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Is There a "Political Question" Doctrine?

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Late last spring, the editors asked Louis Henkin of Columbia Law School whether he would contribute an essay to the Journal as our own memorial to Alexander Bickel's work in constitutional law. We are honored that Professor Henkin accepted our invitation. Like Bickel, he was a law clerk of Justice Frankfurter, served in the State Department in the early 1950's, and is a constitutional scholar of the highest stature. His voice seems the best tribute to Professor Bickel, whom we knew only in our first year of law school and whose absence we continue to regret.

Of the many constitutional themes which Alex Bickel addressed, few evoked from him more perceptive insights and more sophisticated comment—or aroused more controversy—than his illumination of the "political question" doctrine. Like others, I have had difficulties with the doctrine, and some with Bickel's view of it. Continuing confusion and controversy, aggravated by what the Supreme Court has done and said since Bickel wrote, lead me to heretical questions: Is there a "political question" doctrine? Do we need one?¹

That there are political questions—issues to be resolved and decisions to be made by the political branches of government and not by the courts—is axiomatic in a system of constitutional government built on the separation of powers. The federal courts exercise neither the "legislative Powers" nor "The executive Power" of the United States.² They do not tax and spend, borrow or coin money, regulate commerce, establish rules of naturalization or exercise any of the other powers vested by the Constitution in Congress; nor make treaties, appoint officers, command the armed forces, or make other decisions

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1. I began to move towards these questions in an editorial comment, Henkin, *Viet-Nam in the Courts of the United States: Political Questions*, 63 AM. J. INT'L L. 284 (1969), and in my book, L. HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 210-16 (1972).

2. Compare U.S. Const. art. I, § 1, and art. II, § 1, with art. III, § 1.

that are the President's to make. The courts exercise "The judicial Power of the United States," deciding cases and controversies arising under the Constitution and under the laws and treaties of the United States—laws and treaties made by the political branches.³

If, as happens, a federal court is asked to make "law" or to extend existing law beyond the limits of proper interpretation, the courts might say that to make such law is a political responsibility, and whether to do so, a "political question." And indeed the courts have used the term in that sense, to demarcate the political from the judicial domain and judicial responsibility from that of Congress or the Executive. They have said, for example, that their concern is only whether the political branches of government, federal or state, have exceeded constitutional limitations; as long as the political branches act within their constitutional powers, whether they have done wisely or well is a "political question" which is not for the courts to consider.⁴

One needs no special doctrine to describe the ordinary respect of the courts for the political domain. If a political question is one which

3. In addition to law-making inherent in the art of interpreting the Constitution or the laws and treaties, federal courts make law to maintain and develop the judge-made maritime law inherited from England, and to govern relationships between states that come for original adjudication before the Supreme Court. *See, e.g.,* *Southern Pac. Co. v. Jensen*, 244 U.S. 205 (1917); *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92 (1938); *Connecticut v. Massachusetts*, 282 U.S. 660 (1931); *cf. West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22, 28 (1951). They sometimes make law interstitially in other areas which are constitutionally committed to the federal government. *See, e.g.,* *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964); *Friendly, In Praise of Erie—And of the New Federal Common Law*, 39 N.Y.U. L. REV. 383 (1964); *Henkin, The Foreign Affairs Power of the Federal Courts: Sabbatino*, 64 COLUM. L. REV. 805 (1964).

4. For one of many examples, see *Nebbia v. New York*, 291 U.S. 502, 537-38 (1934). Such statements imply no special doctrine of judicial abstention; in that sense there are political questions in virtually every case, whenever a court reads and applies the Constitution or an act of Congress.

Marshall was speaking of such political questions as early as *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803):

By the Constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience.

. . . [A]nd whatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion. The subjects are political. They respect the nation, not individual rights, and being entrusted to the executive, the decision of the executive is conclusive.

Id. at 165-66.

The 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. Questions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court.

Id. at 170.

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the Constitution commits to the political branches, our political life is full of them. The courts may sometimes have occasion to decide whether a question was in fact constitutionally committed to the political branches, but that, too, needs no special doctrine suggesting a quality of "nonjusticiability" with connotations that the courts must dismiss for lack of jurisdiction and authority without reaching the merits.

A meaningful political question doctrine, in my view, implies something more and different: that some issues which *prima facie* and by usual criteria would seem to be for the courts, will not be decided by them but, extra-ordinarily, left for political decision. In particular, I suggest, in "pure theory" a political question is one in which the courts forego their unique and paramount function of judicial review of constitutionality. As so conceived, the doctrine would have it that although in general, in a proper case, the courts will examine the actions of government for conformity to constitutional authorizations and limitations,⁵ some constitutional requirements are entrusted exclusively and finally to the political branches of government for "self-monitoring."⁶ As to these, the courts say to the petitioner in effect: "Although you may indeed be aggrieved by an action of government, although the action may indeed do violence to the Constitution, it involves a political question which is not justiciable, not given to us to review." In our day the political question doctrine was invoked in lower courts to deny judicial review of constitutional issues raised by our national misfortunes associated with Vietnam.⁷

Failure to maintain the distinction between the ordinary respect of the courts for the substantive decisions of the political branches, and extra-ordinary deference to those branches' determination that what they have done is constitutional, has aggravated confusion and controversy as to whether, and why, and when, such extra-ordinary

5. In theory, every action of government is subject to such judicial review but by now, surely, the large majority of governmental actions are indubitably within constitutional authority if only because the courts have long ago so held, and the availability of judicial scrutiny is only hypothetical. In a substantial number of cases a claim of constitutional infirmity is not wholly without substance, but the courts nonetheless readily conclude that the action of the political branches was not *ultra vires* under the Constitution. In such cases, I stress, the courts are in no sense deferring to the political branches: the judges are scrutinizing but "passing" what the political branches have done.

6. The Supreme Court was applying this "pure theory" of political questions when it considered whether the issues were political questions in *Baker v. Carr*, 369 U.S. 186 (1962), and *Powell v. McCormack*, 395 U.S. 486 (1969), but held they were not. See pp. 603-04 *infra*.

In the Constitution of India, some provisions are declared to be "Directive Principles of State Policy" and expressly immunized from judicial review. See INDIA CONST. pt. IV, art. 37.

7. See pp. 623-24 *infra*.

judicial deference is called for.⁸ As an exception to judicial review, a political question doctrine is surely striking and of great import. Thanks to *Marbury v. Madison*,⁹ constitutional issues generally are not "political" but justiciable,¹⁰ and declaring acts of the political branches of government unconstitutional does not, ipso facto, express the "lack of the respect due coordinate branches of government" which Justice Brennan found to be one basis for judicial abstention under the political question doctrine.¹¹ Judicial review is now firmly established as a keystone of our constitutional jurisprudence. A doctrine that finds some issues exempt from judicial review cries for strict and skeptical scrutiny.

The thesis I offer for discussion is that there may be no doctrine requiring abstention from judicial review of "political questions."¹²

8. Confusion is compounded when the courts do not make it clear whether they are denying relief out of deference for the political branches, ordinary or extra-ordinary, or for other reasons, e.g., that the court does not have jurisdiction of the case under applicable constitutional and statutory provisions, that a sufficient claim for relief has not been made, or that the remedy sought is not appropriate in the circumstances. The courts sometimes sweep into "political question" other alleged political failures and inadequacies which the courts cannot remedy, for example, the failure by a legislature to legislate or appropriate funds to carry out responsibilities of government.

Other references to "political" decisions, powers, interests, also do not form part of a constitutional political question doctrine. A different doctrine denies standing to those who assert only a "political" interest. The courts will not entertain a suit by a state to challenge an alleged usurpation of power by the federal government where the state's interest is only "political," its desire to maintain the constitutional compact. *Massachusetts v. Mellon*, 262 U.S. 447 (1923); cf. *Massachusetts v. Laird*, 400 U.S. 886 (1970). Similarly the courts, it has been assumed, would not entertain a suit by Congress against the President alleging presidential usurpation of congressional authority. Courts have, however, given standing to a member of Congress claiming presidential usurpation and interference with the member's function. Compare *Holtzman v. Schlesinger*, 484 F.2d 1307, 1315 (2d Cir. 1973), cert. denied, 416 U.S. 936 (1974), and *Harrington v. Schlesinger*, 528 F.2d 455 (4th Cir. 1975), with *Kennedy v. Sampson*, 511 F.2d 430 (D.C. Cir. 1974). Compare the Supreme Court's grant of standing to members of the state legislature in *Coleman v. Miller*, 307 U.S. 433 (1939), with Frankfurter's dissent, *id.* at 460. Where plaintiff is denied standing to raise an issue because his interest is only political, the issue is usually justiciable if raised by a different plaintiff with a "personal" interest. See notes 12, 39 *infra*.

Constitutional issues might be denied review if a necessary party is constitutionally immune to the court's jurisdiction, e.g., members of Congress under "the speech or debate clause," U.S. CONST. art. I, § 6, or the President under his suggested immunity while in office. *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475 (1867); but cf. *United States v. Nixon*, 418 U.S. 683 (1974).

9. 5 U.S. (1 Cranch) 137 (1803).

10. Justice Gibson's famous opinion in *Eakin v. Raub*, 12 S. & R. 330 (Pa. 1825), in effect saw every claim that the legislature violated the Constitution as a political question; the legislature's conclusion that it was acting within its constitutional authority he thought was not subject to judicial review.

11. See p. 603 *infra*.

12. And few, if any, discrete clauses of the Constitution are immune to review by their own terms. Compare pp. 604-05 & note 26 *infra*. There may of course be failure of judicial review for lack of case or controversy or the other grounds for "not hearing"

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The cases which are supposed to have established the political question doctrine required no such extra-ordinary abstention from judicial review; they called only for the ordinary respect by the courts for the political domain. Having reviewed, the Court refused to invalidate the challenged actions because they were within the constitutional authority of President or Congress. In no case did the Court have to use the phrase "political question," and when it did, it was using it in a different sense, saying in effect: "We have reviewed your claims and we find that the action complained of involves a political question, and is within the powers granted by the Constitution to the political branches. The act complained of violates no constitutional limitation on that power, either because the Constitution imposes no relevant limitations, or because the action is amply within the limits prescribed. We give effect to what the political branches have done because they had political authority under the Constitution to do it."¹³

I

Bickel wrote about "political questions" in reaction and response to my colleague Herbert Wechsler. Wechsler had written:

[A]ll the doctrine can defensibly imply is that the courts are called upon to judge whether the Constitution has committed to another agency of government the autonomous determination of the issue raised, a finding that itself requires an interpretation.

....

[T]he only proper judgment that may lead to an abstention from decision is that the Constitution has committed the determination of the issue to another agency of government than the courts. Difficult as it may be to make that judgment wisely, whatever factors may be rightly weighed in situations where the answer is not clear, what is involved is in itself an act of constitutional interpretation, to be made and judged by standards that should govern the interpretive process generally. That, I submit, is *toto caelo* different from a broad discretion to abstain or intervene.¹⁴

which the Supreme Court has developed. Some clauses may be effectively immune to judicial review because no one has standing to raise them. See note 39 *infra*; note 8 *supra*.

13. I do not find any reason to believe that the Court in these cases was eager to dismiss as nonjusticiable, rather than to affirm, in order to avoid "legitimizing" what the political branches had done. It was perhaps otherwise with some of the lower courts that avoided deciding issues of the Vietnam War. See pp. 623-24 *infra*.

14. Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 7-8, 9 (1959).

Bickel's response was pungent:

It is different, just so; but only by means of a play on words can the broad discretion that the courts have in fact exercised be turned into an act of constitutional interpretation. The political-question doctrine simply resists being domesticated in this fashion. There is something different about it, in kind, not in degree, from the general "interpretive process"; something greatly more flexible, something of prudence, not construction and not principle.¹⁵

His own explanation of the doctrine had a very different flavor:

Such is the basis of the political-question doctrine: the court's sense of lack of capacity, compounded in unequal parts of the strangeness of the issue and the suspicion that it will have to yield more often and more substantially to expediency than to principle; the sheer momentousness of it, which unbalances judgment and prevents one from subsuming the normal calculations of probabilities; the anxiety not so much that judicial judgment will be ignored, as that perhaps it should be but won't; finally and in sum ("in a mature democracy"), the inner vulnerability of an institution which is electorally irresponsible and has no earth to draw strength from.¹⁶

Neither Wechsler nor Bickel was addressing the ordinary respect which courts must pay to the constitutional authority of the political branches; both, I believe, were discussing the "political question" doctrine as a basis for extra-ordinary judicial abstention. For Wechsler the courts had no basis for, and no business, abstaining except where the Constitution could fairly be interpreted as requiring them to abstain. And he did indeed read several constitutional provisions as, extra-ordinarily, committing issues finally and exclusively to the political branches, denying the courts even their usual task of scrutinizing the actions of the political branches for alleged constitutional infirmity.¹⁷ Bickel was insisting that the courts were entitled to abstain, from

15. Bickel, *The Supreme Court, 1960 Term—Foreword: The Passive Virtues*, 75 HARV. L. REV. 40, 46 (1961).

16. *Id.* at 75. See also A. BICKEL, *THE LEAST DANGEROUS BRANCH* 172 (1962).

17. See note 26 *infra*. Wechsler does not, of course, exclude considerations of prudence as guides to constitutional interpretation. The Framers may have acted from "prudence," say, in making each House judge of the qualifications of its members. Or, motivations of the Framers apart, courts may favor one interpretation over another from considerations of prudence, including concern for the place of courts in our system and their relations to the political branches. But the result is an interpretation of the Constitution, not abstention by the courts on their own initiative from their own institutional considerations of wisdom and policy or from ad hoc prudential concerns of particular judges in particular circumstances.

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prudence or from "wisdom," and were to be applauded for asserting that authority in appropriate instances.¹⁸

In large measure, Wechsler and Bickel differed as to what the doctrine should be. But I think they were also exposing different impressions of what the courts had wrought. As to that we have had additional light from the Supreme Court since Wechsler and Bickel disputed. In *Baker v. Carr*, Justice Brennan told us:

It is apparent that several formulations which vary slightly according to the settings in which the questions arise may describe a political question, although each has one or more elements which identify it as essentially a function of the separation of powers. 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.¹⁹

Professor Wechsler might seem entitled to say that Justice Brennan largely confirms his view: "Prominent . . . is . . . a textually demonstrable constitutional commitment of the issue to a coordinate political department . . ." ²⁰ And in *Baker v. Carr* (and in more recent

18. I do not deal here with other exercises of judicial prudence which Bickel applauded (and Professor Wechsler challenged)—for example, the Supreme Court's occasional escape, by various devices, from reviewing cases which were within its jurisdiction on appeal (rather than on writ of certiorari). Cf. *Naim v. Naim*, 350 U.S. 891 (1955) (per curiam); *Naim v. Naim*, 350 U.S. 985 (1956); *Poe v. Ullman*, 367 U.S. 497 (1966). Compare BICKEL, *supra* note 16, at 71, 126, with Wechsler, *supra* note 14, at 34, and Gunther, *The Subtle Vices of the "Passive Virtues,"* 64 COLUM. L. REV. 1, 11-12 (1964). The central issue of the debate was whether the Supreme Court had such discretion to avoid review when Congress can be deemed to have denied it by placing such cases within the Court's compulsory rather than its discretionary jurisdiction. Bickel apparently thought that Congress did not mean to (and perhaps had no authority to) deny some "inherent" power of the Court to be "prudent." Unlike those cases, the political question doctrine is not policy for the Supreme Court; it is a doctrine of non-judiciability requiring abstention by all courts, federal and state.

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

20. In turn, Bickel might note that the other considerations in Justice Brennan's list are not rooted in any textual commitment and several of them partake of "wisdom" and prudence. But see note 27 *infra*. Brennan's considerations appear as generalizations which have afforded guidance to lower courts. Bickel did not try to "domesticate" his prudential concerns into guidelines, and would probably support abstention whenever he

cases)²¹ the Supreme Court looked into the Constitution in order to decide whether the issues in those cases were "political," *i.e.*, non-justiciable, requiring extra-ordinary judicial abstention (though in the end it interpreted the text as not denying justiciability to those issues, and proceeded to adjudicate and resolve them). But even as the Supreme Court was restating the doctrine and rooting it "prominently" in textual interpretation, the Court was also cutting away the principal candidates to which Professor Wechsler would apply it. Although the Constitution provides that "Each House shall be the Judge of the . . . Qualifications of its own Members," the Court held reviewable, and reversed, a judgment by the House that elected-Representative Adam Clayton Powell was not qualified.²² Although the same clause provides that each House "shall be the Judge of the Elections [and] Returns . . . of its own Members," the Court in *Roudebush v. Hartke*²³ reviewed and upheld a state procedure providing for a recount in an election for the United States Senate.²⁴

The Supreme Court has not recently held any issue to be textually committed by the Constitution to the other branches and therefore not justiciable—a "political question."²⁵ And the Court's failure to require judicial abstention in those instances where scripture can most plausibly be read to require it leaves a strong sense that the present Justices are not disposed to find many—or any—issues in fact

and the courts agreed that abstention was "wise," in the public interest most broadly conceived.

21. See notes 22-25 *infra*.

22. *Powell v. McCormack*, 395 U.S. 486 (1969). The Court read the Constitution as denying the House the right to impose qualifications other than those explicitly prescribed in Article I, § 2, *viz.*, age, citizenship and residence. And it was those explicit constitutional qualifications "at most," the Court said, which were committed to each House without review by the judiciary. *Id.* at 548.

23. 405 U.S. 15 (1972).

24. And while the Court found executive privilege implied in the constitutional system, it rejected presidential claims that the scope and content of the privilege were exclusively and finally for the President to determine, and reviewed and invalidated Mr. Nixon's invocation of it. *United States v. Nixon*, 418 U.S. 683 (1974). Also, although Wechsler had read the provisions that the House "shall have the sole Power of Impeachment" and the Senate "shall have the sole Power to try all Impeachments" as excluding the courts from intervention in the impeachment process (compare note 26 *infra*), others, especially in the light of *Powell*, have read the Constitution as permitting at least some interventions as regards some issues related to impeachment. Compare R. BERGER, *IMPEACHMENT: THE CONSTITUTIONAL PROBLEM* (1973), with C. BLACK, *IMPEACHMENT: A HANDBOOK* (1974), and the differing opinions in COMMITTEE ON FEDERAL LEGISLATION, ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, *THE LAW OF PRESIDENTIAL IMPEACHMENT* (1974); HOUSE COMM. ON THE JUDICIARY, REPORT ON THE IMPEACHMENT OF RICHARD M. NIXON, PRESIDENT OF THE UNITED STATES, H.R. REP. NO. 1305, 93d Cong., 2d Sess. (1974); cf. *Nixon v. Sirica*, 487 F.2d 700 (D.C. Cir. 1973); Gunther, *Judicial Hegemony and Legislative Autonomy: The Nixon Case and the Impeachment Process*, 22 U.C.L.A. L. REV. 30 (1974).

25. But cf. *Gilligan v. Morgan*, 413 U.S. 1 (1973); see pp. 619-21 *infra*.

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so textually committed. Justice Brennan, however, found textual commitment to another branch "prominent" in the doctrine as established by the older cases, and both he and Professor Bickel, trying to make sense of the constitutional jurisprudence they had inherited, apparently found instances of judicial abstention on grounds other than "textual commitment."²⁵

If any clauses in the Constitution are properly interpreted as conferring power not subject to judicial review, so be it (though there might be too few of such bricks and it might be otherwise misleading to build a "political question doctrine").²⁶ If the cases have established that courts must, or should, or may, abstain from judicial review of constitutionality because of one or more of the considerations distilled by Justice Brennan or from Bickel's undifferentiated "prudence," so be that too (although Professor Wechsler is surely entitled to ask where the Court found authority for such abstention). I am not satisfied, however, that the older cases called for extra-ordinary judicial abstention in the sense of the pure "political question doctrine"; the considerations distilled from them by Justice Brennan seem rather to be elements of the ordinary respect which the courts show to the substantive decisions of the political branches.²⁷ Different

26. For Wechsler, judicial review was contemplated by the Fathers. See Wechsler, *supra* note 14, at 2-10. But since even for him judicial review is not unambiguously explicit, it would be surprising if one found clauses in the Constitution that explicitly and unambiguously excluded judicial review. Nevertheless, he reads various clauses as textually barring judicial review. He would agree, I think, that they might be read otherwise; indeed, as we have seen, in several notable instances the Court has read them otherwise. See p. 604 *supra*. For example, "Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members." That clause does not say "sole Judge," and one can argue that the commitment of that task to each House no more precludes judicial review of what they do, than the commitment of the power to regulate commerce to Congress precludes judicial review of what Congress does under that power. Compare note 22 *supra*. Even the unique instance, "[t]he Senate shall have the sole Power to try all Impeachments," does not necessarily preclude the argument that while the Senate alone is to be the judge in impeachment proceedings, the courts can review how it does it, at least for constitutional excesses or infirmities. See note 24 *supra*.

27. As I read them, neither Justice Brennan's catalogue nor the cases from which he distills it suggest that the courts must abstain from judicial review because the Constitution says so (Wechsler's view), or may do so from general considerations of prudence and wisdom (as claimed by Bickel). Judging from the cases, even the "textually demonstrable commitment" of an issue to the political branches apparently does not necessarily mean exclusive and final commitment to the political branches without judicial review (see pp. 608, 611-12 *infra*), but only the kind of commitment found, say, in the grants to Congress in Article I, § 8; the courts consider daily whether the political branches exercise power textually committed to them with due respect for constitutional limitations or prohibitions.

The other considerations cited seem also to be particularizations of how the courts exercise their ordinary deference for the political domain. Only "unusual need for unquestioning adherence to a political decision already made" can perhaps be read to imply that from prudential reasons (like those cited by Bickel) the courts should not consider even the constitutionality of such a decision. But that interpretation of what Justice

(perhaps only clearer) opinions might have been written in the leading cases that would justify and explain their result without even using the words "political question," and without suggesting a doctrine that would also be deemed to support an exception to our commitment to judicial review.

The Court, I suggest, was following (or might have followed) one of several established jurisprudential lines which are sometimes confused with the "political question doctrine" but which essentially have nothing to do with it:

1. The act complained of was within the power conferred upon the political branches of the federal government by the Constitution, and their action was law binding on the courts.

2. Contrary to petitioner's assertion, the act complained of fell within the enumerated powers conferred upon the political branches by the Constitution (or within the inherent powers of the state) and was not prohibited to them explicitly or by any warranted inference from the Constitution; nor did it violate any right reserved to the petitioner by the Constitution.

3. Although a legal claim existed, indeed although a constitutional violation may have been committed, the remedy sought was an equitable remedy and would not be granted in the circumstances by a court of equity in the exercise of sound discretion.

The first two are commonplace: courts have held one or the other of these in innumerable cases. In such cases, I stress, the court does not refuse judicial review; it exercises it. It is not dismissing the case or the issue as nonjusticiable; it adjudicates it. It is not refusing to pass on the power of the political branches; it passes upon it, only to affirm that they had the power which had been challenged and that nothing in the Constitution prohibited the particular exercise of it.

Denial of a particular, or any, equitable remedy is also not an exception to judicial review. The court may indeed review, find a violation, and still deny the remedy; or it may deny some remedy, say, an injunction, but grant other relief, *e.g.*, a declaratory judgment.²⁸

Brennan said is not inevitable, and I do not know of any case from which Justice Brennan might have derived such a principle.

Baker v. Carr has become the starting point and the touchstone for all discussions of political questions. See, *e.g.*, *Powell v. McCormack*, 395 U.S. 486, 517, 518-21 (1969). The lower courts also have harked back to Justice Brennan's criteria in considering arguments that certain issues require abstention from judicial review. See the cases cited in note 74 *infra*.

28. That doctrine, too, was commonplace, at least to earlier generations of judges and lawyers. In the past, especially when equity courts were distinct and lawyers and law students studied their jurisdiction and jurisprudence, lawyers argued and the courts

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II

The first and still-leading case is *Luther v. Borden*,²⁹ and the prime example of a "political question" commonly offered is still one arising under Article IV, § 4: "The United States shall guarantee to every State in this Union a Republican Form of Government"

Luther v. Borden . . . though in form simply an action for damages for trespass was, as Daniel Webster said in opening the argument for the defense, "an unusual case." The defendants, admitting an otherwise tortious breaking and entering, sought to justify their action on the ground that they were agents of the established lawful government of Rhode Island, which State was then under martial law to defend itself from active insurrection; that the plaintiff was engaged in that insurrection; and that they entered under orders to arrest the plaintiff. The case arose "out of the unfortunate political differences which agitated the people of Rhode Island in 1841 and 1842," 7 How., at 34, and which had resulted in a situation wherein two groups laid competing claims to recognition as the lawful government. The plaintiff's right to recover depended upon which of the two groups was entitled to such recognition; but the lower court's refusal to receive evidence or hear argument on that issue, its charge to the jury that the earlier established or "charter" government was lawful, and the verdict for the defendants, were affirmed upon appeal to this Court.³⁰

The federal courts were asked and refused to reexamine the legitimacy of the charter government, which had been recognized by Congress and the President. Referring to Article IV, Chief Justice Taney said:

Under this article of the Constitution it rests with Congress to decide what government is the established one in a State. For as the United States guarantees to each State a republican government, Congress must necessarily decide what government is established in the State before it can determine whether it is republican or not. And when the senators and representatives of a State are admitted into the councils of the Union, the authority of the government under which they are appointed, as well as its republican character, is recognized by the proper constitutional authority. And its decision is binding on every other depart-

frequently considered the appropriateness of the equitable remedy even in constitutional cases. See pp. 617-22 *infra*.

29. 48 U.S. (7 How.) 1 (1849).

30. *Baker v. Carr*, 369 U.S. 186, 218-19 (1962) (Brennan, J.) (footnotes omitted).

ment of the government and could not be questioned in a judicial tribunal.³¹

Of course, the decisions of the political branches in that case were "political,"³² as is every action of the political branches, but the *Luther* decision gave them no extra-ordinary deference. The Court was not refusing to scrutinize the constitutionality of what the political branches had done. To the contrary, it found that the actions of Congress and the President in this case were within their constitutional authority and did not violate any prescribed limits or prohibitions.³³ They were therefore law for the courts and there could be no basis for any court to disregard them.³⁴

Luther, I conclude, established no pure "political question doctrine." But in later, different cases, private parties attacked as unconstitutional, because not consistent with a "Republican Form of Government," various forms of state government, legislative delegations, and new procedures for making law other than by representative legislatures, such as the referendum and the initiative. Beginning

31. *Luther v. Borden*, 48 U.S. (7 How.) 1, 42 (1849). "So, too," added Taney, "as relates to the clause in the above-mentioned article of the Constitution, providing for cases of domestic violence. It rested with Congress, too, to determine upon the means proper to be adopted to fulfil this guarantee." *Id.* at 42-43. By statute Congress had authorized the President in such circumstances, on application of the state legislature or executive, to call forth the militia. Here the President had, upon application of the Governor of Rhode Island, recognized him as the executive power of the state, and took measures to call out the militia to support his authority if it should be found necessary.

The state courts had previously upheld the charter government and Taney considered that the federal courts must follow the state courts on that question of state law. *Id.* at 40. That did not involve any refusal to judge the state's actions by some constitutional standard; at the time, surely, there was no constitutional limitation applicable to the states that might have been violated, as arguably there might have been after the adoption of the Fourteenth Amendment. Plaintiffs did not claim that the charter government was inconsistent with a republican form of government. See note 33 *infra*.

32. In reviewing this case later, Justice Brennan said:

Clearly, several factors were thought by the Court in *Luther* to make the question there "political": the commitment to the other branches of the decision as to which is the lawful state government; the unambiguous action by the President, in recognizing the charter government as the lawful authority; the need for finality in the executive's decision; and the lack of criteria by which a court could determine which form of government was republican.

Baker v. Carr, 369 U.S. 186, 222 (1962) (footnote omitted).

33. Petitioners did not allege that the charter government failed to satisfy the requirement for a republican form of government, that the other regime was "more republican" or that the act of Congress in recognizing it violated some other provision of the Constitution.

34. It is said that this power in the President is dangerous to liberty, and may be abused. All power may be abused if placed in unworthy hands. . . . At all events, it is conferred upon him by the Constitution and laws of the United States, and must therefore be respected and enforced in its judicial tribunals.

Luther v. Borden, 48 U.S. (7 How.) 1, 44 (1849). Compare the President's authority to recognize foreign governments, pp. 611-13 *infra*.

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in *Pacific States Telephone & Telegraph Co. v. Oregon*,³⁵ the Court, citing *Luther*, refused to consider the constitutional claim, holding that the clause is given exclusively to the political branches to monitor and that the courts could not enforce it. In these cases the Court apparently read the "guarantee clause" as including a prohibition forbidding the states to abandon republican forms, but a prohibition that cannot be monitored and enforced by the courts. "The United States shall guarantee" plausibly refers to the political branches, and it is not implausible to read it as excluding monitoring and enforcement by the courts. If so, we may have a unique constitutional clause excluding the courts; but that hardly adds up to a "political question doctrine."

In fact, the *Pacific States* reading of the guarantee clause was not inevitable. It was not compelled by *Luther*; it was not what the Court was required to say in holding as it did in *Luther* or in a confusion of later cases. In fact, the Court might readily have continued to include itself in "the United States," and continued to dispose of cases, as it had earlier, by holding that the challenged variations in the forms of state government did not vitiate their essentially republican character.³⁶ Or, determined not to be bothered, the Court might have

35. 223 U.S. 118 (1912). Later cases dismissed the claim on the authority of *Pacific States* without discussion. *Kiernan v. City of Portland*, 223 U.S. 151 (1912) (attacks on initiative and referendum); *Marshall v. Dye*, 231 U.S. 250 (1913) (state constitutional amendment procedure); *O'Neill v. Leamer*, 239 U.S. 244 (1915) (delegation to court to form drainage districts); *Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565 (1916) (submission of legislation to referendum); *Mountain Timber Co. v. Washington*, 243 U.S. 219, 234-35 (1917) (challenge to workmen's compensation system); *Ohio ex rel. Bryant v. Akron Metropolitan Park Dist.*, 281 U.S. 74, 79-80 (1930) (concurrence of all but one justice of state high court required to invalidate statute); *Highland Farms Dairy, Inc. v. Agnew*, 300 U.S. 608, 612 (1937) (delegation of legislative powers).

36. Before *Pacific States*, the Court had treated several claims under the guarantee clause as justiciable, though deciding against the claim in each case. *Attorney Gen. ex rel. Kies v. Lowrey*, 199 U.S. 233, 239 (1905) (legislative creation and alteration of school districts "compatible" with a republican form of government); *Forsyth v. City of Hammond*, 166 U.S. 506, 519 (1897) (delegation of power to court to determine municipal boundaries does not infringe republican form of government); *Minor v. Happersett*, 88 U.S. (21 Wall.) 162, 175-76 (1875) (denial of suffrage to women no violation of republican form of government). In *Highland Farms Dairy, Inc. v. Agnew*, 300 U.S. 608 (1937), the Court held that the delegation in question did not violate the republican form of government requirement; nonjusticiability was an alternative ground.

The only discussion of the nonjusticiability of state violations of the guarantee clause is Chief Justice White's in *Pacific States*. He treated the attack on the "initiative" in Oregon's constitution as challenging the whole of the state government. The challenge, he said, was to the state as a state and the courts obviously could not consider it, or execute a judgment that "the state" was illegal. See note 39 *infra*. He might have considered it an attack on the particular procedure only, and invalidating it would have no "inconceivable" consequences. Cf. *Reitman v. Mulkey*, 387 U.S. 369 (1967). In any event, it would not necessarily follow that a challenge to some specific new procedure, where invalidation would not have serious consequences, would also be nonjusticiable, but the later cases simply invoked the authority of *Pacific States* without discussion. The

read Article IV to say that the responsibility cast upon "the United States" to *guarantee* to every state a republican form of government does not necessarily imply a power, even in the political branches, to *impose* a republican form of government on a state that wished to deviate from it.³⁷ Or, granting the power of Congress to impose republican government on deviant states, the grant to Congress implies no "self-executing" prohibition upon the states.³⁸ Or, that any prohibition implied in Article IV does not bring with it a private right to be governed only by republican institutions, and to enjoin the operations of deviant state government or to challenge the validity of their particular acts on that ground.³⁹ None of these reasons would amount to extra-ordinary deference either to state government or to the political branches of the federal government. They would not exceptionally deny judicial review of constitutionality. They would deny relief because the claims assert no cause of action under the Constitution, because there is no constitutional prohibition to enforce or no constitutional right to vindicate.

The foreign relations of the United States have provided a second group of leading cases commonly cited as instances of judicial absten-

Court, rightly, never gave the objections serious consideration, but it might as easily have rejected the claims on the merits as it had done earlier.

37. While the records of the Convention are inconclusive, Randolph, at least, apparently sought a clause that would prohibit state deviations from republican government. 1 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 206 (Farrand ed., rev. ed. 1937); 2 *id.* at 48; 4 *id.* at 49. The language eventually adopted, however, was not his but, essentially, Wilson's. 2 *id.* at 48-49. Madison, in the *Federalist Papers*, implies that the federal government would have "authority to defend the system against aristocratic or monarchical innovations." THE FEDERALIST No. 43. Hamilton suggests that a guarantee of republican government "could only operate against changes to be effected by violence." "It could be no impediment to reforms of the State constitutions by a majority of the people in a legal and peaceable mode." THE FEDERALIST No. 21.

38. Compare the views of Chief Justice Taney in the License Cases, 46 U.S. (5 How.) 504, 573 (1847), and of Justice Black in *Southern Pac. Co. v. Arizona*, 325 U.S. 761, 784 (1945), that the grant to Congress of the commerce power implied no self-executing prohibitions forbidding the states to regulate commerce. This suggestion is related to the judicial abstention of the political question doctrine only because, in general, courts might be less willing to find a constitutional prohibition when they are reluctant to monitor it. Compare also *Kentucky v. Dennison*, 65 U.S. (24 How.) 66 (1861), holding that the obligation of a state to extradite a fugitive to a sister state cannot be judicially enforced.

The Court might have said also that, even reading Article IV as forbidding the states to deviate from republican government, the definition of republican government was left to Congress and the courts will enforce the prohibition only after Congress defined and prescribed its content.

39. *Coleman v. Miller*, 307 U.S. 433 (1939). Compare other clauses in the Constitution which can probably not be vindicated by private action because no one may have standing; e.g., the prohibition of titles of nobility, or the "statement and account" clause, U.S. CONST. art. I, §§ 9, 10. See *United States v. Richardson*, 418 U.S. 166, 179 (1974); cf. *Laird v. Tatum*, 408 U.S. 1, 13 (1972). Standing to assert that Congress is exceeding its spending power, U.S. CONST. art. I, § 8, cl. 1, is also hard to come by.

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tion because the issues were political.⁴⁰ In several cases the Court considered itself bound by the Executive's determination that a particular regime was the government of a foreign state; that given territory belonged to a foreign state; that an island belonged to the United States; that certain aliens should be deported.

Consider what the Court said:

And can there be any doubt, that when the executive branch of government, which is charged with our foreign relations, shall in its correspondence with a foreign nation assume a fact in regard to the sovereignty of any island or country, it is conclusive on the judicial department? And in this view it is not material to inquire, nor is it the province of the Court to determine, whether the executive be right or wrong. It is enough to know, that in the exercise of his constitutional functions, he has decided the question. Having done this under the responsibilities which belong to him, it is obligatory on the people and government of the Union.⁴¹

Or:

Who is the sovereign, *de jure or de facto*, of a territory is not a judicial, but a political question, the determination of which by the legislative and executive departments of any government conclusively binds the judges⁴²

But even if courts could require full disclosure, the very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. They are delicate, complex and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has

United States v. Richardson, *supra*; Flast v. Cohen, 392 U.S. 83 (1968); *Ex parte Levitt*, 302 U.S. 633, 634 (1937); *Massachusetts v. Mellon*, 262 U.S. 447 (1923).

In some cases at least, and surely in the days before declaratory judgments, the courts might have held that enforcing a republican form of government might require restructuring a state government in ways beyond the capacity of a court of equity. See p. 622 *infra*. Compare Taney's opinion in *Luther v. Borden*, 48 U.S. (7 How.) 1, 41-43 (1849). In *Pacific States*, Chief Justice White emphasized that the assault in the case was "not on the tax as a tax but on the state as a state," and stressed the far-reaching implications of exercising judicial power to vindicate a republican form of government in that case. 223 U.S. at 141-42, 150.

40. I draw here on previous writings, cited in note 1 *supra*.

41. *Williams v. Suffolk Ins. Co.*, 38 U.S. (13 Pet.) 415, 420 (1839).

42. *Jones v. United States*, 137 U.S. 202, 212 (1890).

long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.⁴³

Also:

It is pertinent to observe that any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government. Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.⁴⁴

None of those cases, I conclude, involved abstention from judicial review, or other extra-ordinary deference to the President.⁴⁵ In none of them did the Court refuse to consider whether the President had exceeded his constitutional authority; rather, it concluded that the President's decision was within his authority and therefore law for the courts. The Court was not asserting that the President's determinations were binding on the courts "right or wrong," constitutional or unconstitutional. Recognizing a particular regime as the government of a foreign country, accepting the sovereignty of a foreign country over given territory, or claiming sovereignty for the United States are neither findings of fact nor legal conclusions (which a court might review) but political positions taken by the President on behalf of the United States, and his to take under the Constitution.⁴⁶ If the Court sometimes spoke of the special quality of foreign relations and the need for the nation to speak with one voice, it did so not to support extra-ordinary judicial abstention but to explain the generous

43. *Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948).

44. *Harisiades v. Shaughnessy*, 342 U.S. 580, 588-89 (1952).

45. Justice Brennan apparently recognized that the foreign relations cases did not involve extra-ordinary judicial abstention. See, e.g., 369 U.S. at 211 n.31, where he cites an example of "sweeping statements to the effect that all questions touching foreign relations are political questions." The example reads: "The conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative—"the political"—Departments of the Government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision," *quoting* *Oetjen v. Central Leather Co.*, 246 U.S. 297, 302 (1918). But if, as is probable, "propriety" in *Oetjen* did not mean constitutionality, the statement is unexceptionable and commonplace: so long as the political branches are acting within their constitutional powers, "wisdom," "desirability," "propriety," are not for the courts to review. See note 4 *supra*.

46. On other matters, too, the President has been recognized as having "legislative" authority in foreign affairs, binding on the courts. See, e.g., *Republic of Mexico v. Hoffman*, 324 U.S. 30 (1945); *Ex parte Republic of Peru*, 318 U.S. 578, 589 (1943); *United States v. Pink*, 315 U.S. 203 (1942); *United States v. Belmont*, 301 U.S. 324 (1937); cf. *Charlton v. Kelly*, 229 U.S. 447 (1913). See generally L. HENKIN, *supra* note 1, at 56-65.

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grant of constitutional powers to the President or Congress.⁴⁷

The boldest expressions of judicial avoidance of political questions (not, I note, articulation of a "political question doctrine") were by Justices not speaking for a majority of the Court. In *Coleman v. Miller*,⁴⁸ members of the Kansas legislature brought an action to invalidate the state's ratification of the Child Labor Amendment. Among other things the Supreme Court held that "how long a proposed amendment to the Federal Constitution remained open to ratification, and what effect a prior rejection had on a subsequent ratification, were committed to congressional resolution and involved criteria of decision that necessarily escaped the judicial grasp."⁴⁹

Nothing in that conclusion suggests that in the Court's view acceptance of the Kansas ratification by Congress might be a violation of the Constitution which the courts could not or were free not to review. The Court did not say or imply that the "textual commitment" of the amendment process to Congress was "exclusive," or in any way different from other grants of power to Congress which the courts have freely scrutinized for alleged constitutional usurpations. The Court was saying only that the Constitution left the amendment process to Congress to regulate, and, its specific requirements apart, placed no limitations on the amendment process or on Congress's control of it. Congress having imposed no limitations, there are none, constitutional or otherwise, and the courts had no basis for imposing any.

A concurring opinion by Justice Black (joined by Justices Roberts, Frankfurter, and Douglas) had a very different flavor:

To the extent that the Court's opinion in the present case even impliedly assumes a power to make judicial interpretation of the exclusive constitutional authority of Congress over submission and ratification of amendments, we are unable to agree.

47. L. HENKIN, *supra* note 1, at 213-14 & corresponding notes at 450-53.

48. 307 U.S. 433 (1939). *Coleman v. Miller* is included in every catalogue of political questions, although for Justice Brennan the elements in various formulations of the doctrine "identify it as essentially a function of the separation of powers." 369 U.S. at 217. Presumably he reads the issues in *Coleman* as involving separation between Supreme Court and Congress as regards the amending process, U.S. CONST. art. V.

49. Justice Brennan's summary in *Baker v. Carr*, 369 U.S. 186, 214 (1962). Another issue was whether in view of the constitutional requirement of ratification by "the legislature" of the state, ratification was effective if the Lieutenant Governor cast the deciding vote in the state legislature. The Court was equally divided (how is a mystery, since nine Justices apparently participated in the case) as to whether "this contention presents a justiciable controversy, or a question which is political in its nature and hence not justiciable . . ." *Coleman v. Miller*, 307 U.S. 433, 447 (1939). There was also an issue as to whether state legislators had standing to bring the suit. *Id.* at 437-46; see note 8 *supra*.

The state court below assumed jurisdiction to determine whether the proper procedure is being followed between submission and final adoption. However, it is apparent that judicial review of or pronouncements upon a supposed limitation of a "reasonable time" within which Congress may accept ratification; as to whether duly authorized state officials have proceeded properly in ratifying or voting for ratification; or whether a State may reverse its action once taken upon a proposed amendment; and kindred questions, are all consistent only with an ultimate control over the amending process in the courts. And this must inevitably embarrass the course of amendment by subjecting to judicial interference matters that we believe were intrusted by the Constitution solely to the political branch of government.

. . . And it is not made clear that only Congress has constitutional power to determine if there is any such implication in Article V of the Constitution. On the other hand, the Court's opinion declares that Congress has the exclusive power to decide the "political questions" of whether a State whose legislature has once acted upon a proposed amendment may subsequently reverse its position, and whether, in the circumstances of such a case as this, an amendment is dead because an "unreasonable" time has elapsed. No such division between the political and judicial branches of the government is made by Article V which grants power over the amending of the Constitution to Congress alone. Undivided control of that process has been given by the Article exclusively and completely to Congress. The process itself is "political" in its entirety, from submission until an amendment becomes part of the Constitution, and is not subject to judicial guidance, control or interference at any point.

. . . Congress has sole and complete control over the amending process, subject to no judicial review⁵⁰

These Justices indeed were asserting an authentic political question, though why they read the grant of power to Congress in Article V differently from other grants to Congress is not obvious. It was not the position of the majority.

Finally, until *Baker v. Carr* held otherwise, an example commonly cited as a political question was "legislative malapportionment," with Justice Frankfurter the principal expositor of the doctrine. *Colegrove v. Green*⁵¹ involved a suit to restrain Illinois elections for Congress because the congressional district in which plaintiffs resided was much larger in population than other districts in Illinois. The lower court dismissed the suit and the Supreme Court affirmed. In his noted

50. 307 U.S. at 458-59.

51. 328 U.S. 549 (1946).

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opinion (for a minority of the Court), Frankfurter said several different things:

We are of opinion that the appellants ask of this Court what is beyond its competence to grant. This is one of those demands on judicial power which cannot be met by verbal fencing about "jurisdiction." It must be resolved by considerations on the basis of which this Court, from time to time, has refused to intervene in controversies. It has refused to do so because due regard for the effective working of our Government revealed this issue to be of a peculiarly political nature and therefore not meet for judicial determination.⁵²

The short of it is that the Constitution has conferred upon Congress exclusive authority to secure fair representation by the States in the popular House and left to that House determination whether States have fulfilled their responsibility. If Congress failed in exercising its powers, whereby standards of fairness are offended, the remedy ultimately lies with the people. Whether Congress faithfully discharges its duty or not, the subject has been committed to the exclusive control of Congress. An aspect of government from which the judiciary, in view of what is involved, has been excluded by the clear intention of the Constitution cannot be entered by the federal courts because Congress may have been in default in exacting from States obedience to its mandate.

. . . Yet, Congress has at times been heedless of this command and not apportioned according to the requirements of the Census. It never occurred to anyone that this Court could issue mandamus to compel Congress to perform its mandatory duty to apportion. "What might not be done directly by mandamus, could not be attained indirectly by injunction." . . .

To sustain this action would cut very deep into the very being of Congress. Courts ought not to enter this political thicket. The remedy for unfairness in districting is to secure State legislatures that will apportion properly, or to invoke the ample powers of Congress. The Constitution has many commands that are not enforceable by courts because they clearly fall outside the conditions and purposes that circumscribe judicial action. . . . The Constitution has left the performance of many duties in our governmental scheme to depend on the fidelity of the executive and legislative action and, ultimately, on the vigilance of the people in exercising their political rights.⁵³

52. *Id.* at 552.

53. *Id.* at 554-56. Among other things, Frankfurter seemed to identify his position with dismissal for "want of equity," but he thought that a court could not issue a declaratory judgment if it could not issue an injunction. *Id.* at 551-52. Justice Rutledge treated Frankfurter's position otherwise. See p. 619 *infra*.

Frankfurter can be read, as he has been, as saying that constitutional objections to malapportionment are not justiciable. But he seems also to be saying something else that would support the result, even his principal thesis, without establishing an exception to judicial review. He was saying that Congress has power under the Constitution to regulate the manner of electing representatives, and Congress had done so, both affirmatively as well as by accepting what the state legislatures had done; that what Congress had done or accepted did not violate any constitutional limitation or prohibition. In particular it did not violate any constitutional rights of the petitioners. "The basis of the suit is not a private wrong, but a wrong suffered by Illinois as a polity."⁵⁴

That strand in Frankfurter's thesis became even clearer in his dissent in *Baker v. Carr*, and in Justice Harlan's dissent in *Baker* which Frankfurter joined. In that case plaintiffs had argued that malapportionment of the state legislature denied them the equal protection of the laws because the weight of their vote was not equal to that of voters in less populous districts. Surely one reason why Frankfurter thought the complaint should be dismissed was that it did not state a cause of action: the Constitution did not give the plaintiffs the right they alleged; the equal protection clause was not violated because it does not require "one-man one-vote."

The notion that representation proportioned to the geographic spread of population is so universally accepted as a necessary element of equality between man and man that it must be taken to be the standard of a political equality preserved by the Fourteenth Amendment—that it is, in appellants' words, "the basic principle of representative government"—is, to put it bluntly, not true. However desirable and however desired by some among the great political thinkers and framers of our government, it has never been generally practiced, today or in the past.⁵⁵

Harlan's opinion makes it wholly clear:

Once one cuts through the thicket of discussion devoted to "jurisdiction," "standing," "justiciability," and "political question," there emerges a straightforward issue which, in my view, is determinative of this case. Does the complaint disclose a violation of a federal constitutional right . . . ? [I]n my opinion, appellants' allegations, accepting all of them as true, do not, parsed down or

54. 328 U.S. at 552.

55. *Baker v. Carr*, 369 U.S. 186, 301 (1962) (Frankfurter, J., dissenting).

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as a whole, show an infringement by Tennessee of any rights assured by the Fourteenth Amendment. . . .

. . . Until it is first decided . . . whether what Tennessee has done or failed to do in this instance runs afoul of any such [constitutional] limitation we need not reach the issues of "justiciability" or "political question" . . .⁵⁶

The suggestion of my Brother FRANKFURTER that courts lack standards by which to decide such cases as this, is relevant not only to the question of "justiciability," but also, and perhaps more fundamentally, to the determination whether any cognizable constitutional claim has been asserted in this case. Courts are unable to decide when it is that an apportionment originally valid becomes void because the factors entering into such a decision are basically matters appropriate only for legislative judgment. And so long as there exists a possible rational legislative policy for retaining an existing apportionment, such a legislative decision cannot be said to breach the bulwark against arbitrariness and caprice that the Fourteenth Amendment affords.⁵⁷

By the time the battle was joined (and lost) even those who opposed judicial intervention in reapportionment insisted less that the constitutional claims were not justiciable than that they were without merit.

III

The leading cases of the past were or could have been decided, I believe, without forswearing judicial review or indulging other extraordinary self-effacement by the courts, whether from principle or prudence. Yet, like Professor Bickel, I do not exclude that wisdom might sometimes advise the courts to stay their hand. They can usually do that where necessary, I believe, within the context of judicial review, by invoking established principles permitting a court to withhold relief for "want of equity."

Equitable principles and considerations are absorbed into constitutional jurisprudence whenever a court is asked for an equitable remedy in a constitutional case, and in numerous and various cases federal courts have refused a remedy on grounds historically available to a court of equity.⁵⁸ Such grounds cannot be confined in black

56. *Id.* at 330-31.

57. *Id.* at 337.

58. The Supreme Court has invoked the special principles and considerations governing the equity jurisdiction of the federal courts in a variety of contexts. *E.g.*, *Stainback v. Mo Hock Ke Lek Po*, 336 U.S. 368, 383 (1949); *SEC v. U.S. Realty & Improvement Co.*, 310 U.S. 434 (1940); *Virginian Ry. v. System Federation No. 40*, 300 U.S. 515,

letters, but they have been given form, if not codified, by centuries of chancellors, courts of equity, and their courts of appeals, and the Supreme Court has supervised lower federal courts in applying them. When federal courts deny a remedy for want of equity, they do not declare an issue nonjusticiable, whether on textual or prudential grounds; they make no extra-ordinary exception to judicial review. Rather they review, and they may even declare invalid, though they deny all or some equitable remedies.

The confusion of "nonjusticiability" with "want of equity" is not limited to our subject,⁵⁹ but it has additional significance here. For while the jurisdiction of the federal courts derives from and is defined by Constitution and statute, their exercise of equity powers where federal jurisdiction exists has long and deep roots, and is in their own control unless Congress is moved to regulate it.⁶⁰ The equity practice of the federal courts has largely retained its historic scope, its historic exceptions, and its tradition of broad discretion and flexibility, leaving large room for "wisdom" and "prudence."⁶¹ There is no reason why these should not include considerations of federalism or the separa-

549-53 (1937). Among these cases were several which implicated constitutional rights. *E.g.*, *Brown v. Board of Educ.*, 349 U.S. 294, 300 (1955); *Lemon v. Kurtzman*, 411 U.S. 192, 200 (1973) (Burger, C.J.).

59. Compare the confusion between lack of jurisdiction, or of federal jurisdiction, and want of equity. *See* 2 MOORE'S FEDERAL PRACTICE § 2.08, at 406 (2d ed. 1975).

Among the considerations in Justice Brennan's list in *Baker v. Carr*, p. 603 *supra*, several seem more persuasive as reasons to deny an equitable remedy, or a particular equitable remedy, than to support a finding of nonjusticiability: "[T]he 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."

60. Doctrines denying, limiting, or deferring injunctions and other equitable relief in various circumstances were developed by the courts, though some were later codified and others added by Congress. Compare, for example, the history of injunctions against collection of taxes, or against state judicial proceedings, and the doctrine of federal abstention. Congress limited the use of injunctions in labor disputes, and their use against state utility rates. *See generally* 2 MOORE'S FEDERAL PRACTICE § 2.08 (2d ed. 1975).

61. The Supreme Court has repeatedly stressed that an appeal to an equity court is an appeal to the exercise of the sound discretion which guides the determination of courts of equity. *E.g.*, *Pennsylvania v. Williams*, 294 U.S. 176, 182 (1935) ("[T]he sound discretion which is the controlling guide of judicial action in every phase of a suit in equity"); *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496, 500 (1941) ("The history of equity jurisdiction is the history of regard for public consequences in employing the extraordinary remedy of the injunction. There have been as many and as variegated applications of this supple principle as the situations that have brought it into play."); *cf.* *Younger v. Harris*, 401 U.S. 37 (1971). Justice Frankfurter explicitly spoke of considerations of "wisdom" in the exercise of that discretion. *Stefanelli v. Minard*, 342 U.S. 117, 120 (1951) ("[T]o sustain the claim would disregard the power of courts of equity to exercise discretion when, in a matter of equity jurisdiction, the balance is against the wisdom of using their power.")

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tion of powers,⁶² of institutional integrity and the inter-institutional harmony implied in the nature of judicial power and the character of judicial institutions in their relation to political power and political institutions.

The difference between "want of equity" and "political question" is explicitly invoked by Justice Rutledge in his opinion in *Colegrove v. Green*.⁶³ Pointedly, he did not join Frankfurter's opinion that the issues in the case were not justiciable:

Assuming that [*Smiley v. Holm*, 285 U.S. 355] is to stand, I think, with Mr. Justice Black, that its effect is to rule that this Court has power to afford relief in a case of this type as against the objection that the issues are not justiciable.

In the later case of *Wood v. Broom*, 287 U.S. 1, the Court disposed of the cause on the ground that the 1929 Reapportionment Act . . . did not carry forward the requirements of the 1911 Act . . . and declined to decide whether there was equity in the bill. . . . But, as the Court's opinion notes, four justices thought the bill should be dismissed for want of equity.

In my judgment this complaint should be dismissed for the same reason. Assuming that the controversy is justiciable, I think the cause is of so delicate a character, in view of the considerations above noted, that the jurisdiction should be exercised only in the most compelling circumstances.

....
I think, therefore, the case is one in which the Court may properly, and should, decline to exercise its jurisdiction. Accordingly, the judgment should be affirmed and I join in that disposition of the cause.⁶⁴

It was something closer to denying an equitable remedy, than to abstaining from judicial review and dismissing for nonjusticiability, that the Supreme Court may have been (and should have been) about in the only recent case that smacks of "political question." In *Gilligan*

62. There are numerous references to "public interest" as a guide in the application of equitable principles. Federalism is explicitly respected in *Pullman* and *Younger*.

63. 328 U.S. 549, 564 (1946) (Rutledge, J., concurring).

64. *Id.* at 565-66. In footnotes Justice Rutledge amplified:

Want of equity jurisdiction does not go to the power of a court in the same manner as want of jurisdiction over the subject matter. Thus, want of equity jurisdiction may be waived.

Id. at 565 n.2.

"The power of a court of equity to act is a discretionary one. . . ."

Id. at 566 n.3. The Supreme Court in effect adopted Rutledge's rationale in *South v. Peters*, 339 U.S. 276, 277 (1950) ("Federal courts consistently refuse to exercise their equity powers in cases posing political issues arising from a state's geographical distribution of electoral strength among its political subdivisions.") See *Baker v. Carr*, 369 U.S. 186, 203-04 (1962).

v. Morgan,⁶⁵ plaintiffs, students at Kent State University in Ohio, asked the federal district court to enjoin the Governor from prematurely calling the National Guard in civil disorders and to restrain leaders of the National Guard from future violations of the students' constitutional rights. They also alleged that the training, weaponry, and orders of the National Guard required, or made inevitable, the use of lethal force in suppressing civilian disorders even in circumstances when such force was excessive, and asked the district court to establish standards and exercise continuing judicial surveillance to control the National Guard in the future.

The Supreme Court held that the district court properly dismissed the suit. The Court said:

The relief sought by respondents, requiring initial judicial review and continuing surveillance by a federal court over training, weaponry, and orders of the Guard, would therefore embrace critical areas of responsibility vested by the Constitution in the Legislative and Executive Branches of the Government.

... It would be inappropriate for a district judge to undertake this responsibility in the unlikely event that he possessed requisite technical competence to do so.⁶⁶

65. 413 U.S. 1 (1973). The Court made "political question" noises also in *O'Brien v. Brown*, 409 U.S. 1 (1972). The credentials committee of the Democratic National Committee had recommended seating certain delegations as representing Illinois and California, and the excluded delegations challenged the Committee's actions in federal court. The district court dismissed, the court of appeals reversed, and the Supreme Court by a vote of 6-3 stayed the latter's decision. In the course of its brief opinion the majority cited *Luther v. Borden* and stated: "No case is cited to us in which any federal court has undertaken to interject itself into the deliberative processes of a national political convention." 409 U.S. at 4. The Court continued:

In light of the availability of the convention as a forum to review the recommendations of the Credentials Committee, in which process the complaining parties might obtain the relief they have sought from the federal courts, the lack of precedent to support the extraordinary relief granted by the Court of Appeals, and the large public interest in allowing the political process to function free from judicial supervision, we conclude the judgments of the Court of Appeals must be stayed. *Id.* at 5. The case did not raise substantive constitutional questions, does not suggest abstention from judicial review, and was a likely occasion for the court to talk of federal equity powers.

66. 413 U.S. at 7-8. The Court, however, went to pains to bring this conclusion within the political question doctrine under the criteria of *Baker v. Carr*. It noted that a dissenting opinion in the court of appeals "correctly read *Baker v. Carr*," when it said:

"I believe that the congressional and executive authority to prescribe and regulate the training and weaponry of the National Guard, as set forth above, clearly precludes any form of judicial regulation of the same matters. . . . Any such relief, whether it prescribed standards of training and weaponry or simply ordered compliance with the standards set by Congress and/or the Executive, would necessarily draw the courts into a nonjusticiable political question, over which we have no jurisdiction."

413 U.S. at 8-9 (emphasis added in Supreme Court opinion).

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As in many such cases, the Court's reason for denying relief is not clear. The Court might be saying that even if the training and weapons prescribed by Congress and the Executive are constitutionally inadequate, the courts cannot review the lapse and hence can give no relief. If so, the Court does not tell us how it reached that conclusion; surely, there is nothing in the clauses committing training to Congress that implies immunity from judicial review, any more than in any other clauses conferring authority on Congress. The Court might be saying that the training of the National Guard is the responsibility of the political branches, that they have exercised that responsibility, and that what they did violates no constitutional limitation or prohibitions. But the suggestion that courts should not even order compliance with the standards set by the political branches⁶⁷ could only be justified, I think, on the ground that the remedy was inappropriate for an equity court:

Moreover, it is difficult to conceive of an area of governmental activity in which the courts have less competence. The complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgment, subject *always* to civilian control of the Legislative and Executive Branches.⁶⁸

I am suggesting that while there may be no basis for finding an issue nonjusticiable, there are traditional reasons why a court might

67. The plaintiffs asked, among other things, "[c]ontinued judicial surveillance to assure compliance with the changed standards" that had been adopted by the Ohio National Guard after the Kent State incident. *Id.* at 6; *see also id.* at 11 n.15. The Supreme Court denied relief. *See* note 66 *supra*.

68. *Id.* at 10 (emphasis in original). The Court might have been thinking of the limits on its equity powers in *Laird v. Tatum*, 408 U.S. 1 (1972). Plaintiffs sought declaratory and injunctive relief claiming violation of their constitutional rights by the Army's alleged system of surveillance of lawful and peaceful civilian political activities. The district court dismissed, the court of appeals reversed and was reversed in turn by the Supreme Court. The principal ground for dismissing the suit was that even accepting the allegations, no constitutional right of the plaintiff had in fact been violated. But the Court added:

Stripped to its essentials, what respondents appear to be seeking is a broad-scale investigation, conducted by themselves as private parties armed with the subpoena power of a federal district court and the power of cross-examination, to probe into the Army's intelligence-gathering activities, with the district court determining at the conclusion of that investigation the extent to which those activities may or may not be appropriate to the Army's mission. . . .

Carried to its logical end, this approach would have the federal courts as virtually continuing monitors of the wisdom and soundness of Executive action; such a role is appropriate for the Congress acting through its committees and the "power of the purse"; it is not the role of the judiciary, absent actual present or immediately threatened injury resulting from unlawful governmental action. *Id.* at 14-15.

refuse a remedy. The difference is not only or principally conceptual or academic. To deny a remedy on equitable grounds does not carve an exception in *Marbury v. Madison* for which there is no basis in constitutional text or in anything else relevant to constitutional interpretation. The traditional grounds for denying an equitable remedy are few and narrow and not frequently present. And the reasons for denying some remedy in some circumstances may not apply to deny any remedy in any circumstance. In particular, the courts may be able to render a declaratory judgment even when there are "equity reasons" for refusing an injunction. So, in *Powell v. McCormack*,⁶⁹ the Supreme Court said:

We need express no opinion about the appropriateness of coercive relief in this case, for petitioners sought a declaratory judgment, a form of relief the District Court could have issued. The Declaratory Judgment Act, . . . provides that a district court may "declare the rights . . . of any interested party . . . whether or not further relief is or could be sought." The availability of declaratory relief depends on whether there is a live dispute between the parties . . . and a request for declaratory relief may be considered independently of whether other forms of relief are appropriate.⁷⁰

IV

The "political question" doctrine, I conclude, is an unnecessary, deceptive packaging of several established doctrines that has misled lawyers and courts to find in it things that were never put there and make it far more than the sum of its parts. Its authentic contents have general jurisprudential validity, and nothing but confusion is gained by giving them special handling in selected cases. I see its proper content as consisting of the following propositions:

1. The courts are bound to accept decisions by the political branches within their constitutional authority.
2. The courts will not find limitations or prohibitions on the powers of the political branches where the Constitution does not prescribe any.
3. Not all constitutional limitations or prohibitions imply rights and standing to object in favor of private parties.
4. The courts may refuse some (or all) remedies for want of equity.
5. In principle, finally, there might be constitutional provisions

69. 395 U.S. 486 (1969).

70. *Id.* at 517-18. *But cf.* Justice Frankfurter's position, note 53 *supra*.

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which can properly be interpreted as wholly or in part "self-monitoring" and not the subject of judicial review. (But the only one the courts have found is the "guarantee clause" as applied to challenges to state action, and even that interpretation was not inevitable.)⁷¹

This alternative jurisprudence is offered not, or not only, for the sake of *elegantia iuris*, or the precision of analysis that is implied in our constitutional jurisprudence.⁷² The propositions I derive from the cases would have substantive consequences less drastic in important respects than those flowing from the political question doctrine as the lower courts have read and applied it. In particular, these propositions do not include any basis for refusing to consider, in a category of cases uncertain in rationale and definition, an allegation that the political branches have acted unconstitutionally. A constitutional exception to judicial review can perhaps be found in some unique provision ("The United States shall guarantee"). But judicial prudence can be supported in some circumstances by other doctrines and better reasons.

These distinctions, I suggest, would have prevented the unhappy confusion in the courts when attempts were made to adjudicate the constitutionality of the Vietnam War. In a number of cases, plaintiffs raised two principal issues. One was whether the actions of the United States in Vietnam violated international law, in particular the treaty obligations assumed in the Kellogg-Briand Pact and the UN Charter. The courts properly refused to consider that question because it was immaterial, and would not control disposition of the case: the Constitution does not prohibit the political branches, acting within their powers, from disregarding treaties or other obligations of international law.⁷³ Plaintiffs also claimed that the President had exceeded his constitutional powers by engaging in a war not declared by Congress; several courts held that the political question doctrine required or permitted them not to decide that issue,⁷⁴ doubtless from a pru-

71. Of course courts will not carry out responsibilities assigned to the Congress or the President, nor mandamus them to do so.

72. Cf. Henkin, *Some Reflections on Current Constitutional Controversy*, 109 U. PA. L. REV. 637, 660-62 (1961).

73. L. HENKIN, *supra* note 1, at 214.

74. The constitutionality of the war in Vietnam was challenged in more than 70 reported cases. See Sugarman, *Judicial Decisions Concerning the Constitutionality of United States Military Activity in Indo-China: A Bibliography of Court Decisions*, 13 COLUM. J. TRANSNAT'L L. 470 (1974). Most of them were dismissed either for lack of standing or for nonjusticiability as a political question, but some reached the merits and rejected the constitutional objection. Compare *Mora v. McNamara*, 387 F.2d 862 (D.C. Cir.), cert. denied, 389 U.S. 934 (1967), and *Atlee v. Laird*, 347 F. Supp. 689 (E.D. Pa. 1972), *aff'd without opinion sub nom. Atlee v. Richardson*, 411 U.S. 911 (1973), with *Orlando v. Laird*, 443 F.2d 1039 (2d Cir.), cert. denied, 404 U.S. 869 (1971), and

dence that would have warmed Alex Bickel's heart, although he thought the Vietnam War unconstitutional and opposed it on political and moral grounds.

Bickel might have agreed that the courts were wise and prudent not to step into a major national crisis where the President might feel compelled not to heed the courts; or perhaps the courts had reason to be anxious, "not so much that judicial judgment will be ignored, as that perhaps it should be, but won't."⁷⁵ But I find nothing in the Supreme Court's political question doctrine to cite in support of that forbearance. Claims that the President had usurped congressional authority, or Congress the President's, were heard and adjudicated in several major cases in our history without a suggestion that the courts are barred by some political question doctrine.⁷⁶ I see no reason why the usurpation alleged in these cases should, exceptionally, have been exempt from judicial review. Under the general propositions I have cited, the cases were justiciable. In cases satisfying the requirements of case or controversy, standing, ripeness, and other accepted conditions for adjudication, the courts would have interpreted what Congress had delegated or authorized, and explored the President's own constitutional authority.⁷⁷ They would have decided separately whether there were equitable reasons for denying any injunction; and if they deemed an injunction "unwise" for an equity court in the circumstances, they would have decided whether they might issue a declaratory judgment.

V

Of course, there are "political questions"—responsibilities lodged in the political branches—and whether and how these responsibilities are exercised is ordinarily not subject to review by the courts. The Con-

Holtzman v. Schlesinger, 484 F.2d 1307 (2d Cir. 1973), *cert. denied*, 416 U.S. 936 (1974). The Supreme Court regularly denied certiorari, but in the *Atlee* case, holding various issues political and nonjusticiable, the judgment was affirmed on appeal without opinion. It is debatable whether that affirmation constitutes Supreme Court approval of the grounds for dismissal.

75. Bickel, *supra* note 15, at 75.

76. *Buckley v. Valeo*, 96 S. Ct. 612 (1976); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); *Myers v. United States*, 272 U.S. 52 (1926); *Kendall v. United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524 (1838); *see also* *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871); *Ex parte Garland*, 71 U.S. (4 Wall.) 333 (1867); *Fleming v. Page*, 50 U.S. (9 How.) 603 (1850); *Brown v. United States*, 12 U.S. (8 Cranch) 110 (1814); *cf.* *Kent v. Dulles*, 357 U.S. 116 (1958); *Valentine v. United States ex rel. Neidecker*, 299 U.S. 5 (1936).

77. My own conclusion was, contrary to Bickel's, that Congress had authorized the war and that the Tonkin Gulf Resolution did not involve an unconstitutional delegation. Henkin, *supra* note 1, at 80-81, 100-02.

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stitution has not made them ombudsmen for all legislative inadequacies in all seasons, and they cannot supply an effective remedy for all ills. These limitations on the judicial role do not depend on some extra-ordinary doctrine requiring the courts to abstain in some special package of cases.

The political question doctrine saw its heyday in the New Deal Court, and received its highest measure of devotion from Justice Frankfurter, perhaps its boldest articulation by Justice Black in *Coleman v. Miller*.⁷⁸ It was perhaps an expression of a wider, deeper mood by Justices appointed to restore judicial self-restraint and allow the elected governors to govern. The issues on which they wrote—reapportionment, the constitutional amendment process⁷⁹—seemed particularly fitting for legislative rather than judicial rule and particularly fitting occasions to build fences against future judicial incursions.

Since Frankfurter and Black wrote, judicial review has had a new birth, its character and content reformed, and its place established as a hallmark of American political life, even a birthright of every inhabitant. I see no place in it for an exemption for uncertain "political questions." Would not the part of the courts in our system, the institution of judicial review, and their public and intellectual acceptance, fare better if we broke open that package, assigned its authentic components elsewhere, and threw the package away?⁸⁰

78. 307 U.S. 433, 548-59 (1939); see pp. 613-14 *supra*.

79. Indeed *Coleman*, the amendment case, involved the Child Labor Amendment which had been made necessary by judicial activism invalidating efforts to eliminate child labor by federal legislation. See *Hammer v. Dagenhart*, 247 U.S. 251 (1918); *Bailey v. Drexel Furniture Co.*, 259 U.S. 20 (1922).

80. "Much confusion results from the capacity of the 'political question' label to obscure the need for case-by-case inquiry." *Baker v. Carr*, 369 U.S. 186, 210-11 (1962).