standing in the same relation to whatever governmental action is challenged, the determination whether treatment is equal presupposes a determination concerning the nature of the relationship."[106]

Thus, in deciding *Baker* and subsequent apportionment decisions, the Court has in a sense defined a government republican in form. The Court has carried over to the ballot box the aspiration of American democracy that every person counts one. Having done this, the next step may well be specific judicial enforcement of guarantee clause claims. Witness, a recent statement by Justice Fortas:[107]

> They [the voting rights cases and apportionment cases] represent . . . an acknowledgment that the republican form of government guaranteed by the Constitution, read in light of the General Welfare Clause, the guarantees of equal protection of the law and the privileges and immunities of citizens of the United States, requires something more than an adherence to form.

It is reasonable to say, however, that judicial enforcement of the guarantee of a republican form of government would be an undesirable extension of judicial power. Such an extension would be undesirable not because of the impossibility of finding judicial standards, for in deciding equal protection claims in the apportionment cases the Court has, in effect, crossed this hurdle. Instead, nonjusticiability of republican guarantee claims should be dictated by other relevant considerations. As indicated above, there is an interrelation between a state's scheme of representation and its frame of government. Hence, much of the criticism which was aimed at the Court's holding malapportionment claims justiciable is applicable here.

The form of a state's government involves potentially explosive and power-packed issues which cut deep into the heart of American political institutions. For the Court to regulate the structure of a state's government would be "hostile to a democratic system"; judicial regulation would deprive the people of an important func-

[106] Baker v. Carr, 369 U.S. 186, 301 (1962) (Frankfurter, J., dissenting).
[107] Fortson v. Morris, 385 U.S. 231, 249 (1966), (Fortas, J., dissenting).

tion in a democracy. A related consideration, moreover, concerns the division of sovereignty between nation and states in our federal system. As power to determine the structure of government is one of the essential attributes of sovereignty, due regard for the role of state government in an effective, viable federal system compels judicial non-intervention.

CONCLUSION

Prior to *Baker v. Carr* perhaps the most important generalization one could make about the political question was that there was no readily ascertainable test for determining whether or not a matter was justiciable. It was, in a sense, a conclusion that followed from the weighing of various policy considerations concerning the appropriateness of judicial review.[108] Although an attempted enumeration of these considerations would be incomplete, three underlying ideas have been dominant in the application of the political question;[109] each idea has had its own independent impact while at the same time converging and overlapping with one or both of the other two.

First, is the idea that the Court should not interfere with matters which because of their nature or because of express constitutional language are committed to or are clearly the prerogative of one of the political departments of government. In point is *Coleman v. Miller.*[110] Chief Justice Hughes' opinion, which was accepted by only two other members of the Court, asserted that the nature of the question before the Court—whether ratification of a proposed constitutional amendment was valid—committed it to the determination of Congress. Because appraisal of a great variety of relevant conditions, political, social and economic, was involved, the question was essentially political and better suited for Congress. Justice Black, on the other hand, in a concurring opinion which was joined by three other justices, said that Article V of the Constitution granted "power over the amending of the Constitution to Congress alone."[111] So exclusive was this power that the amending process was " 'political' in its entirely, from submission until an amendment becomes part of the Constitution. . . ."[112]

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[108] See Taylor, *Legal Action to Enjoin Legislative Malapportionment: The Political Question Doctrine,* 34 So. CALIF. L. REV. 179 (1961).
[109] These ideas are discussed in McCloskey, *supra* note 80, at 61.
[110] 307 U.S. 433 (1939).
[111] *Id.* at 459 (Black, J., concurring).
[112] *Id.* at 458 (Black, J., concurring).

The cases dealing with foreign relations—the area where the political question has traditionally been given emphasis—also express this idea in various ways. Thus, in the cases involving recognition of governments, jurisdiction over territory, boundary determinations and abrogation and violations of treaties, the Court emphasized that judicial inquiry was withheld because the conduct of foreign relations is committed by the Constitution to the political departments of government. In addition, the very nature of many of the foreign affairs issues has been a significant factor. For example, the Court has recognized the need for uniform decisions in the conduct of international relations:[113]

> If this were not the rule, cases might often arise in which, on the most important questions of foreign jurisdiction, there would be an irreconcilable difference between the executive and judicial departments. By one of the departments a foreign island or country might be considered at peace with the United States; whilst the other would consider it in a state of war. No well regulated government has ever sanctioned a principle so unwise, and so destructive of national character.

The need to speak with one voice only is sometimes said to be necessary in order to avoid the danger of embarrassment abroad. Certainly this was a factor in *Chicago & So. Air Lines, Inc. v. Waterman,*[114] in which the Court refused to review the validity of a Civil Aeronautics Board decision on the ground that judicial intervention might prove embarrasing to the President in executing foreign policy. The *Waterman* case, moreover, illustrates yet another consideration which sometimes contributes to the Court's conclusion that a matter is beyond the realm of judicial competence because committed to another branch of government, namely: the inability of the Court to acquire information necessary for decision. As Justice Jackson expressed it:[115]

> The President, both as Commander-in-Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports are not and ought not to be published to the world. It would be intolerable that courts without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret.

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[113] Williams v. Suffolk Ins. Co., 38 U.S. (13 Pet.) 415, 420 (1839).
[114] 333 U.S. 103 (1948).
[115] *Id.* at 111.

Of course this factor has not been without significance in domestic disputes.[116]

A second idea which has run through the political question has been the Court's inability to develop or to apply principles of law. To put it another way, "standards meet for judicial judgment" have sometimes been said to be lacking;[117] some situations have been thought to be judicially unmanageable. This idea has been prevalent in the apportionment cases in which the Court has felt incompetent or ill equipped to render decision because apportionment involves the weighing of such factors as geography, economics and the urban-rural conflict. Thus, complaints with legislative districting could not be addressed to the courts. Instead, "[a]ppeal must be to an informed, civically militant electorate. In a democratic society . . . relief must come through an aroused popular conscience that sears the conscience of the people's representatives."[118] Inequities in representation should not be corrected by the judiciary because such a practice deprives the people of an important function in a democracy.

Related to the idea of lack of judicial standards is a third idea of judicial non-intervention where the organization of a government forms the basis of the complaint. This idea has frequently been reflected in the guarantee clause cases. Thus, in the *Pacific States* case the Court said that the taxpayer's attack was "not on the tax as a tax, but on the State as a State. It is addressed to the framework and political character of the government by which the statute levying the tax was passed."[119] In cases such as this one, the Court has refused to administer relief because of the fear, whether real or supposed, of the consequences that might follow from a holding that a state government is not republican in form. That is, the Court has been afraid that such a decision would invalidate all state laws and create a state of general lawlessness.[120]

The sum of these two concepts—non-intervention when "standards meet for judicial judgment" are lacking and when the organiza-

[116] *See e.g.,* Coleman v. Miller, 307 U.S. 433, 453-54 (1939) where the Court said: "[T]he question of a reasonable time in many cases would involve . . . an appraisal of . . . conditions . . . which can hardly be said to be within the appropriate range of evidence receivable in a court of justice and as to which it would be an extravagant extension of judicial authority to assert judicial notice as the basis of deciding a controversy. . . ."

[117] Baker v. Carr, 369 U.S. 186, 289 (1962), (Frankfurter, J., dissenting).

[118] *Id.* at 270.

[119] Pacific States Tel. & Tel. Co. v. Oregon, 223 U.S. 118, 150-51 (1912).

[120] *Id.* at 141-42; Luther v. Borden 48 U.S. (7 How.) 1, 38-39 (1849).

tion or framework of a government is in question—"amounts to respect, either prudential of normative in origin, for the arrangements the political process has worked out for shaping the political process."[121] *Baker v. Carr* and subsequent decisions, however, have made it clear that it is the relationship between the federal judiciary and the coordinate branches of the federal government and not the judiciary's confrontation with the states which gives rise to the political question, with the possible exception of situations in which there is an absence of judicially discoverable standards. The standards problem, however, was dismissed in *Baker* by the simple statement that "[j]udicial standards under the Equal Protection Clause are well developed and familiar. . . ."[122] Having thus settled the issue of justiciability, the Court wasted little time in reading the democratic ideal of one person, one vote into the elastic language of equal protection, while at the same time paying lip service to the guarantee clause cases. Yet, by insuring numerical equality in voting, the Court has in one sense determined what frame of government is proper because equality under the equal protection clause cannot be defined without reference to the frame of government being employed.

The short of it is that respect for federalism and the principle of separation of powers as between the federal judiciary and the states have been subordinated to concepts of individual liberty and equality for which the Court claims to have no difficulty discovering standards. Thus in the Julian Bond case the Court did not hesitate to review the action of the Georgia Legislature in determining the qualifications of a prospective member and to hold the Georgia Legislature's action an unconstitutional interference with free speech.[123]

On the other hand, there is less likelihood that the Court would review the action of either house of Congress in disciplining or refusing to seat a member. At least this would seem a fair implication to be drawn from the stress placed on the intrafederal character of the political question by Justice Brennan in *Baker v. Carr*. Apparently, the Court will invoke the political question where the doctrine otherwise would not be used in order to avoid confrontation with Congress. In addition, the push of express constitutional language favors the political question. Article I, section 5 of the Con-

[121] McCloskey, *supra* note 80, at 62.
[122] Baker v. Carr, 369 U.S. 186, 226 (1962).
[123] Bond v. Floyd, 385 U.S. 116 (1966).

stitution is quite clear in saying that "[e]ach House shall be the Judge of the . . . Qualifications of its own Members . . . and may . . . punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member."

Recent House activities disciplining Representative Adam Clayton Powell, Jr. for alleged misconduct invite attention. The House denied Powell his seat pending an investigation by a special Select Committee. In its concluding report, the Committee recommended, among other things, that Powell be seated and publicly censured by the Speaker of the House and that he be fined to repay government funds he was alleged to have misused. The House, however, rejected the Committee's report and denied Powell his seat by a two-thirds vote, although the Speaker in calling the vote said that only a majority was necessary.

Powell has sought relief in the federal courts, and the case has now reached the Supreme Court.[124] One of Powell's grievances is the Speaker's failure to call for a two-thirds vote. He also alleges that he was denied his seat for racial reasons. Undoubtedly, the racial claim will tempt the Court to decide the case on the merits, as it can be argued that a holding of nonjusticiability will be viewed as tacit judicial approval of racial discrimination by the House of Representatives in regard to the qualifications of one of its members. A further factor in Powell's favor is the fact that the Court in the *Bond* case seemed to approve the Hamilton-Madison view that the qualifications of legislators as defined and fixed by the Constitution cannot be altered.[125]

Having said all these things, still it is likely that the Supreme Court will apply the political question and refuse to decide Powell's case. Although Powell is seeking a seat that was denied to him after a regular congressional election, in terms of years of service he was one of the senior members of the House. Article I, section 5 of the Constitution clearly states that the House by two-thirds vote may expel a member for "disorderly [b]ehaviour," and no restrictions are placed on the expulsion power. Apparently, a

[124] The federal district court and the circuit court of appeals have refused to decide the merits of Powell's case. Powell v. McCormack, 266 F. Supp. 354 (D.D.C. 1968), *aff'd*, 395 F.2d 577 (D.C. Cir. 1968), *cert. granted*, 37 U.S.L.W. 3184 (U.S. Nov. 18, 1968). Although the Congress has recently seated Powell, he is prosecuting his appeal in the Supreme Court. The case is not altogether moot because payment of the fine has not been forgiven and Powell's seniority has not been reinstated.

[125] Bond v. Floyd, 385 U.S. 116, 135 (1966).

member may be expelled for any reason. If judicial abstention seems inconsistent with the *Bond* case, the explanation for the difference is that separation of powers remains an operative factor where the Court confronts one of its peers—the Congress or the President.

Results such as the one projected in the *Powell* case, however, will not be common, for decisions such as *Baker* and *Bond* have a clear message: the significance of the political question as a curb on justiciability has been reduced substantially, and its prestige has been dealt a severe blow; no longer will it occupy the seat of honor among the techniques of avoidance.

In a broader context the demise of the political question has paralleled the activist tendencies of the present Court in its zealous protection of individual rights. Of course those who would cast the political question aside in order to protect individual rights see a strong constitutional duty to adjudicate. Only a small percentage of the political question cases, however, can be explained solely in terms of the Court's duty to say what the law is in accordance with the admonition in *Marbury v. Madison.* As Professor Bickel has suggested, the political question "resists being domesticated" in such a fashion, for there has been "something greatly more flexible" about it;[126] the doctrine is indicative of the discretion that has accompanied the exercise of judicial review.

Whether or not these ingredients of flexibility and discretion have been coupled with an equal dosage of prudence depends in the final analysis upon one's philosophy of judicial review. To explain the doctrine "in functional terms, as the Court's acknowledgment of the limitations of the American judicial process"[127] really does no more because the limits of the process depend in large measure upon one's conception of the judiciary's role in our constitutional scheme.

Viewed in this context, the political question has been a useful tool for allowing the Court to dispose of issues, such as apportionment of governments, for example, which are inappropriate for judicial decision. Prior to *Baker* the Court had steadfastly rejected apportionment suits; furthermore, there was a dearth of historical justification for making representation proportional to population. Yet, in the face of its own precedent and despite the absence of

[126] Bickel, *supra* note 26, at 46.
[127] Scharpf, *supra* note 19, at 567.

compelling historical justification, the Court has been able to find the political ideal of representation according to numerical equality written into the vague contours of equal protection to the extent that it is legally enforceable. Accordingly, one is inescapably confronted with Justice Frankfurter's charge that what the Court has done "is to choose among competing bases of representation—ultimately, really among competing theories of political philosophy . . . ."[128]

Reform in matters such as these should come from the political branches—from the people striving "however blindly and inarticulately, toward their own conception of the Good Life."[129] If brave new worlds are to be ushered in, the responsibility for their creation does not lie with the judiciary. In placing responsibility for such issues where it properly belongs and in limiting the judiciary to the decision of cases and controversies, the political question has performed a valuable function. The doctrine affirms Alexander Hamilton's observation that the judiciary from the nature of its functions should be "the least dangerous [branch] to the political rights of the Constitution."[130]

[128] Baker v. Carr, 369 U.S. 186, 300 (1962) (Frankfurter, J., dissenting).
[129] L. HAND, THE SPIRIT OF LIBERTY 105-06 (3d ed. Dillard 1960).
[130] A. HAMILTON, THE FEDERALIST (1961 ed.).