Mississippi College Law Review

Volume 32
Issue 3 *Vol. 32 Iss. 3*

Article 8

2014

In Re Hooker: A Political Question Doctrine Game Change

Jackson C. Smith

Custom Citation
32 Miss. C. L. Rev. 531 (2013-2014)

In re Hooker: A Political Question Doctrine Game Change

*Jackson C. Smith**

I. Introduction

Separation of powers among the three branches of government is a fundamental and defining characteristic of American democracy both at the federal and state levels of government. The idea of separation of powers did not exist in Britain where the monarch could appoint judges yet dismiss them at will, a style of governance that ran contrary to the idea of a democracy.[1] A system of checks and balances ensures equilibrium among the coequal branches, and it prevents encroachment of one branch of government into the vested constitutional sphere of another because "[a]mbition must be made to counteract ambition."[2] Under the political question doctrine, the actions of a coequal branch of government's actions are deemed political as long as it acts in accordance with its constitutionally vested powers. When the branches act within their sphere of powers, conflicts do not arise. The problem, however, is when one branch attempts to encroach into the sphere of another branch. The issue then becomes how to resolve the conflict when one branch goes beyond their sphere of constitutional power.

In re Hooker centered on the now-infamous pardons granted by Mississippi Governor Haley Barbour on his final day in office.[3] Those pardons led Mississippi Attorney General Jim Hood to bring suit against all pardonees, alleging that the pardons were unconstitutional—in violation of Article 5, Section 124 of the Mississippi Constitution.[4] Section 124 states that "after conviction no pardon shall be granted until the [pardon] applicant therefor [sic] shall have published for thirty days . . . ."[5] The trial court granted a temporary restraining order requiring "[parolees] to appear at a preliminary injunction hearing."[6] However, the Mississippi Supreme Court granted the parolees' petition "for permission to file an interlocutory appeal."[7] In their opinion, the *In re Hooker* majority conceded that the publication requirements stated in section 124 are a constitutional prerequisite

* J.D., Mississippi College School of Law. B.A., Political Science, Miami University (Ohio). Mr. Smith extends his appreciation to Professor Donald E. Campbell for his invaluable guidance and feedback given during the drafting of this Note. Finally, he would like to thank his friends and family for their unwavering support and encouragement.

1. The Federalist No. 47 (James Madison).
2. The Federalist No. 51 (James Madison).
3. In re Hooker, 87 So. 3d 401, 403 (Miss. 2012).
4. *Id.*
5. Miss. Const. art. V, § 124 (1890).
6. *In re Hooker*, 87 So. 3d at 403.
7. *Id.*

for a valid pardon.[8] Nevertheless, the court ultimately upheld the pardons concluding that the judicial branch lacked the constitutional authority to void a pardon issued by the governor—as the head of the coequal executive branch.[9] The *Hooker* majority was "compelled to hold that . . . it fell to the governor alone to decide whether the Constitution's publication requirement was met."[10] In essence, the Mississippi Supreme Court deemed Governor Barbour's actions political in nature and nonjusticiable under the political question doctrine.

This Note will examine the concerns and implications of the judiciary branch by broadening the political question doctrine in *In re Hooker* and essentially abdicating its constitutionally vested obligation to interpret the law to the executive branch. Part II summarizes the relevant facts of *In re Hooker*. Part III addresses the background and history of the law including both federal law and Mississippi precedent in relation to the political question and separation of powers doctrines. Finally, Part IV, as exemplified by *In re Hooker*, analyzes the unprecedented implications of state judiciaries misinterpreting and broadening the political question doctrine to the extent it creates an imbalance between the three branches of government.

II. FACTS

In the final days of his governorship, Mississippi Governor Haley Barbour "granted executive clemency to 215 persons, most of whom were no longer in custody."[11] However, twenty-six of the pardonees remained in custody. Governor Barbour "granted ten [individuals] full pardons."[12] The ten received pardons were "full, complete, and unconditional . . . ."[13] The ten pardonees were convicted of crimes including murder; statutory rape; aggravated assault; accessory after-the-fact to murder and armed carjacking; illegal drug possession; armed robbery; and burglary.[14] Five of the ten pardonees served as trusties at the Mississippi Governor's Mansion during Barbour's governorship, and four out the five mansion trusties were convicted murderers.[15] The Mississippi "'trusty' system . . . allows well-behaved prisoners to clean, cook and do other chores at the governor's mansion."[16] While pardoning trusties at the governor's mansion was politically unpopular, there was no dispute that the Governor had authority and

8. *Id.* at 403, 412.

9. *Id.* at 403, 414.

10. *Id.* at 403.

11. *Id.*

12. *Id.* Among the remaining sixteen individuals in custody, Governor Barbour granted "thirteen medical releases; one suspension of sentence; one conditional, indefinite suspension of sentence; and one conditional clemency." *Id.*

13. Initial Brief of Appellee-Respondent, In re Hooker, 87 So. 3d 401 (Miss. 2012) (No. 2012-IA-00166-SCT), 2012 MS S. Ct. Briefs LEXIS 4, at *7.

14. *Id.* at *4-5.

15. *Id.* at *11-13.

16. Alyssa Newcomb & Huma Khan, *Mississippi Pardons Issued by Gov. Haley Barbour Challenged in Court*, ABC NEWS (Feb. 9, 2012), http://abcnews.go.com/US/mississippi-governor-haley-barbour-pardons-challenged/story?id=15545964#.URb5_qyY2wQ.email.

discretion to pardon these individuals.[17] The legal question asserted by the Mississippi Attorney General was whether the pardons were in violation of Article 5, Section 124 of the Mississippi Constitution and, therefore, unconstitutional and void.[18]

Specifically, General Hood believed that the pardons violated Section 124's requirement that pardon applicants "publish a petition stating why the pardon should be granted."[19] So, in the Circuit Court of the First Judicial District of Hinds County, General Hood filed a civil suit, arguing that the ten full pardons violated Section 124 and requested the circuit judge to declare the pardons "null, void, and unenforceable."[20] Governor Barbour entered the case as a friend of the court.[21] During the trial court proceedings, Mississippi "filed a Second Amended Complaint that added [Barbour's successor and] current [Mississippi] Governor Phil Bryant as a defendant . . . ."[22] However, Governor Barbour was "[u]naware of the amended complaint . . . [and] filed a motion for leave to file an *amicus curiae* brief, citing the absence of . . . Bryant as a reason that his involvement in the suit was necessary."[23]

A temporary restraining order was issued by the circuit judge that required all ten pardonees to "provide the court 'sufficient proof [of publication] consistent with Section 124.'"[24] Also, pursuant to the temporary restraining order, the Mississippi Department of Corrections could not release any of the pardonees until the circuit court was provided with "sufficient proof of acceptable Section 124 publication."[25] The temporary restraining order was extended and the pardonees were ordered to appear before the circuit judge for a "preliminary injunction hearing."[26] The pardonees filed a petition with the Mississippi Supreme Court seeking "permission to file an interlocutory appeal."[27] The Mississippi Supreme Court granted the pardoners's petition.[28] Also, the Mississippi Supreme Court stayed all the circuit court proceedings and ordered that the temporary restraining order remain effective until the court rendered a decision.[29]

---

17. *See* Richard Fausset, *Outgoing Gov. Haley Barbour's Pardons Shock Mississippi*, L.A. TIMES (Jan. 12, 2012), http://articles.latimes.com/2012/jan/12/nation/la-na-barbour-pardons-20120113; Judy Keen, *Barbour's Pardons Stir Outrage in Mississippi*, USA TODAY (Jan. 13, 2012), http://usatoday30.usatoday.com/news/nation/story/2012-01-12/mississippi-barbour-pardons/52511486/1.

18. NEWCOMB & KHAN, *supra* note 16.

19. *Id.*

20. *In re Hooker*, 87 So. 3d at 403.

21. Campbell Robertson, *Mississippi Justices Hear Arguments on Pardons*, THE NEW YORK TIMES (Feb. 10, 2012) http://www.nytimes.com/2012/02/10/us/politics/mississippi-justices-hear-arguments-on-barbours-pardons.html?_r=0.

22. Initial Brief of Appellee-Respondent, *supra* note 13, at *10 n.6.

23. *Id.*

24. *In re Hooker*, 87 So. 3d at 403.

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

III. Background and History of the Law

A. The United States Constitution: Federal Separation of Powers

The legislative, executive, and judicial branches of the federal government operate through a system of checks and balances.[30] In Federalist Number 48, James Madison argued that one branch of government "ought [not] to possess, directly or indirectly, an overruling influence over the other[ ] [branches], in the administration of their respective powers."[31] Under the United States Constitution, the legislative power is vested in the United States Congress; the executive power is vested with the President; and the judicial power is vested with the judiciary branch.[32]

Furthermore, "that power [of each of the three coequal branches of government] is of an encroaching nature, and that it ought to be effectually restrained from passing the limits assigned to it."[33] Therefore, for example, as a check on Congress's legislative power, the President is vested with the power to veto legislation passed by Congress.[34] However, Congress can override the President's veto with two-thirds vote of each house.[35] Also, the President is constitutionally vested with the power to appoint judges to the federal bench with lifetime tenure.[36] Nevertheless, the House of Representatives has the power to bring articles of impeachment against either the President or federal judges while the Senate has the power to try impeachment proceedings.[37]

B. 1890 Mississippi Constitution: State Separation of Powers

1. Separation of Powers

Mississippi's current Constitution was adopted in 1890, which structures the Mississippi government to parallel the federal government with three coequal branches.[38] In article I, section 1, of the 1890 Mississippi Constitution, "[t]he powers of the government of the state of Mississippi shall be divided into three distinct departments, and each of them confided to a separate [constitutional sphere], to-wit: those which are legislative to one, those which are judicial to another, and those which are executive to another."[39] Furthermore, article II, section 1, of the 1890 Mississippi Constitution provides:

---

30. The Federalist No. 48 (James Madison).
31. *Id.*
32. U.S. Const. art. I, § 1; U.S. Const. art. II, § 1, cl. 1; U.S. Const. art. III, § 1.
33. The Federalist No. 48 (James Madison).
34. U.S. Const. art. I, § 7, cl. 2.
35. *Id.*
36. U.S. Const. art. II, § 2, cl. 2.
37. U.S. Const. art. I, § 2, cl. 5; U.S. Const. art. II, § 3, cl. 7.
38. *In re Hooker*, 87 So. 3d at 404.
39. Miss. Const. art. I, § 1 (1890).

> No person or collection of persons, being one or belonging to one of these departments, shall exercise any power properly belonging to either of the others. The acceptance of an office in either of said departments shall, of itself, and at once, vacate any and all offices held by the person so accepting in either of the other departments.[40]

2. The Mississippi Governor's Vested Pardoning Power

Under the 1890 Constitution, the pardon power is vested solely with the governor.[41] Article V, section 124, addresses both reprieves and pardons to be issued by the governor, but, more importantly lays out certain criteria that must be met for the governor to issue a valid pardon.[42] Section 124 states:

> In all criminal and penal cases, excepting those of treason and impeachment, the governor shall have power to grant reprieves and pardons . . . but no pardon shall be granted before conviction; and in cases of felony, after conviction no pardon shall be granted until the applicant therefor shall have published for thirty days, in some newspaper in the county where the crime was committed, and in case there be no newspaper published in said county, then in an adjoining county, his petition for pardon, setting forth therein the reasons why such pardon should be granted.[43]

The drafters included the publication requirement to ensure the Governor did not abuse the pardoning power.[44] They deliberately added the publication requirement.[45] The requirement was not included in prior Mississippi Constitutions, allowing Governors to abuse their pardon powers.[46] The drafters of the 1890 Mississippi Constitution believed '"the Governor be not a man to be trusted.'"[47] The purpose of the publication requirement was to make the pardoning process more transparent, which would subject a governor's pardon actions to public scrutiny and consideration.[48] It was essential to provide notice to those communities potentially affected by an impending pardon, and prevent governors from issuing controversial eleventh-hour pardons that lacked notice.[49] Accordingly, the publication

40. MISS. CONST. art. I, § 2 (1890).
41. *In re Hooker*, 87 So. 3d at 412.
42. MISS. CONST. art. V, § 124 (1890).
43. *Id.*
44. Initial Brief of Appellee-Respondent, *supra* note 13, at *28.
45. *Id.* at *28.
46. *Id.* at *28-*29.
47. *Id.* at *28 (quoting Amasa M. Eaton, *Recent State Constitutions*, 6 HARV. L. REV. 109, 117-18 (1892) (discussing Mississippi 1890 Constitution)).
48. *Id.* at *30.
49. *Id.* at *31.

requirement was intended to place a constitutional prerequisite to the governor issuing a pardon.

C. Separation of Powers and the Political Question Doctrines: Federal

In *Marbury v. Madison*, Chief Justice Marshall famously and affirmatively confirmed the powers of the judiciary as a coequal branch within the federal government, and he also addressed the notion of the judiciary considering matters that would be political in nature.[50] In *Marbury*, during the waning days of his presidency, President John Adams nominated William Marbury as a justice of the peace for Washington, D.C.[51] He was confirmed by the Senate.[52] His commission was signed by President Adams with his Secretary of State, John Marshall, sealing it with the seal of the United States.[53] However, James Madison, the Secretary of State of President Adams's successor, refused to deliver the commissions.[54] Therefore, Marbury petitioned the Supreme Court for a writ of mandamus to compel Madison to deliver his commission.[55] The Court held that the commissions were valid when they were signed by John Adams.[56] However, the Court ruled the matter was outside the Court's original jurisdiction because Congress did not have the authority to alter the Supreme Court's original jurisdiction stated in the U.S. Constitution.[57]

In addressing judicial power versus executive power, Chief Justice Marshall noted that "[i]t is emphatically the province and duty of the judicial department to say what the law is."[58] However, Marshall did recognize the possibility that a conflict could arise among the three branches that would be beyond the capacity of the courts to resolve.[59] In addressing executive actions, Marshall unequivocally states that "[t]he province of the court is, solely, to decide on the rights of individuals, not to enquire how the executive, or executive officers, perform duties in which they have a discretion."[60] Marshall defined the type of questions that are beyond the scope of judicial review as those classified as "political:" "[q]uestions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this Court."[61] Marshall was asserting that as long as the executive branch was adhering to its constitutionally vested powers, then executive branch actions would be deemed political and nonjusticiable. Marshall's statement was the advent of the political

50. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 170, 177 (1803).
51. *Id.* at 137.
52. *Id.*
53. *Id.*
54. *Id.*
55. *Id.*
56. *Id.* at 155.
57. *Id.* at 172-79.
58. *Id.* at 177.
59. *Id.* at 170.
60. *Id.*
61. *Id.*

question doctrine that the Supreme Court expounded on in the 1962 case *Baker v. Carr*.[62]

Baker concerned a constitutional challenge to a Tennessee state apportionment statute alleging that it violated voters' constitutional due process rights under the Fourteenth Amendment to the United States Constitution.[63] In addressing the justiciability of Tennessee apportionment in relation to the political question doctrine, the U.S. Supreme Court laid out several instances where a legal issue would be nonjusticiable.[64]

> 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.[65]

The *Baker* Court held that absent any of these limitations a case should not be dismissed citing nonjusticiability for the presence of a political question.[66] Essentially, the judiciary "cannot reject as 'no law suit' a [genuine] controversy as to whether some action denominated 'political' exceeds constitutional authority."[67] Furthermore, *Nixon v. United States*[68] illustrates how the political question doctrine continues to affect U.S. Supreme Court jurisprudence.[69]

Nixon centered on a federal district court judge who was impeached by the United States House of Representatives when he failed to resign after being convicted of perjury.[70] In *Nixon*, the U.S. Senate commenced Judge Nixon's impeachment trial pursuant to U.S. Senate Rule XI, "under which the presiding officer appoints a committee of Senators to 'receive evidence and take testimony.'"[71] After the testimony, the committee of Senators "presented the full Senate with a complete transcript of the proceeding and a [r]eport stating the uncontested facts and summarizing the

62. Baker v. Carr, 369 U.S. 186, 217 (1962).
63. *Id.* at 186-88.
64. *Id.* at 217-18.
65. *Id.* at 217.
66. *Id.*
67. *Id.*
68. Nixon v. United States, 506 U.S. 224 (1993).
69. *Id.* at 228.
70. *Id.* at 226-28.
71. *Id.* at 227.

evidence on the contested facts."[72] The judge was eventually convicted and removed by the full Senate.[73] After his Senate conviction, Nixon brought suit "arguing that Senate Rule XI violate[d] the constitutional grant of authority to the Senate to 'try' all impeachments [pursuant to Article I, Section 3, Clause 6, of the U.S. Constitution]."[74] In sum, he argued that he was entitled to a trial before the full Senate, not before a Senate committee.[75]

The Supreme Court held that "[i]f courts may review the actions of the Senate in order to determine whether that body 'tried' an impeached official, it is difficult to see how the Senate would be 'functioning . . . independently and without assistance or interference.'"[76] The Supreme Court is not constitutionally vested to participate in impeachment proceedings.[77] The *Nixon* Court stressed that "[j]udicial involvement in impeachment proceedings, even if only for purposes of judicial review, [was] counterintuitive because it would eviscerate the 'important constitutional check' placed on the Judiciary by the Framers."[78] Accordingly, in *Nixon*, the Senate's actions raised a political question and were nonjusticiable because the Senate did not "transgress[ ] [its] identifiable textual limit[ ]" in the Constitution to try all impeachments.[79]

In sum, the Supreme Court has recognized that questions are "political" and beyond the scope of judicial consideration when: (a) "a textually demonstrable constitutional commitment of the issue to a coordinate political department"[80] is evident like, as in *Nixon*, the U.S. Senate is constitutionally vested to try all impeachments;[81] or (b) there is "a lack of judicially discoverable and manageable standards for resolving it,"[82] which was not the case in *Marbury* where the U.S. Constitution's grant of original jurisdiction to Supreme Court prevented Marshal from compelling Madison to deliver Marbury's commission.[83] Matters of national security and foreign policy are also considered political questions.[84] There is an external versus internal dichotomy embedded within the political question doctrine. When a branch of government acts in accordance with its constitutionally vested powers, its actions are deemed political and the branch's internal operations are nonjusticiable. However, if a branch of government exceeds its grant of constitutional authority then its actions become subject to judicial review. This exact sentiment is echoed through Mississippi jurisprudence.

72. *Id.*
73. *Id.* at 228.
74. *Id.*
75. *Id.* at 228-29.
76. *Id.* at 231.
77. *Id.* at 233-34.
78. *Id.* at 235.
79. *Id.* at 228, 238.
80. *Baker*, 369 U.S. at 217.
81. *Nixon*, 506 U.S. at 238.
82. *Baker*, 369 U.S. at 217.
83. *Marbury*, 5 U.S. at 172-79.
84. *Baker*, 369 U.S. at 211-14.

D. Separation of Powers and the Political Question Doctrines: Mississippi Precedent

1. Legislative Authority

Even in cases preceding the adoption of the 1890 Mississippi Constitution, the Mississippi Supreme Court held that matters concerning a coequal branch's compliance with constitutional provisions that regulate that branch are nonjusticiable.[85] In *Ex Parte W.V. Wren*, the Mississippi Supreme Court said that "[t]he sound view . . . is to regard all of the provisions of the constitution as mandatory, and those regulating the legislative [and executive branches] as addressed to and mandatory to [those branches], and with which the courts have nothing to do . . . ."[86] In other words, the actions are characterized as political in nature in the same manner as in federal courts.

Ex Parte W.V. Wren concerned a traveling salesman for a New Orleans grocer who was "exhibiting goods and soliciting and obtaining orders for like goods on behalf" of the grocer in Jackson, Mississippi.[87] However, the salesman was arrested under Mississippi law for failing to pay a privilege tax that was placed "on each person traveling and selling goods or merchandise by sample or otherwise in [Mississippi]."[88] After his arrest, the salesman obtained a writ of *habeas corpus* and alleged that the statute he was arrested under was unconstitutional because the act that the governor signed was not the bill passed by both houses of the legislature.[89] The part of the act at issue was the absence of amendment 34, "that part of the bill which imposed the tax for the non-payment of which petitioner was arrested," from the act the governor signed.[90] Under the Mississippi Constitution, once a bill passes both houses of the legislature it must "be signed by the president of the Senate and the speaker of the house of representatives in open session" before it is presented to the governor for his or her signature.[91] Therefore, the salesman urged the Mississippi Supreme Court to consult the legislative journals of both the House of Representatives and the Senate.[92]

The salesman in *Ex Parte Wren* asserted that "the adjudged law of [Mississippi] . . . is only prima facie evidence that the act was enacted and that the journals may be consulted, and if from the journal it appears that the act did not pass, it must on that evidence be declared void."[93] The Mississippi Supreme Court disagreed, holding that the governor's signature "is the sole expositor of its contents and the conclusive evidence of its existence according to its purport, and that it is not allowable to look further to

85. Ex Parte Wren, 63 Miss. 512, 533-34 (1886).
86. *Id.* at 534.
87. *Id.* at 512.
88. *Id.* at 512-13.
89. *Id.* at 513-15.
90. *Id.* at 527-28.
91. *Id.* at 514.
92. *Id.* at 514-15.
93. *Id.* at 522.

discover the history of the act or ascertain its provisions."[94] This view "is the simplest, the surest to avoid errors and difficulties, in accord with the constitution, and supported by an array of authority and a cogency of argument that commands [the court's] fullest assent."[95] After all, the legislature is a coequal branch of government, "possessing all legislative power and not subject to supervision and control during its performance of its constitutional functions, nor to judicial revision . . . ."[96] Nevertheless, the Mississippi Supreme Court "should not shrink from declaring an act of the legislature enacted precisely in the mode prescribed by the constitution void if its provisions violate [the constitution] . . . ."[97] The Mississippi Supreme Court's political question jurisprudence towards legislative actions was also reflected in *Hunt v. Wright*.[98]

Wright concerned a suit brought by the appellant alleging that a revenue bill enacted by the legislature was unconstitutional.[99] One of claims for unconstitutionality was that the bill was passed "within the last five days of the [legislative] session . . . ."[100] Section 68 of the Mississippi Constitution says "that no appropriation or revenue bill shall be passed during the last five days of [a legislative] session."[101] The court held that "section 68 is obligatory on the legislature, its disregard of it is beyond the reach of courts, which are not keepers of the consciences of legislators, and deal only with what they do, and not what they should have done or omitted."[102] Simply put, the *Wright* court adopted and echoed the *Wren* precedent where the legislative branch is a coequal branch of the government and vested with the legislative power.[103] The legislative branch "is not subject to supervision and revision by the courts as to those rules of procedure prescribed by the constitution for its observance . . . ."[104] Again, the judiciary "cannot explore legislative journals to see if all the directions of the constitution were observed, but must accept as legislative enactments, duly passed as prescribed by the constitution, all such acts as are duly authenticated as such in the mode prescribed by it."[105] The *Wright* decision parallels the court's holding in *Lang v. Board of Supervisors*.[106]

Lang stemmed from a claim brought by appellant that a bill enacted by the Legislature was unconstitutional "because of the failure of the

94. *Id.* at 529.
95. *Id.* at 532.
96. *Id.* at 533-34.
97. *Id.* at 535.
98. Hunt v. Wright, 11 So. 608 (Miss. 1892).
99. *Id.* at 608-09.
100. *Id.*
101. *Id.* at 610.
102. *Id.*
103. *Id.* at 609.
104. *Id.*
105. *Id.*
106. Lang v. Bd. of Supervisors, 75 So. 126 (Miss 1917).

[bill's] title to sufficiently indicate the subject-matter of the legislation . . . ."[107] Section 71 of the Mississippi Constitution requires "[e]very bill introduced into the legislature shall have a title, and the tile ought to indicate clearly the subject-matter or matters of the proposed legislation."[108] In *Lang*, the court said "'Ought' is a shade stronger than 'should', but 'a shade is not to be seized to nullify an act of the Legislature.'"[109] At its core, the court also held that "an act without a title would not be a law" yet also held that the "sufficiency of the title is a question solely for the Legislature."[110] Aside from legislative actions, the political question doctrine applies equally to actions of the executive branch.

2. Executive Authority

In *State v. McPhail*,[111] the court held that a governor's exercise of executive authority "must be within the Constitution and the laws [of Mississippi], and the facts must be such as to uphold or justify the exercise of the official authority which in a given case is exerted."[112] However, the governor's actions would be subject to judicial review in an "attempt to exercise an authority not legally vested in him."[113] In *McPhail,* intoxicating liquors and rampant gambling were causing "East Jackson, Rankin County, Mississippi" to become a lawless society.[114] So, "[o]n December 8, 1936, the Governor issued an executive order . . . deemed necessary to send therein a sufficient detachment of the national guard of the state 'for the purpose of assisting in the enforcement of the criminal laws of [Mississippi] . . . ."[115] After the detachment of the National Guard, a justice of the peace issued a search warrant for an officer of the National Guard to search the appellee's business.[116]

On executing the search warrant, the guardsman seized a sizeable "quantity of intoxicating liquors . . . and much other evidence was obtained of violations of the law in keeping with the stated conditions . . . ."[117] The district attorney brought suit against the appellee's business for being a common nuisance.[118] However, the chancery court dismissed the charges citing that the "facts were not sufficient to authorize the interference of the [National Guard]" and that the evidence was illegally obtained.[119] Mississippi appealed to the supreme court.[120]

---

107. *Id.* at 128.
108. Miss. Const. art. IV, §71.
109. *Lang*, 75 So. at 128.
110. *Id.*
111. State v. Mcphail, 180 So. 387 (Miss. 1938).
112. *Id.* at 391.
113. *Id.*
114. *Id.* at 388-89.
115. *Id.* at 389.
116. *Id.*
117. *Id.*
118. *Id.*
119. *Id.*
120. *Id.*

In *McPhail*, the Mississippi Supreme Court "deal[t] solely with the constitutional and statutory powers of the Governor, and of the militia, in the execution of the laws."[121] The court said that the essential feature of the Mississippi Constitution "is that primary local authority shall be preserved, so far as practically possible."[122] However, the court noted that the framers of the Mississippi Constitution foresaw "that for one cause or another, local conditions would sometimes . . . render the local authorities powerless to enforce the laws . . . ."[123] Accordingly, the governor, being head of the executive branch of government and constitutionally vested with executing the laws, could "act, in case of need, for the whole state."[124] Therefore, the supreme court reversed and remanded the chancery court holding that "the Governor was within his constitutional and statutory power in sending the [National Guard to East Jackson] . . ., and that in consequence the [guardsman] were lawful civil officers within that area."[125] Nonetheless, the *McPhail* court did acknowledge that some of the governor's actions "are of purely political concern" and "no writ of injunction or mandamus or other judicial remedial writ will run against the [g]overnor" unless his actions infringe an individual's personal or property right.[126] By extension, the governor executing his constitutionally vested power to issue pardons is purely political, which is reinforced by the court's ruling in *Montgomery v. Cleveland*.[127]

Cleveland was appealed to the Mississippi Supreme Court "from a judgment in habeas corpus discharging the appellee, Walter Cleveland, from the State Penitentiary . . . ."[128] Cleveland was granted a pardon by then Mississippi Lieutenant Governor, H. H. Casteel, while then Mississippi Governor, Lee. M. Russell, was out of the state.[129] Cleveland "had properly published and filed in the Office of the Governor of the state a petition praying that he be granted a pardon for the offense of which he had been convicted . . . ."[130] However, the superintendent of the State Penitentiary refused to recognize the Lt. Governor's pardon.[131] As the appellant, the superintendent argued that, pursuant to section 131 of the Mississippi Constitution, the Lt. Governor could only discharge the duties, which does not include the grants of pardons because that is a discretionary power vested with the Governor.[132]

---

121. *Id.*
122. *Id.* at 390.
123. *Id.*
124. *Id.*
125. *Id.* at 392.
126. *Id.* at 391.
127. Montgomery v. Cleveland, 98 So. 111, 112 (Miss. 1923).
128. *Id.* at 111.
129. *Id.*
130. *Id.*
131. *Id.*
132. *Id.* at 114.

However, the supreme court held that "powers" versus "duties" are interchangeable.[133] In short, the court held that the Lt. Governor was vested with the duties of the Office of the Governor to pardon Cleveland while the Governor was out of the state.[134] The court acknowledges that governor "is the sole judge of the sufficiency of the facts and of the propriety of granting the pardon [pursuant to section 124 of the Mississippi Constitution], and no other department of the government has any control over his acts or discretion in such matters."[135] The *Cleveland* court's sentiment pertaining to the governor's vested pardoning power under section 124 was echoed in *Pope v. Wiggins*.[136]

Wiggins was a habeas corpus proceeding where the appellant, Pope, alleged he was being denied due process of law because his suspension of sentence was revoked by the governor without notice and the opportunity to be heard.[137] The court held that "the petitioner offered no proof to show that his behavior had been good between the date of the second suspension of his sentence . . . and the subsequent revocation . . . ."[138] The petitioner's suspension was conditioned that the governor may revoke it for any reason without notice.[139] When Pope accepted the suspension, he accepted the conditions of his suspension.[140] Therefore, the governor's reason of Pope's subsequent murder conviction was sufficient to revoke his suspended sentence.[141] The court affirmed the denying of petitioner's writ.[142] With respect to section 124, the court asserted that "the power to grant pardons and to otherwise extend clemency, after the judicial process whereby one has been convicted of crime has come to an end, is vested in the governor alone."[143] The *Wiggins* court reasoned that the governor's pardon "power is not limited by any other provision of the [Mississippi] Constitution, nor can the same be limited or restricted by either of the other two principal departments of the state government in the absence of a constitutional amendment so authorizing."[144] Again, issues concerning whether another coequal branch of government exercised their constitutionally vested powers are nonjusticiable where the actions are within an express grant of constitutional authority. In any event, as evident with the *McPhail*, *Cleveland*, *Wiggins*, *Wright*, and *Lang* holdings, *Ex Parte Wren* continues to govern and to serve as a guiding force for Mississippi precedent.

133. *Id.*
134. *Id.* at 115.
135. *Id.* at 114.
136. Pope v. Wiggins, 69 So. 2d 913, 915 (Miss. 1954).
137. *Id.* at 913-14.
138. *Id.* at 914.
139. *Id.* at 918.
140. *Id.*
141. *Id.*
142. *Id.*
143. *Id.* at 915.
144. *Id.*

3. The Scope of Mississippi's Political Question Doctrine Jurisprudence

Mississippi appears to abide by the *Marbury* principle that as long as coequal branches act pursuant to their explicit grant of constitutional authority then their actions are nonjusticiable.[145] Their actions are "political," which does not subject their internal procedural operations to judicial review. Although, one caveat to Mississippi's political question jurisprudence, as evident in *Wright*, it appears that the Mississippi Supreme Court misinterpreted the political question doctrine to read explicit constitutional limitations to a branch's constitutional authority out of the Mississippi Constitution and characterize them as procedural matters.[146] Nevertheless, a coordinate political branch's actions become subject to judicial review when it exceeds or transgresses its textually committed constitutional authority.

E. Mississippi Supreme Court Looks West to Wyoming for Pardon Interpretation

In re Moore,[147] a case from the Wyoming Supreme Court, was consulted because the Mississippi Supreme Court had "no previous case on point concerning" the particular pardon issue presented in *In re Hooker*.[148] It concerned a "petition for the writ of *habeas corpus*, and for a discharge of the petitioner from imprisonment" for grand larceny.[149] Despite receiving a pardon from the governor, the petitioner continued to be incarcerated because of insufficient notice of his pardon application.[150] Under the Wyoming Constitution, the governor is vested with the pardoning power "but the legislature may by law regulate the manner in which the remissions of fines, pardons, commutations, and reprieves may be applied for."[151] Article 4, section 5 of the Wyoming Constitution states:

> The governor shall have power to remit fines and forfeitures, to grant reprieves, commutations and pardons after conviction, for all offenses except treason and cases of impeachment; but the legislature may by law regulate the manner in which the remission of fines, pardons, commutations and reprieves may be applied for. Upon conviction for treason he shall have power to suspend the execution of sentence until the case is reported to the legislature at its next regular session, when the legislature shall either pardon, or commute the sentence, direct the execution of the sentence

145. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 170 (1803).
146. Hunt v. Wright, 11 So. 608, 610 (Miss. 1892).
147. In re Moore, 31 P. 980 (Wyo. 1893).
148. In re Hooker, 87 So. 3d 401, 413 (Miss. 2012).
149. *In re Moore*, 31 P. at 981.
150. *Id.*
151. *Id.*

> or grant further reprieve. He shall communicate to the legislature at each regular session each case of remission of fine, reprieve, commutation or pardon granted by him, stating the name of the convict, the crime for which he was convicted, the sentence and its date, and the date of the remission, commutation, pardon or reprieve with his reasons for granting the same.[152]

However, the Wyoming Supreme Court said that this language does not regulate or "limit the authority or jurisdiction of the governor."[153] The court classified the statutory publishing notice provisions enacted in 1869[154] as a "directory to applicants for pardons, and those moving in their behalf . . . ."[155] However, the governor could "grant a pardon upon his knowledge, and upon his own motion, without any application or hearing."[156] All in all, *In re Moore* concerned the Wyoming Governor's jurisdiction in issuing pardons, which the court "cannot inquire whether the pardoning power has been exercised judiciously, or whether the proceedings preliminary to the granting of the pardon were irregular, if any such were necessary."[157]

IV. In re Hooker

A. Majority

Justice Dickinson, Presiding Justice for the Mississippi Supreme Court, wrote the majority opinion.[158] In the beginning of his opinion, Justice Dickinson stresses that *In re Hooker* is a case about separation of powers and "not about whether the governor [of Mississippi] is above the law," which, the court stresses, he is not.[159] The Mississippi Supreme Court "has the constitutional duty to interpret the *content* of laws passed by the [Mississippi] Legislature and executive orders issued by the governor . . . ."[160] However, the Mississippi Supreme Court (hereinafter "court") cannot assume "the absolute power to police the branches of government in fulfilling their constitutional duties to produce laws and executive orders, unless there is alleged a justiciable violation of a personal right."[161]

During oral arguments, Attorney General Hood was unable "to point out any pardon [issued by Governor Barbour] that was not facially valid"

152. Wyo. Const. art. IV, § 5.
153. *In re Moore*, 31 P. at 980.
154. Rev. St. Wyo. T. §§ 3367-70.
155. *In re Moore*, 31 P. at 981.
156. *Id.*
157. *Id.* at 982.
158. In re Hooker, 87 So. 3d 401, 402 (Miss. 2012).
159. *Id.*
160. *Id.*
161. *Id.*

under Section 124 of the Mississippi Constitution.[162] A facially valid pardon was a pardon that appeared valid on its face and where the only thing missing was the thirty-day publication requirement.[163] Therefore, Justice Dickinson argued that "the controlling issue [was] whether the judicial branch of government has constitutional authority to void a facially-valid pardon issued by the coequal executive branch, where the only challenge is compliance with Section 124's publication requirement."[164] Thus, the court was "compelled to hold-that in each of the cases before [the court]-it fell to the governor alone to decide whether the [Mississippi] Constitution's publication requirement was met."[165] The court reversed and rendered the Circuit Court of the First Judicial District of Hinds County and rendered judgment to dismiss Attorney General Hood's Second Amended Complaint "and this action as barred by the doctrine of separation of powers."[166]

Relying on *Marbury v. Madison*, the majority argued that both the U.S. Supreme Court and the Mississippi Supreme Court have "refused to exercise jurisdiction over a matter when there was a 'textually demonstrable constitutional commitment of the issue to a coordinate political department . . . .'"[167] Therefore, "according to *Marbury* and its progeny, cases and controversies involving interpretation and adjudication of constitutional provisions that are textually committed to another branch of government are nonjusticiable."[168] The majority argues that the "*Marbury* and its progeny" precedent has been adopted by the Mississippi Supreme Court.[169]

Referring to *McPhail*, the majority noted that "executive action must fall within the Constitution and [the] laws of [Mississippi], and the facts must be such as to uphold or justify the exercise of the official authority exercised."[170] However, the majority stressed the awareness of political questions because "some [executive] actions are of 'a purely political nature . . . .'"[171] Furthermore, the majority asserted that 'no writ of injunction or mandamus or other judicial remedial writ will run against the governor' *unless personal or private property rights are interfered with*.'"[172] The majority held that this was not the case in *In re Hooker* because the attorney general's claims were brought "on behalf of the State of Mississippi, and no particular individual."[173] Therefore, the exercise of the governor's pardon power "is of 'a purely political nature.'"[174]

---

162. *Id.*
163. *Id.* at 414.
164. *Id.* at 403 (emphasis omitted).
165. *Id.*
166. *Id.* at 414.
167. *Id.* at 405.
168. *Id.* at 406.
169. *Id.*
170. *Id.* at 411 (citing State v. Mcphail, 180 So. 387, 391 (Miss. 1938)).
171. *Id.* (quoting *McPhail*, 180 So. at 391).
172. *Id.* (quoting *McPhail*, 180 So. at 391).
173. *Id.* at 411-412.
174. *Id.* at 412 (quoting *McPhail*, 180 So. at 391).

Under *Cleveland*, the court held "that the governor [i]s the sole judge of the sufficiency of the facts of the propriety of granting the pardon . . . ."[175] However, although the court acknowledged that pardon applicants are held to Section 124's publication requirements, "the courts may not investigate the inner workings of other branches of government to determine whether those procedural requirements were met."[176] Again, the court reiterates that the doctrine of nonjusticiability is applicable to *In re Hooker* because Section 124's publication requirement for pardon applicants "is not any particular individual's personal or property right."[177]

Relying on *Wright*, the court stated that the judicial branch is not the keeper of the Mississippi executive branch's conscience.[178] Thus, a facially valid pardon issued by the governor, head of the coequal executive branch, cannot "be set aside or voided by the judicial branch, based solely on a claim that the procedural publication requirement of Section 124 was not me, or that the publication was insufficient."[179] Finding that this action was barred by the separation of powers doctrine the court reversed and remanded.[180]

B. Carlson Concurrence

Justice Carlson, Presiding Justice for the Mississippi Supreme Court, specially concurred with the majority and was joined by fellow Presiding Justice Dickinson and Justices Lamar and Chandler.[181] However, he was "compelled to write in response to the separate opinions in this case."[182] Justice Carlson argued that the majority correctly states that '"[t]he controlling issue is whether the judicial branch of government has constitutional authority to void a facially valid pardon issued by the coequal executive branch, when the only challenge is compliance with Section 124's publication requirement."'[183] Furthermore, Justice Carlson was at a loss for words for how the examples cited by the dissenters of former Mississippi governors executing their pardoning power under Section 124 did not involve '"interpretation.'"[184] The former Mississippi governors referenced were Governors Williams and Waller and their pardoning of Randall Kelly Davis.[185] Davis was charged with two crimes, one of which he was pardoned for by Governor Williams.[186] Then Davis was pardoned for "another crime due to the inability of Governor Williams to pardon Davis on the second crime because of Governor Williams's belief that Davis had not

175. *Id.* (quoting Montgomery v. Cleveland, 98 So. 111, 112 (Miss. 1923)) (emphasis omitted).
176. *Id.*
177. *Id.*
178. *Id.* at 413.
179. *Id.* at 414.
180. *Id.*
181. *Id.* at 417 (Carlson, J., concurring).
182. *Id.* at 414.
183. *Id.*
184. *Id.* at 415 (emphasis omitted).
185. *Id.*
186. *Id.*

complied with the publication provisions of Section 124."[187] Justice Carlson argues that if the court was going to take judicial notice of the actions of former governors, then what is to stop the court to take judicial notice of the legislative actions in response to the governors' actions especially the 2012 Legislature action in response to Governor Barbour's actions.[188]

Justice Carlson concluded that the dissenters take issue with Governor Barbour's interpretation of Section 124 because it was improper compared to the actions of former Mississippi governors Williams, Waller, and Mabus.[189] Essentially, as expressed by the majority, the court should "calmly and unemotionally consider the language of Section 124, as written, and interpret the plain language of Section 124" without considering both the actions of former Governor Barbour and the 2012 Mississippi Legislature.[190] However, Justice Carlson does agree with the dissenters that "it is [the Mississippi Supreme Court], and not the executive or legislative branches, which ultimately interprets the provisions of [the Mississippi] Constitution."[191] Thus, Justice Carlson concludes that "[i]f the [Mississippi] Constitution in general, and Section 124 in particular, as currently written, has produced unintended results, the people may amend it."[192]

C. Chandler Concurrence

Justice Chandler specially concurred with the majority and was joined by Presiding Justices Dickinson and Carlson and Justice Lamar.[193] Chandler argued that each coequal branch of government "is charged with interpreting the procedural provisions of the Constitution applicable to that branch."[194] The Mississippi Supreme Court is to determine "what provisions of the Constitution describe powers that are within the exclusive sphere of each branch."[195] Chandler believes that Section 124's publication requirements "are procedural requirements with the executive sphere . . . [and] are not a condition precedent to the governor's power to pardon."[196] Accordingly, Chandler argues that "[t]he fundamental purpose of . . . Section 124 is to gather information for the governor, who all agree, [pursuant to the Mississippi Constitution], is vested with the sole discretion to decide whether to pardon a certain individual."[197] Chandler believes that the majority properly concluded that Section 124's procedural requirements, the publication requirements, were "within the executive sphere."[198] Justice Chandler then refutes the dissenters' belief that Section 124's publication

187. *Id.*
188. *Id.* at 416.
189. *Id.*
190. *Id.*
191. *Id.* at 416-17.
192. *Id.* at 417.
193. *Id.* at 419 (Chandler, J., concurring).
194. *Id.* at 417.
195. *Id.*
196. *Id.*
197. *Id.*
198. *Id.* at 417-18.

requirement "is a reservation by the people of a right to thirty days' notice."[199]

Chandler argues that the thirty days' notice right "dissolves when considered in light of the fact that noticing the public has absolutely no impact on the governor's decision to pardon."[200] There is no due process right within Section 124.[201] Again, the publication requirements are intended to benefit the governor in gathering information when deciding on whether or not to issue a pardon.[202]

In referencing the majority opinion, Chandler stresses that for the court to subject a governor's interpretation of Section 124's publication requirements to judicial review, "with [the court's] interpretation to apply retroactively . . . the court's ability to invalidate pardons would extend to every pardon that has ever been issued in [Mississippi]."[203] Essentially, he argues that "[t]he details surrounding the publication of applications for pardons long thought final would be unearthed and subjected to a lengthy judicial review process [that would take years]."[204] Responding to the dissenters, Chandler argues "every gubernatorial pardon would be subject to judicial review—not just upon the face of the pardon, but upon evidentiary inquiries into whether the publication requirement was met to the satisfaction of [the Mississippi Supreme Court]."[205] Chandler states that, under the Mississippi Constitution, the clemency power is both vested with the governor and serves as "a check on the judiciary."[206] However, Chandler argues that had the dissenters' prevailed, "for all practical purposes . . . the clemency power [would have been placed] with the judiciary."[207] Therefore, Justice Chandler specially concurs with the majority.[208]

D. Waller Dissent

Chief Justice Waller, joined by Justices Randolph and Pierce, dissented.[209] Citing *Pro Choice Mississippi*, Waller says "[r]egardless of the result, [the Mississippi Supreme] Court must enforce the article of the Constitution as written."[210] The people of Mississippi "did *not* give the governor the power to pardon a convicted felon until the felon applying for pardon 'shall have published for thirty days . . . his petition for pardon, setting forth therein the reasons why such pardon should be granted.'"[211]

199. *Id.* at 418.
200. *Id.*
201. *Id.*
202. *Id.*
203. *Id.*
204. *Id.* at 419.
205. *Id.*
206. *Id.*
207. *Id.*
208. *Id.*
209. *Id.* at 420 (Waller, J., dissenting).
210. *Id.* at 419 (quoting Pro Choice Miss. v. Fordice, 716 So. 2d 645, 652 (Miss. 1998)).
211. *Id.* at 420.

Thus, echoing the court's holding in *Barbour*, Waller says that no Mississippi governor, "or for that matter, any government official, can exercise power beyond their constitutional authority."[212]

Waller argues that the constitutionality of a governor's pardons is justiciable.[213] Relying on *Broom*, Waller says that "once a governor has acted, 'the legality of the act is a judicial question for the courts.'"[214] Therefore, the Mississippi Supreme Court has a "duty—to determine whether the governor, or any government official, has acted outside his or her constitutional authority."[215] Thus, Waller respectfully dissents with the majority's view of the proper role of the executive within the constitutional scheme of separation of powers.[216]

E. Randolph Dissent

Justice Randolph dissented from the majority and was joined by Chief Justice Waller and Justice Pierce.[217] Randolph argues the judicial branch has a duty to determine "whether in specific instances the other two [branches of government] have exceeded the power granted to them by the Constitution."[218] When there is a clash between the Constitution and the actions branch of government "the edicts of the [C]onstitution" reign supreme.[219] Nonetheless, Randolph characterizes the majority opinion as "a stunning victory for some lawless convicted felons, and an immeasurable loss for the law-abiding citizens of [Mississippi]."[220] Essentially, the "court[ ] relinquish[ed] the inherent judicial function of declaring what the [Mississippi] Constitution and our laws say."[221]

Randolph strongly argues that the majority holding "allows some convicted felons to avoid their constitutional obligations and allows a coordinate branch to eschew multiple constitutional obligations and duties, in favor of those-convicted felons and in total disregard of substantive constitutional rights reserved by the people of Mississippi."[222] This holding annuls the people of Mississippi's right to petition the Government.[223] Randolph asserts that the majority's decision "contravenes the text of the Constitution [and] fails to abide by [the Mississippi Supreme] Court's 1924 holding that a pardon petition 'is required by law to be published before the pardon therein prayed for can be granted . . . .'"[224] Unlike the majority opinion, Randolph believes that the court's holding in *Grantham* should

212. *Id.* (quoting Barbour v. State ex rel. Hood, 974 So. 2d 232, 239 (Miss. 2008)).
213. *Id.*
214. *Id.* (quoting Broom v. Henry, 100 So. 602, 603 (Miss. 1924)).
215. *Id.* (quoting *Barbour*, 974 So. 2d at 239).
216. *Id.*
217. *Id.* at 439 (Randolph, J., dissenting).
218. *Id.* at 420-21 (citing Albritton v. City of Winona, 178 So. 799, 803 (Miss. 1938)).
219. *Id.* at 421 (quoting Newell v. State, 308 So. 2d 71, 77 (Miss. 1975)).
220. *Id.*
221. *Id.*
222. *Id.*
223. *Id.*
224. *Id.*

control *In re Hooker*.[225] In *Grantham*, the court held that "'Section 124 . . . requires all petitions for the pardon of a felon to be published' and that 'it is required by law to be published before the pardon therein prayed for can be granted . . . .'"[226] Overall, Randolph is perplexed by "the majority's acquiescence to [the] untenable accretion of judicial authority to the executive branch . . . ."[227]

Agreeing with Chief Justice Waller, Randolph asserts that "the plain language of [Section 124's] text still must control [the court's] decision, for [the] court must declare the Mississippi Constitution as it is written, not as [the court] assume[s] it to be."[228] Relying on *Delta Correctional Facility Authority*, Randolph says that "[t]he ultimate power and responsibility for interpreting [the Mississippi] Constitution is bestowed upon the judiciary, and that responsibility is the crux of [*In re Hooker*]."[229] Governor Barbour's actions are justiciable because the pardons he issued were outside his constitutional authority as governor.[230]

Randolph notes that the U.S. Supreme Court has found the reviews of pardons justiciable.[231] Therefore, he argues that "when the State controverts a pardon, as here, the courts have a duty to expound upon it."[232] Like Chief Justice Waller, Randolph argues that the majority "relinquishes the constitutional question to the governor, and then concludes that the governor's decision is not reviewable by a court."[233] Randolph questions this action because "[t]here is no textual commitment to the executive branch for the interpretation of the [Mississippi] Constitution."[234] The Mississippi Supreme Court "lacks the authority to cede power bestowed upon it by the people . . . ."[235]

Randolph reiterates that the pardoning power exists only to the extent that the people have constitutionally granted it.[236] Relying on *McPhail*, Randolph argues that court "cannot know with certitude the framers' intent in placing limitation in the text of the Constitution, but we can with certitude view the express words used in the framers' textual commitment to publication, and know with certitude that the Constitution means what the words say."[237] He states that "Mississippians did not bestow upon the governor an unconditional grant of authority to pardon [, but rather limit

225. *Id.* at 429.
226. *Id.*
227. *Id.* at 423.
228. *Id.*
229. *Id* at 423-24 (citing Barbour v. Delta Corr. Facility Auth., 871 So. 2d 703, 710 (Miss. 2004)).
230. *Id.* at 424.
231. *Id.* at 425 (citing United States v. Wilson, 32 U.S. 150 (1833)).
232. *Id.*
233. *Id.*
234. *Id.*
235. *Id.*
236. *Id.* at 426.
237. *Id.* (citing State v. McPhail, 180 So. 387, 389 (Miss. 1938)).

the governor's pardon authority through constitutionally enumerated limitations stated in Section 124]."[238] Echoing Waller, Randolph asserts that "before a governor may pardon a convicted felon, the felon 'shall' publish his petition for thirty days [pursuant to Section 124] before any 'pardon shall be granted . . . .'"[239] In other words, the governor is powerless to grant a pardon in absence of Section 124's publication requirements and if he proceeds to issue the pardon then the legality of that pardon is justiciable.[240]

Randolph laments that "[n]o citation is required for the general principle that excising a provision from and—reading nonexistent language precluding judicial review into—Section 124 violates all tenets that govern constitutional interpretation."[241] The majority would have prevented the presence of uncertainties and legal morass in this case if they had simply adhered to the existing language of Section 124.[242] Randolph respectfully dissents from the majority's view that the governor has free reign to wield the pardoning power.[243]

F. Pierce Dissent

Justice Pierce dissented from the majority and was joined by Chief Justice Waller and Justice Randolph.[244] Pierce states that this case is "simply an analysis of words and a determination of the legal meaning.[245] The language of Section 124 "is neither hard to apply nor difficult to understand."[246] However, in light of the majority's decision, Pierce argues that "Section 124 will forever be waiting—its words never judicially determined."[247]

Furthermore, Pierce asserts that the executive, legislative and judicial branches of the Mississippi government "owe their existence to the Mississippi Constitution."[248] All the branches are coequal, "[and] by duty and necessity, the obligation of determining whether, in specific instances, one of the [branches] has exceeded the powers granted to it, 'devolves' upon the judiciary."[249] Pierce believes that it is an untenable position for the majority to hold "whether the constitutional strictures of Section 124 were met . . . nonjusticiable."[250] He concludes that "the majority has effectively countenanced a view that almost any interpretation the executive or legislative [branches] may give to the Mississippi Constitution—no matter how

238. *Id.* at 427.
239. *Id.*
240. *Id.*
241. *Id.* at 428.
242. *Id.* at 439.
243. *Id.*
244. *Id.* at 444 (Pierce, J., dissenting).
245. *Id.* at 439.
246. *Id.*
247. *Id.*
248. *Id.* at 440.
249. *Id.* (citing Albritton v. City of Winona, 178 So. 799, 803 (Miss. 1938)) (Pierce, J., dissenting).
250. *Id.* at 442.

erroneous—is now binding on the judiciary."[251] This is a road that Pierce does not want to travel, and, therefore, he respectfully dissents.[252]

V. ANALYSIS

The idea "[t]hat great constitutional and legal questions may become topics of political and even partisan controversy should never be employed by [the judiciary] as an excuse to duck its responsibility to adjudicate the legal and constitutional rights of the parties."[253] The political question doctrine asserts "that there exist certain issues of constitutional law that are more effectively resolved by the political branches of government and are therefore inappropriate for judicial resolution."[254] Political questions are declared "'non-justiciable,' which means that the courts will neither approve nor reject the judgments of the political branches, and will instead let the political process take its course."[255] Governor Barbour's actions were deemed "political" because the *In re Hooker* court viewed the constitutionally explicit publication requirement as a procedural matter reserved to the internal operations of Mississippi's executive branch.[256] Reading the textually committed publication requirement out of the Mississippi Constitution, the *In re Hooker* court has left the impression that the coequal nature of Mississippi's government is imbalanced.

The political question doctrine provides courts the '"means to avoid passing on the merits of a question when reaching the merits would force the [judiciary] to compromise an important principle or would undermine the [judiciary's] authority.'"[257] It "does not generally relieve the courts of authority over cases where decisions of the political branches are challenged."[258] Under the political question doctrine, the judiciary is required "to avoid reviewing the decisions of the political bodies where the Constitution has explicitly granted to them complete discretion over the subject matter."[259] Furthermore, "the class of issues where final authority is granted to political branches includes questions which are not in and of themselves 'political'; rather they are deemed 'political' because they represent the exercise of discretion delegated to political actors."[260] In *Baker*, the U.S. Supreme Court established certain formulations that define a political question.[261]

---

251. *Id.* at 443-44.

252. *Id.* at 444.

253. Dye v. State ex rel. Hale, 507 So. 2d 332, 339 (Miss. 1987).

254. Martin H. Redish, *Judicial Review and the 'Political Question'*, 79 Nw. U. L. REV. 1031 (1984).

255. *Id.*

256. *In re Hooker*, 87 So. 3d at 414.

257. Marcella David, *Passport to Justice. Internationalizing the Political Question Doctrine for Application in the World Court*, 40 HARV. INT'L L.J. 81, 129 (1999) (citing LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 96 (2d ed. 1988)).

258. *Id.*

259. *Id.* at 130.

260. *Id.*

261. Baker v. Carr, 369 U.S. 186, 217 (1962)

> The presence of a political question is indicated when:
>
> 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.[262]

The judiciary has also considered military matters and foreign relations as political questions.[263] There is also an external operation versus internal operation dichotomy to the political question inquiry. Regarding challenges to the internal operations of a coequal branch of government, "the application of the political question doctrine may . . . require the courts to stay their hand."[264] The *Baker* formulations "speak to legal, prudential and functional issues associated with the exercise of jurisdiction in certain circumstances."[265] The first *Baker* formulation "looks to the constitutional limitations on the power granted the courts . . . [and] the second addresses prudential concerns . . . ."[266] The remaining four Baker formulations speak to judicial review of coequal branch decisions."[267]

A. The Baker factors applied to In re Hooker

1. The Textual Commitment

Nixon is a seminal case in the U.S. Supreme Court political question jurisprudence with respect to the textual commitment of constitutional authority. "[A] textually demonstrable constitutional commitment of the issue to a coordinate political department" is indicative of a political question.[268] In *Nixon*, the U.S. Supreme Court held Judge Nixon's allegations that the United States Senate conducted an improper impeachment trial as nonjusticiable pursuant to the political question doctrine.[269] The

262. *Id, see also* Powell v. McCormack, 395 U.S. 486 (1969) (addressing whether seating a U.S. Congressman-elect in the House of Representatives after the passing of a resolution excluding the member-elect was a political question); Goldwater v. Carter, 444 U.S. 996 (1979) (discussing whether the proper way of exiting treaties entered into by the United States is a political question).

263. David, *supra* note 257, at 130.

264. *Id.*

265. *Id.* at 128.

266. *Id.*

267. *Id.*

268. Baker v. Carr, 369 U.S. 186, 217 (1962).

269. Nixon v. United States, 506 U.S. 224, 238 (1993).

matter of trying impeachments was "'a textually demonstrable constitutional commitment of the issue to [the legislative branch with respect to the U.S. Senate] . . . .'"[270] This is an external limitation on judicial review.

In *Nixon*, the Court asserted that the "Senate alone shall have authority to determine whether an individual should be acquitted or convicted."[271] The Senate was "trying" Judge Nixon's impeachment with a committee of Senators.[272] Impeachment trials are political questions and are nonjusticiable.[273] As long as the Senate is operating within its Constitutional sphere, the judiciary cannot "open[ ] the door of judicial review to the [internal] procedures used by the Senate in trying impeachments . . . ."[274] Above all, "[i]f the courts may review the actions of the Senate in order to determine whether [it] 'tried' an impeached official, it is difficult to see how the Senate would be 'functioning . . . independently [from the judiciary]."[275] *Nixon* exemplifies how the political question doctrine was not applicable to *In re Hooker*.

The Barbour pardons were validated on the assertion that Barbour executed the textually committed pardoning power that is constitutionally vested within the Governor of Mississippi.[276] However, the *In re Hooker* court's textual commitment argument is flawed. The plain language of the constitutional provisions at issue in *Nixon* and in *In re Hooker* are distinguishable.[277] In *Nixon*, pursuant to United States Constitution Article 1, Section 3, Clause 6, the United States Senate has "the power to try impeachments without limitation, exception, or specific requirements for its exercise by the Senate."[278] However, with respect to the pardoning power of Mississippi governors, Article 5, "Section 124 [of the Mississippi Constitution] places three limitations on the pardon power: (1) the Senate must consent to a pardon for treason; (2) no pardon shall be granted before conviction; and (3) a felon requesting a pardon must publish a petition for thirty days before the pardon shall be granted."[279]

In *In re Hooker*, a political question would have been present had Governor Barbour's actions complied with "a textually demonstrable constitutional commitment of the [pardoning power] to [the] coordinate [executive branch]."[280] However, within those constitutional textual commitments are the enumerated constitutional limitations to issuing a pardon like the thirty day publication requirement that was absent from Barbour's pardons.[281] Governor Barbour's pardons were a "pardon" in

270. *Id.* at 228 (quoting *Baker*, 369 U.S. at 217).
271. *Id.* at 231.
272. *Id.* at 230.
273. *Id.* at 238.
274. *Id.* at 236.
275. *Id.* at 231.
276. In re Hooker, 87 So. 3d 401, 414 (Miss. 2012).
277. *Id.* at 434 (Randolph, J., dissenting).
278. *Id.* (citing U.S. CONST. art. I, §3, cl. 6).
279. *Id.* at 412; MISS. CONST. art. V, §124 (1890).
280. *Id.* at 405; MISS. CONST. art. V, §124 (1890).
281. MISS. CONST. art. V, §124 (1890).

name only because they were not constitutionally valid for failing to comply with the thirty day publication requirement. All in all, thirty days is thirty days.

2. The Lack of Judicially Discoverable and Manageable Standards

The judiciary is "underequipped to formulate national polices or develop standards for matters not legal in nature."[282] In *Japan Whaling*, several wildlife conservation groups challenged the U.S. Secretary of Commerce's failure "to certify that Japan's whaling practices 'diminish the effectiveness' of the International Convention for the Regulation of Whaling [(IRCW)] because [Japan's] annual harvest exceed[ed] quotas established under the [IRCW]."[283] The Secretary's certification was alleged to be mandated by the Pelly and Packwood Amendments enacted by the U.S. Congress to amend the Fishermen's Protective Act of 1967 and the Magnuson Fishery Conservation and Management Act respectively.[284] The Japanese petitioners argued that the issue was a nonjusticiable political question because it touched on foreign relations.[285]

The *Japan Whaling* Court did acknowledge the prominent role that both the executive and legislative branches play in United States foreign policy.[286] However, there were judicial standards readily available in this case—the legislative amendments. Determining whether certification was required by the Secretary called for the Court to "apply[ ] no more than the traditional rules of statutory construction, and then apply[ ] this analysis to the particular set of facts presented below."[287] Despite the probability that its "decision may have significant political overtones," the Court engaged in the judiciary's traditional role of statutory interpretation.[288]

As in *Japan Whaling*, there was no "lack of judicially discoverable and manageable standards" in *In re Hooker* to determine the validity of the controversial Barbour pardons.[289] *In re Hooker* contained judicial authority, a constitutional amendment to the Mississippi Constitution. Article 5, Section 124 of the 1890 Mississippi Constitution unequivocally and unambiguously states that the Governor of Mississippi is constitutionally vested to issue pardons, but those pardons are subject to constitutionally enumerated restrictions that includes a thirty-day publication requirement.

282. Japan Whaling Ass'n v. Am. Cetacean Soc'y, 478 U.S. 221, 230 (1986) (quoting U.S. ex rel. Joseph v. Cannon, 642 F. 2d 1373, 1379 (D.C. Cir. 1981)).

283. *Id.* at 223.

284. *Id.* at 225-26.

285. *Id.* at 229.

286. *Id.* at 230.

287. *Id.*

288. *Id.*

289. Baker v. Carr, 369 U.S. 186, 217 (1962).

3. Judicial Refrain from Determining Policy

Again, the last four *Baker* factors "collectively speak to [the constitutional] limitations of court review of certain legislative and executive decisions."[290] Nonjusticiable political questions are "those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch."[291] Generally, this involves the realm of foreign affairs.[292] Granted, not every foreign relations issue is a political question.[293] Nevertheless, foreign relations "frequently turn on standards that defy judicial application, or involve the exercise of a discretion demonstrably committed to the executive or legislature; but many such questions uniquely demand single-voiced statement of the Government's views."[294]

Aktepe v. United States[295] concerned tort suits brought by Turkish sailors against the United States for personal injuries and deaths sustained in a multi-national naval exercise that included the United States Navy.[296] However, the Eleventh Circuit dismissed the case as a nonjusticiable political question because the issue centered on foreign relations and would require the judiciary to engage in "initial policy decisions of a kind appropriately reserved for military discretion" like simulated battlefield conditions.[297] The "courts are unschooled in 'the delicacies of diplomatic negotiation [and] the inevitable bargaining for the best solution of an international conflict, the Constitution entrusts resolution of sensitive foreign policy issues to the political branches of government."[298] In the realm of foreign relations, the judiciary "is neither equipped nor, more importantly, constitutionally empowered to speak."[299]

Unlike *Aktepe*, *In re Hooker* was not a matter of foreign relations or national security. It did not involve policy regarding United States foreign affairs or United States military operations.[300] Rather, *In re Hooker* solely concerned a Mississippi matter about whether controversial pardons issued by its governor were valid absent a constitutionally explicit publication requirement.[301]

290. David, *supra* note 257, at 128.

291. *Japan Whaling*, 478 U.S. at 230.

292. *Baker*, 369 U.S. at 211.

293. *Id.*

294. *Id.*

295. Aktepe v. United States, 105 F.3d 1400 (11th Cir. 1997).

296. *Id.* at 1401-02.

297. *Id.* at 1404.

298. *Id.* at 1403 (quoting Smith v. Reagan, 844 F.2d. 195, 199 (4th Cir.) (quoting Holtzman v. Schlesinger, 484 F.2d 1307, 1312 (2d Cir. 1973))).

299. Lane v. Halliburton, 529 F. 3d 548, 563 (5th Cir. 2008).

300. In re Hooker, 87 So.3d 401, 403-04 (Miss. 2012).

301. *Id.*

B. Marbury and Powell v. McCormack

One could argue that *In re Hooker* mirrors *Marbury*. In *In re Hooker*, Governor Barbour failed to adhere to the Section 124 publication requirement, but the Mississippi Supreme Court did not compel the governor to comply with the requirement compared to *Marbury* where Secretary Madison was required to deliver Marbury's commission yet was not compelled to deliver it by the Marshall Court.[302] However, *In re Hooker* is not analogous to *Marbury*.

In *Marbury*, the Marshall Court did not compel Madison to deliver Marbury's commission because the statute, Section 13 of the Judiciary Act of 1789, that afforded Marbury the remedy to a writ of mandamus against Madison by the U.S. Supreme Court was unconstitutional.[303] Section 13 expanded the Supreme Court's original jurisdiction to include the issuance of writs of mandamus, which Marshall held was repugnant to the U.S. Constitution.[304] Marshall asserted that the U.S. Supreme Court's original jurisdiction, which is explicitly stated in the U.S. Constitution, does not include issuing writs of mandamus.[305] Original jurisdiction could only be expanded through a constitutional amendment and not through an act of Congress.[306] Unlike *Marbury*, in *In re Hooker* there was not a constitutionally repugnant statute that prevented the Mississippi Supreme Court from nullifying Governor Barbour's pardons, but rather the textually committed constitutional restrictions to the Mississippi Governor's pardoning power laid out in Section 124.

The *In re Hooker* court held that the judiciary could not nullify pardons issued by the governor when the only claim was the pardon's noncompliance with Section 124's publication requirement even though the majority said that the publication requirement must be met.[307] The pardons were nonjusticiable as they were political in nature.[308] In essence, the Mississippi Supreme Court broadened the political question doctrine to veil a coequal branch's actions trespassing its constitutional sphere as political and not subject to judicial review.

Marshall exclaimed that "[q]uestions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court."[309] Therefore "without constitutional authority to issue a pardon until after publication, the matter was not constitutionally 'submitted to the executive,' such that [Governor Barbour] had no discretion to

302. *Id.* at 414; Marbury v. Madison, 5 U.S. (1 Cranch) 137,173-74 (1803).

303. *Marbury*, 5 U.S. at 170-80.

304. *Id.* at 173-80.

305. *Id.*

306. *Id.*

307. *In re Hooker*, 87 So. 3d at 412.

308. *Id.* at 411-12, 414.

309. *Id.* at 405.

exercise."[310] The Mississippi Governor's pardon restrictions are constitutionally explicit.[311] Barbour's actions were repugnant to the Mississippi Constitution and not political. Accordingly, unlike *Marbury*, *In re Hooker* is analogous to *Powell*.

Powell challenged the United States House of Representatives refusal to seat Adam Clayton Powell, Jr., duly elected by the voters of the 18th Congressional District of New York, in the 90th U.S. Congress.[312] During the 89th Congress, the House Committee on Education and Labor was investigated for the expenditures of that committee during Powell's chairmanship.[313] The report surrounding the investigation concluded that Powell had engaged in improper expenditures including deceiving House authorities about travel expenses and "certain illegal salary payments . . . to Powell's wife at his discretion."[314] However, no formal disciplinary action was taken against Powell and he was subsequently elected to the 90th Congress.[315]

At the beginning of the 90th Congress, House leaders attempted through procedural resolutions to exclude Powell from taking his seat in the House of Representatives.[316] The House adopted House Resolution No. 1 that established "a Select Committee to determine Powell's eligibility."[317] The Committee found that Powell had met the standing qualifications of Article 1, section 2 of the United States Constitution, which states that "[n]o Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen."[318] The Committee also reaffirmed that Powell engaged in improper expenditures and recommended to the full House that Powell be seated but fined, censured, and stripped of seniority.[319] However, the Committee's resolution was rejected by the House but was later amended by the House to call for Powell's exclusion.[320] The amended resolution was adopted by the House "excluding Powell and directing the Speaker [of the House] to notify the Governor of New York that the seat was vacant."[321] Powell brought suit against House leaders including John

310. *Id.* at 433 (citing *Marbury*, 5 U.S. at 170) (Randolph, J., dissenting).

311. MISS. CONST. art. V, § 124 (1890).

312. Powell v. McCormack, 395 U.S. 486, 489-495 (1969).

313. *Id.* at 489-90.

314. *Id.* at 490.

315. *Id.*

316. *Id.* at 489-94.

317. *Id.* at 490.

318. *Id.* at 492; U.S. CONST. art. I, § 2, cl. 2.

319. *Id.*

320. *Id.* at 492-93.

321. *Id.* at 493.

W. McCormack, the Speaker of the House, challenging the exclusion's constitutionality.[322] The U.S. Supreme Court held that this issue was not a nonjusticiable political question.[323]

The House argued that Powell's claim presented a political question because "there has been a 'textually demonstrable constitutional commitment' to the House of the 'adjudicatory power' to determine Powell's qualifications."[324] However, Powell argued that "the 'qualifications' expressly set forth in the Constitution were not meant to limit the long-recognized legislative power to exclude . . . at will, but merely to establish 'standing incapacities,' which could be altered only by a constitutional amendment."[325] In essence, the House decides whether a duly elected member satisfied the qualifications, "but . . . as to what these qualifications consisted of [is] not [at the House's discretion]."[326] Accordingly, the Court agreed with Powell and held that a U.S. Representative-elect, "duly elected by his [or her] constituents . . . and meets all the requirements for membership expressly prescribed in the Constitution," cannot be excluded by the House.[327] Powell was entitled to be seated in the 90th Congress.[328]

As with *Powell*, *In re Hooker* concerned a coequal branch of government's attempt to redefine its textually-committed constitutional authority. However, unlike the House of Representatives, Governor Barbour was successful. In *Powell*, the Court found that the House's internal procedures were subject to judicial review since it attempted to alter the external constitutionally explicit qualifications for member-elects as a way to exclude Congressman Powell from taking his seat in the 90th Congress.[329] The only way the House could change the qualifications for one to serve in the U.S. House of Representatives was through a constitutional amendment.[330] Similarly, in *In re Hooker*, Governor Barbour executed his constitutionally vested pardoning power that was conditioned on constitutionally explicit restrictions.[331]

Pursuant to the 1890 Mississippi Constitution, Article 5, "Section 124 . . . a felon requesting a pardon must publish a petition for thirty days before the pardon shall be granted."[332] The controversial pardons at issue in *In re Hooker* were granted by Governor Barbour void of the thirty-day publication requirement despite the *In re Hooker* majority's declaration that the publication requirement had to be met.[333] The only way for Governor Barbour to waive the thirty-day publication requirement was through

322. *Id.*
323. *Id.* at 550.
324. *Id.* at 519 (quoting Baker v. Carr, 369 U.S. 186, 217 (1962); U.S. CONST. Art. I, § 5, cl. 1).
325. *Powell*, 395 U.S. at 522.
326. Nixon v. United States, 506 U.S. 224, 237 (distinguishing *Powell* from the issue in *Nixon*).
327. *Powell*, 395 U.S. at 522.
328. *Id.* at 550.
329. *Id.* at 522, 550.
330. *Id.* at 522.
331. In re Hooker, 87 So. 3d 401, 402-03 (Miss. 2012).
332. *Id.* at 412; MISS. CONST. art. V, § 124.
333. *In re Hooker*, 87 So. 3d at 412, 414.

an amendment to the Mississippi Constitution.[334] However, despite the blatant violation of the Mississippi Governor's pardoning power's external constitutional restrictions, the Mississippi Supreme Court held that Governor Barbour's actions were political nature of the executive branch's internal procedures and nonjusticiable under the political question doctrine.[335]

C. External Limitations vs. Internal Procedures Dichotomy

As illustrated through *Nixon* and *Powell*, there are external limitations to judicial review versus subjecting the internal procedures of a coequal branch to judicial review dichotomy embedded within the political question doctrine. Generally, the *Baker* factors and matters concerning foreign relations act as external factors to judicial review. If a coordinate coequal branch's actions comply with *Baker* or touch foreign relations, the coequal branch's actions will be deemed political and nonjusticiable. However, if the coequal branch's actions trespass its sphere of constitutional authority, the coequal branch's actions are no longer political and its internal operations are subject to judicial review. In *Nixon*, the U.S. Supreme Court held that the U.S. Senate was the absolute and sole trier of impeachments including trying impeachments through a committee of Senators.[336] Therefore, the *Nixon* Court refused to entertain Judge Nixon's request for a new impeachment trial and subject the U.S. Senate's internal procedures for conducting impeachment trials to judicial review.[337] Conversely, in *Powell*, the U.S. Supreme Court viewed the U.S. House's actions in trying to exclude a duly elected member through procedural resolutions as violating the constitutional qualifications stated in Article 1, section 2 of the U.S. Constitution.[338] The U.S. House's defiance of its textually committed constitutional authority rendered the *Powell* Court to subject the U.S. House's internal procedures to judicial review.[339] In *In re Hooker*, the Mississippi Supreme Court disheveled the external versus internal dichotomy.

The *In re Hooker* court holding that "the governor alone . . . decide[s] whether the [Mississippi] Constitution's publication requirement enables future governors unprecedented wield of the pardoning power amidst an emboldened executive and a weakened judiciary."[340] Unlike the *Nixon* Court, the *In re Hooker* court blurred the lines between the external constitutional limits and subjecting the internal coequal branch's procedures to judicial review. The Mississippi Supreme Court equated Section 124's publication requirement as an internal operation of the executive branch.[341] However, the Section 124's thirty-day publication requirement and the other restrictions on the Governor's pardon authority are not internalized

334. *Id.* at 417 (Carlson, J., concurring); *see also* MISS. CONST. art. XV, § 273.
335. *In re Hooker*, 87 So. 3d at 412, 414.
336. Nixon v. United States, 506 U.S. 224, 229-36; U.S. CONST. art. I, § 3, cl. 6.
337. *Nixon*, 506 U.S. at 238.
338. Powell v. McCormack, 395 U.S. 486, 522, 550 (1969).
339. *Id.* at 550.
340. *In re Hooker*, 87 So. 3d at 403.
341. *Id.* at 403, 412, 414.

but rather constitutionally explicit.[342] Conversely, *In re Hooker* expanded the political question doctrine to read the thirty-day publication requirement out of the constitution.

Article 5, Section 124 of the Mississippi Constitution states that "no pardon shall be granted until the applicant therefor [sic] shall have published for thirty days . . . ." However, Governor Barbour issued pardons that did not comply with the constitutionally explicit thirty-day publication requirement; yet, his constitutional violation was declared nonjusticiable as it was political in nature.[343] Contrary to *Powell* and despite the external violation, the Mississippi Supreme Court did not subject the executive branch's internal operations regarding Barbour's controversial pardons to judicial review.[344]

D. Political Overtones are not always Political Questions

The U.S. Supreme Court has emphatically asserted that "[t]he presence of constitutional issues with significant political overtones does not automatically invoke the political question doctrine."[345] Undeniably, *In re Hooker* was engulfed with political overtones as evident through the parties and other players involved with its adjudication. *In re Hooker* was initiated by Democratic Mississippi Attorney General, Jim Hood,[346] and eventually involved Republican Mississippi Governor Haley Barbour and Barbour's successor, Republican Governor Phil Bryant.[347] Also, five of the ten pardonees served as trustees at the Mississippi Governor's Mansion during the Barbour Administration.[348] Furthermore, *In re Hooker* was adjudicated before the elected Justices of the Mississippi Supreme Court.[349] Nevertheless, these political overtones were not dispositive that *In re Hooker* raised a nonjusticiable political question.

The judiciary's political question doctrine, as exhibited in *In re Hooker*, has the potential to harbor a "'realpolitik'" view that "the [judiciary] must survive in an often hostile political world, and the best way to accomplish that feat and simultaneously maintain its legitimacy is to pick

342. MISS. CONST. art. V, § 124.

343. *In re Hooker*, 87 So. 3d at 414.

344. *Id.*

345. Immigration & Naturalization Serv. v. Chadha, 462 U.S. 919, 942-43 (1983).

346. *Jim Hood, Mississippi*, DEMOCRATIC ATTORNEYS GENERAL ASSOCIATION, http://www.democraticags.org/jim.html (last visited Nov. 2, 2013).

347. Initial Brief of Appellee-Respondent, *supra* note 13, at *49; *Mississippi Governor Haley Barbour*, NATIONAL GOVERNORS ASSOCIATION, http://www.nga.org/cms/home/governors/past-governors-bios/page_mississippi/col2-content/main-content-list/haley-barbour.html (last visited Nov. 4, 2013); *Mississippi Governor Phil Bryant*, National Governors Association, http://www.nga.org/cms/home/governors/current-governors/col2-content/main-content-list/governor-phil-bryant.html (last visited Nov. 4, 2013).

348. Initial Brief of Appellee-Respondent, *supra* note 13, at *7-8.

349. *About the Courts*, STATE OF MISSISSIPPI JUDICIARY, http://courts.ms.gov/aboutcourts/aboutcourts.html (last visited Oct. 12, 2013).

fights."[350] However, this view is not dispositive to allow a court to disregard a case because it is embedded with politics.[351] The *Baker* Court acknowledged that "the doctrine of which we treat is one of 'political questions,' not one of 'political cases.'"[352] Political matters are ubiquitous throughout the federal docket.[353]

The judiciary's interpretation of the law "will sometimes involve the '[r]esolution of litigation challenging the constitutional authority of one of the three branches,' but courts cannot avoid their responsibility merely 'because the issues have political implications.'"[354] Although the *In re Hooker* court cited the political question doctrine for nonjusticiability of the Barbour pardons, when legal issues "sound in familiar principles of constitutional interpretation . . . [t]he political question doctrine poses no bar to judicial review."[355] As in *In re Hooker*, when the head of the coequal executive branch, like the Governor of Mississippi, exceeds the constitutional sphere of executive power, the question is no longer political but rather constitutional, requiring judicial review.

E. The Political Question Doctrine Veil

In re Hooker is a vivid reminder of the implications of a state judiciary misinterpreting and subsequently broadening the political question doctrine, making the fundamental notion of the coequal separation of powers appear imbalanced. There is absolutely no United States Governor that "can exercise power beyond their constitutional authority."[356] The *In re Hooker* majority conceded that the constitutional explicit publication requirements stated in section 124 have to be met.[357] Nevertheless, it still held that "a facially valid pardon, issued by the governor . . . may not be set aside or voided by the judicial branch, based solely on a claim that the procedural publication requirement of Section 124 was not met . . . ."[358] The Governor of Mississippi's "pardoning power is an enumerated power of the [Mississippi] Constitution and . . . its limitations, if any, must be found in the [Mississippi] Constitution itself."[359] Governor Barbour was constitutionally vested to issue pardons, but "no pardon shall be granted until the applicant therefor shall have published for thirty days . . . ."[360] The pardons at issue in *In re Hooker* were indeed pardons, but they were unconstitutional, null, and void in the absence of complying with the explicit and constitutionally enumerated thirty-day publication requirement.

350. Redish, *supra* note 254, at 1031.
351. Baker v. Carr, 369 U.S. 186, 217 (1962).
352. *Id.*
353. ERWIN CHEMERINSKY, FEDERAL JURISDICTION 143 (2d. ed. 1994).
354. Zivotofsky v. Clinton, 132 S. Ct. 1421, 1428 (2012).
355. *Id.* at 1430
356. In re Hooker, 87 So. 3d 401, 420 (quoting Barbour v. State ex rel. Hood, 974 So. 2d 232, 239 (Miss. 2008)) (Waller, J., dissenting).
357. *Id.* at 403, 412. (majority opinion).
358. *Id.* at 414.
359. Schick v. Reed, 419 U.S. 256, 267 (1974).
360. MISS. CONST. art, V, § 124.

In *In re Hooker*, an explicit constitutional limitation was veiled in the political question doctrine and rendered nonjusticiable. Subsequently, in light of *In re Hooker*, how far can the political question doctrine veil be draped over either executive or legislative branch actions to render the entire breadth of their authority nonjusticiable? State courts, especially popularly elected state judiciaries like Mississippi,[361] should be hesitant to broaden the political question doctrine to cover actions outside a coequal branch's constitutional sphere of power.

William Howard Taft, former President of the United States, "declared that judicial elections were 'disgraceful' and 'so shocking . . . that we ought to condemn them.'"[362] There is a perceived notion that "increased competitiveness of [judicial] elections has . . . heightened the pressure on judges to decide cases strategically" at the expense of judicial independence.[363] Ironically, "contested judicial elections introduce a partisan, ideological component into the branch of government that, at least in theory, is supposed to be 'above politics.'"[364] Unequivocally, "[t]he goal of the judicial process is to provide impartial justice to all litigants who come before the courts . . . ."[365]

In re Hooker was decided by justices who '"are selected in highly partisan circumstances and depend upon a highly partisan constituency for continuance in office, they may act in ways which will cultivate support for that constituency, that is, exhibit tendencies in their judicial decision making.'"[366] Unfortunately, the elected Mississippi Supreme Court's *In re Hooker* holding has made all the difference in the world to Governor Barbour's successors and their now unprecedented constitutional authority to interpret and wield their pardoning power in the absence of the Mississippi Supreme Court. If state judiciaries, including Mississippi, post-*In re Hooker*, continue to misinterpret and broaden the political question doctrine to the point that executive or legislative action is immune from judicial review, "then [the judiciary will] be transformed from the guardian of . . . separation of powers [the judiciary] has long recognized into mere wishful thinking."[367]

VI. CONCLUSION

In re Hooker serves as a model for other state judiciaries in assessing their political question jurisprudences. It is imperative that state judiciaries

361. Joanna M. Shepherd, *Are Appointed Judges Strategic Too?*, 58 DUKE L.J. 1589, 1596 (2009).

362. *Id.* at 1601.

363. *Id.* at 1603.

364. John L. Dodd, *The Case for Judicial Appointments*, 33 U. TOL. L. REV. 353, 368 (2002).

365. *Id.* at 374.

366. *Id.* at 375; *About the Courts*, STATE OF MISSISSIPPI JUDICIARY, http://courts.ms.gov/aboutcourts/aboutcourts.html (last visited Nov. 2, 2013).

367. Stern v. Marshall, 131 S. Ct. 2594, 2598 (2011).

"cautiously invoke[ ]" the political question doctrine.[368] Otherwise, as evident with *In re Hooker*, misconstruing the political question doctrine could lead to an explicit, textually committed constitutional requirement being read directly out of a state's constitution. The judiciary must remain vigilant and "mindful that the purpose of the political question doctrine is to bar claims that have the potential to undermine the separation-of-powers design of our federal government."[369] The judiciary branch cannot unequivocally "acquiesce[ ] to [the] untenable accretion of judicial authority to the executive branch . . . ."[370] *In re Hooker* lends credence to the perception that Mississippi's coequal branches of government are imbalanced and has put Mississippi on a path to witness post-Barbour governorships that have free reign in wielding the pardoning power in the absence of the Mississippi judiciary.

Governor Haley Barbour was undeniably a political force within the state of Mississippi. However, his actions as the Governor of Mississippi, the head of the coequal executive branch, in issuing the *In re Hooker* pardons were not political in nature, but rather a question of constitutional law that required judicial review. As long as coequal branches act pursuant to their constitutional powers, their actions are deemed political and are nonjusticiable. However, when the branches pierce their constitutional sphere of power their actions are no longer political but are subject to judicial review. Accordingly, the judiciary cannot broaden the meaning of the political question doctrine to include a coequal branch's unconstitutional actions because it would lead to potentiality unfettered executive or legislative authority.

368. Dodd, *supra* note 363, at 376-75 (citing Can v. United States, 14 F. 3d 160, 163 (2d Cir. 1994)).

369. Lane v. Halliburton, 529 F. 3d 548, 559 (5th Cir.).

370. In re Hooker, 87 So. 3d 401, 423 (Randolph, J., dissenting).