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JUDICIAL SELF-RESTRAINT: POLITICAL QUESTIONS AND MALAPPORTIONMENT

STEPHEN R. MITCHELL*

I

Justice Felix Frankfurter, dissenting in the *Tennessee Reapportionment Case*,¹ characterized the holding of that decision as "a massive repudiation of the experience of our whole past."² Whether or not this is true we may presently discover, but in the meanwhile *Baker v. Carr* may safely be described as a truly momentous constitutional decision. Without wishing to labor the obvious, legislative apportionment can be a violently partisan problem which, in the normal course of things, we might expect the Court to bend every effort to avoid. It is an area in which judicial standards are elusive and in which judicial remedies could be hard to apply and easy to avoid. The Court could have easily avoided the decision in *Baker* by adhering to a line of contrary precedents, but it chose instead to abandon an excellent defensive position in favor of a more active judicial role. I do not presume to pass on the wisdom of that choice, but more narrowly to inquire whether it was, in fact, the "massive repudiation" described by the venerable Justice.

Time and space do not permit an examination of the whole doctrine of judicial self-restraint. This work is concerned more narrowly with that aspect of judicial self-restraint most germane to *Baker v. Carr*, the doctrine of "political questions."

II

The term "political question" as a sub-category of the so-called "non-justiciable question" seems to describe a battery of questions upon which courts, for one reason or another, refuse to rule. Attempts at precise definition have been spectacularly unproductive. A political question, wrote Edward S. Corwin, relates "to the possession of political power, of sovereignty, of government, the determination of which is vested in Congress and the President, [and] whose decisions are conclusive upon the courts."³ The Court of Appeals for the District of Columbia has noted that political questions are such as have

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¹ *Baker v. Carr*, 369 U.S. 186 (1962).

² *Id.* at 267.

³ CORWIN, *THE CONSTITUTION OF THE UNITED STATES OF AMERICA* 547 (1953).

been entrusted by the sovereign for decision to the so-called political departments for government, as distinguished from questions which the sovereign has set to be decided by courts.⁴ Justice Holmes regarded such definitions as "little more than a play upon words,"⁵ and Professor Roche put it this way: "A juridical definition of the term is impossible, for at root the logic that supports it is circular: political questions are matters not soluble by the judicial process; matters not soluble by the judicial process are political questions. As an early dictionary explained, violins are small cellos, and cellos are large violins."⁶

Less pungently, but in the same vein, political questions are "those which judges choose not to decide, and a question becomes political by the judge's refusal to decide it."⁷ Unless we are prepared to accept these kinds of definitions, it might be more illuminating to examine the kinds of questions courts have declined to answer by reason of the fact they were political in nature. There seem to be four general categories, but some overlapping will be inevitable.

First, courts have declined jurisdiction under circumstances which pleaded the necessity for a prompt and final announcement of a single, uniform policy. There are questions, as Justice Brennan suggested in *Baker*, that "uniquely demand single-voiced statement of the Government's views."⁸ The best examples here would come from the field of foreign relations, and would include questions directed at the recognition of foreign governments,⁹ the determination of when hostilities began and ceased,¹⁰ and similar problems.¹¹ Some questions have required uniformity, others have argued the need for finality of judgment. John P. Frank has suggested, for example, that "it would be calamitous to have the validity of constitutional amendments brought into serious question long after their promulgation."¹²

⁴ *Z. & F. Assets Realization Corp. v. Hull*, 114 F.2d 464, 468 (D.C. Cir. 1940).

⁵ *Nixon v. Herndon*, 273 U.S. 536, 540 (1927).

⁶ Roche, *Judicial Self-Restraint*, 44 AM. POL. SCI. REV. 762, 768 (1955).

⁷ PELTASON, *FEDERAL COURTS IN THE POLITICAL PROCESS* 10 (1955).

⁸ 369 U.S. 186, 211 (1962).

⁹ See *United States v. Pink*, 315 U.S. 203 (1942).

¹⁰ See the Court's statement in *Commercial Trust Co. v. Miller*, 262 U.S. 51, 57 (1923).

¹¹ In *Sevilla v. Elizalde*, 112 F.2d 29 (D.C. Cir. 1940), the court compiled a list of such questions which included the recognition of foreign governments; conditions of peace and war; the beginning and end of war; whether aliens should be excluded or deported; government title to or jurisdiction over territory; enforcement of treaties; and constitutional powers of representatives of foreign nations. *Id.* at 33-34.

¹² Frank, *Political Questions*, in *SUPREME COURT AND SUPREME LAW* 38 (Cahn ed. 1954).

A second category of questions has involved problems clearly committed for solution to one of the other branches of government. Congress, for example, is the sole judge of the qualifications of its own members;¹³ the duty to see to it that the laws are faithfully enforced cannot be brought under legal compulsion;¹⁴ and interstate rendition cannot be judicially enforced.¹⁵ As Justice Frankfurter noted in *Colegrove v. Green*: "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."¹⁶

A third area has seen jurisdiction declined for what is generally called "judicial incompetence," *i.e.*, an unwillingness to reach the merits where the solution required information not readily available to judges, as in *Coleman v. Miller*,¹⁷ or in those cases where only some other branch of government could provide a solution. The best example of the latter, *Colegrove v. Green*,¹⁸ has been somewhat impaired.

Finally, the doctrine of political questions has been invoked where a decision on the merits would result in unenforceable orders, or decrees which would be the focal point for widespread public dislike, or even public violence. One of the standard works on political questions suggests, for example, that Chief Justice John Marshall cast the status of Indian Tribes as such a question because he was certain that neither Georgia nor President Jackson would permit judicial solution of the Cherokee question.¹⁹ As a further example, armed conflict might have resulted from Supreme Court intervention in *Luther v. Borden*.²⁰

¹³ *Dennis v. United States*, 171 F.2d 986 (D.C. Cir. 1948).

¹⁴ *Mississippi v. Johnson*, 70 U.S. (4 Wall.) 475 (1867).

¹⁵ *Kentucky v. Dennison*, 65 U.S. (24 How.) 66 (1861).

¹⁶ 328 U.S. 549, 556 (1946).

¹⁷ 307 U.S. 433 (1939). Mr. Chief Justice Hughes, speaking for the Court, indicated that solution would require "an appraisal of a great variety of relevant conditions, political, social and economic, which can hardly be said to be within the appropriate range of evidence receivable in a court of justice and as to which it would be an extravagant extension of judicial authority to assert judicial notice. . . ." *Id.* at 453.

¹⁸ 328 U.S. 549 (1946). Mr. Justice Frankfurter's assertion here was that "no court can affirmatively re-map the Illinois districts so as to bring them more in conformity with the standards of fairness for a representative system. At best we could only declare the existing electoral system invalid." *Id.* at 553. An excellent alternative example covering both aspects is *Chicago & Southern Airlines Inc. v. Waterman Steamship Corp.*, 333 U.S. 103 (1948).

¹⁹ *POST, THE SUPREME COURT AND POLITICAL QUESTIONS* 98-124 (1936).

²⁰ 48 U.S. (7 How.) 1 (1849). There was at the time an insurrection (Dorr's Rebellion) in the State, which could have broken out into civil war. It is obvious, however, that these concerns have not prevented the Court from accepting explosive cases like *Brown v. Board of Education*, 347 U.S. 483 (1954).

There are other and perhaps more useful methods of classifying the kinds of issues known as political questions, but this will serve to open the problem for discussion. The political question doctrine seems more rational and understandable when approached case by case. The general definitions are not very satisfactory, and it makes little sense to apply the doctrine to a list of "untouchable subjects" in the absence of compelling functional reasons for so doing.

III

Coming more directly to the theme of this article, what of political questions and legislative reapportionment? With respect to the state courts, the situation is confused. In a recent monograph, Professor Gordon Baker noted that: "In spite of this long established precedent [referring to *Colgrove v. Green*] there is clearly a trend away from judicial non-interference. The general ferment in American jurisprudence which has re-examined other supposedly established doctrines appears to have touched the area of state legislative reapportionment."²¹ So far as the state courts are concerned, this may have been a little strong. Because the state courts are not bound by the statement of judicial power in Article III, many of these tribunals have had the opportunity to develop broader standards of justiciability than could formerly have been found in the federal courts.²² But while there have been numerous attempts to involve state judicial systems in reapportionment problems, few of these have been successful. The state courts have held many times that legislatures had a duty and an obligation to reapportion themselves, but they have also nearly always found that the requirement was not judicially enforceable.²³

The early Twentieth Century reform movements brought a number of apportionment suits to the state courts, but these were by and

²¹ BAKER, *STATE CONSTITUTIONS: REAPPORTIONMENT* 51 (1960).

²² Note, for example, the broad powers exercised by the courts in Virginia annexation questions. See Bain, *Annexation: Virginia's Not-So-Judicial System*, 15 *PUB. ADMIN. REV.* 251 (1955).

²³ For example, the so-called *Suffolk County Cases* involved action against the county officials and not the legislature: *Attorney General v. Suffolk County Apportionment Comm'rs*, 224 *Mass.* 598, 113 *N.E.* 581 (1916); *Donovan v. Suffolk County Apportionment Comm'rs*, 225 *Mass.* 55, 113 *N.E.* 740 (1916); *Brohpy v. Suffolk County Apportionment Comm'rs*, 225 *Mass.* 124, 113 *N.E.* 1040 (1916). In these cases the courts twice invalidated the legislative districts and twice directed the writ of mandamus to the county officials. Having reduced the population disparity from a little better than 3-1 to a little less than 2-1, the court declined to invalidate and mandamus a third time. See also the *Fergus Cases*: *Fergus v. Marks*, 321 *Ill.* 510, 152 *N.E.* 557 (1926); *Fergus v. Kinney*, 333 *Ill.* 437, 164 *N.E.* 665 (1928); *People ex rel. Fergus v. Blackwell*, 342 *Ill.* 223, 173 *N.E.* 750 (1930). These represented unsuccessful attempts to obtain a petition to mandamus the legislature, to enjoin the payment of legislative salaries, and to obtain quo warranto process against legislators.

large unsuccessful actions. There were some limited remedies available in a few states, but in the whole history of the reapportionment problem in the state courts there does not appear to be a single state decision in which a judicial order was given to a legislature to reapportion. In the often-cited *Suffolk County Cases*²⁴ in Massachusetts, the writ of mandamus lay to the county commissioners and not to the legislature. In the more recent Oregon decision,²⁵ the Court's order was issued to the Secretary of State under procedure provided for in the state constitution.

However open the question of judicial intervention may have been prior to 1946,²⁶ the holding of the United States Supreme Court in *Colegrove v. Green*²⁷ was quite generally applied by the state courts to their own situations. A number of these tribunals declined jurisdiction in apportionment cases on the ground that such questions were non-justiciable under the *Colegrove* rule.²⁸ There were, however, some exceptions. High courts in three states did assume jurisdiction of apportionment questions, but affirmative relief was denied.²⁹ In at least one state case jurisdiction was taken and a decision on the merits postponed in order to give the legislature a chance to act.³⁰ Instances of affirmative state court action have been rare since *Colegrove*; other than the Oregon decision³¹ mentioned above, the only notable judicial action occurred in Arkansas in 1952. There the Arkansas Supreme Court apportioned that state itself after an apportioning board had failed to act.³²

It is difficult to assess the impact of the state decisions on the justiciability of apportionment questions, but a few generalizations might

²⁴ Cited in note 23 *supra*.

²⁵ *In re* Apportionment of Senators and Representatives, 228 Ore. 575, 365 P.2d 1042 (1961). Oregon is one of the six states that provide for an alternative commission or executive official to act if the legislature does not. The others are California, Illinois, Michigan, South Dakota, and Texas.

²⁶ Although the position that courts could not afford relief in such cases seems strong. See Annot., 2 A.L.R. 1134 (1919) and 46 A.L.R. 964 (1927).

²⁷ 328 U.S. 549 (1946).

²⁸ The leading examples are *Waid v. Pool*, 255 Ala. 441, 51 So.2d 869 (1951); *Romang v. Cordell*, 206 Okla. 369, 243 P.2d 677 (1952); *Scholle v. Hare*, 360 Mich. 1, 104 N.W.2d 63 (1960); *Barnes v. Barnett*, 241 Miss. 206, 129 So.2d 638 (1961); *Butcher v. Rice*, 397 Pa. 158, 153 A.2d 869 (1959); *Kidd v. McCanless*, 200 Tenn. 273, 292 S.W.2d 40 (1956); and *State ex rel. Broughton v. Zimmerman*, 261 Wis. 398, 52 N.W. 2d 903 (1952).

²⁹ *Brewer v. Gray*, 86 So.2d 799 (Fla. 1956); *State v. Meyers*, 51 Wn.2d 454, 319 P.2d 828 (1957); *State ex rel. Thomson v. Zimmerman*, 264 Wis. 644, 60 N.W.2d 416 (1953).

³⁰ *Asbury Park Press Inc. v. Woolley*, 33 N.J. 1, 161 A.2d 705 (1960).

³¹ *In re* Apportionment of Senators and Representatives, 228 Ore. 575, 365 P.2d 1042 (1961).

³² *Pickens v. Board of Apportionment*, 220 Ark. 145, 246 S.W.2d 556 (1952).

be offered. First, in spite of the potentially broader standards of justiciability available to the state courts, the great weight of precedent in those courts has supported the view that apportionment questions are inappropriate subjects for the judicial power.³³ Second, the state decisions were not nearly as helpful as they might have been, since they rarely contained any kind of precise discussion of either standing or justiciability, the most common kind of disposition being on simple separation of powers reasoning. Finally, even where the state courts have afforded some kind of relief, the remedies have been limited and unimaginative. No state court has ordered a legislature to reapportion, and no state court has ordered an at-large election.³⁴ Most of the remedies accomplished by mandamus have come under explicit provision of the state constitution, further reducing the area of judicial innovation. There does not appear to have been a trend away from the older state court view that courts could not afford relief in apportionment questions.

IV

Turning to the federal cases, a somewhat different pattern emerges. The litigation began in earnest in the 1930's, reflecting the dislocations caused by the population increase during the previous decade. The population of the United States increased by 17,000,000 during this period, and after the decennial census in 1930, fully two-thirds of the states found their representation affected by the ensuing congressional reapportionment. The problem apparently was not as severe for those states which gained representation, for of the five decisions which reached the Supreme Court as a result of the 1932 apportionment, only one came from such a state.³⁵ The other four cases³⁶ came from states which had lost representation and thus faced the prospect of complete at-large elections if they failed to reapportion.

³³ See Walter, *Reapportionment of State Legislative Districts*, 37 ILL. L. REV. 20, 23 (1942).

³⁴ A possible exception is *Brown v. Saunders*, 159 Va. 28, 166 S.E. 105 (1932), where a mandamus was obtained to compel the Secretary of State to accept the at-large filings of the congressional delegation.

³⁵ *Koenig v. Flynn*, 258 N.Y. 292, 179 N.E. 705 (1932). New York gained two seats for a total of 45. States which gained representation but which did not redistrict simply elected the additional representatives at large. New York was one of the States which did redistrict, the suit here challenging the validity of the legislature's redistricting by concurrent resolution.

³⁶ *Smiley v. Holm*, 285 U.S. 355 (1932), *reversing* 184 Minn. 228, 238 N.W. 494 (1931); *Carrol v. Becker*, 329 Mo. 501, 45 S.W.2d 533 (1932), *affirmed*, 285 U.S. 380 (1932); *Wood v. Broom*, 287 U.S. 1 (1932), *reversing* 1 F. Supp. 134 (S.D. Miss. 1932); and *Mahon v. Hume*, 287 U.S. 575 (1932), *reversing* 1 F. Supp. 142 (E.D. Ky. 1932).

The two most significant cases here were *Smiley v. Holm*,³⁷ a case from Minnesota, and *Wood v. Broom*,³⁸ which came from a federal district court in Mississippi. In *Smiley v. Holm*, a citizen, elector, and taxpayer of the State sought a declaration of invalidity for a reapportionment statute, as well as an injunction against its use, on two grounds. First, he argued that since the Governor had vetoed the re-districting act, and since the legislature had not re-passed the act over his veto, any use of the act was improper. He further urged the argument that the act was invalid because it did not follow the standards of compactness, contiguity, and population equality laid down by the Federal Reapportionment Act of 1911.³⁹ The Minnesota Supreme Court dismissed the complaint holding, as to the first point, that re-districting was not a normal legislative act and that the gubernatorial veto did not apply. With regard to the second point, the Minnesota court held that the Act of 1911 had expired, and that even if it had been in force, the question was non-justiciable.⁴⁰ On review, the United States Supreme Court reversed, confining its holding to the first point raised. Legislative re-districting, said the Court, was not of a sufficiently special character so as to be immune from the veto power. It was thus unnecessary to reach the question concerning the 1911 Act. The two other cases involving the validity of the veto were disposed of on the same grounds.⁴¹

The precedent value of *Smiley v. Holm* might well be argued. Mr. Justice Rutledge assumed that *Smiley* stood for the proposition that "This Court has power to afford relief in a case of this type as against the objection that the issues are not justiciable."⁴² Justice Brennan, in *Baker*, read *Smiley* as a decision on the merits without qualification or restriction.⁴³ Mr. Justice Frankfurter, on the other hand, took the view that *Smiley v. Holm* was distinguishable as a case in which the Supreme Court had simply "released state constitutional provisions prescribing local lawmaking procedures from misconceived restriction of superior federal requirements."⁴⁴ In *Smiley* the Court had hinted, however tentatively, that the ultimate remedy in such cases lay with

³⁷ 285 U.S. 355 (1932).

³⁸ 287 U.S. 1 (1932).

⁴¹ The other cases were *Carroll v. Becker*, 285 U.S. 380 (1932); and *Koenig v. Flynn*, 285 U.S. 375 (1932). In these cases, as well as in *Smiley*, the Court tentatively suggested the appropriateness of at-large elections should the legislature not respond with sufficient speed to the veto.

⁴² Concurring in *Colegrove v. Green*, 328 U.S. 549, 565 (1946).

⁴³ *Baker v. Carr*, 369 U.S. 186, 201 (1962).

⁴⁴ *Id.* at 285.

³⁹ Chapter 5, 37 Stat. 13 (1911).

⁴⁰ 184 Minn. 228, 238 N.W. 494 (1931).

Congress.⁴⁵ But the Court also hinted that it was not considering the Act of 1911 because of the disposition of the case on the veto question, the possible inference being that the Court had power to treat the issue had it not been otherwise disposed of.⁴⁶ Whatever its full meaning, *Smiley* at least undercut somewhat the premise that apportionment questions are, by their very nature, insoluble by judicial means.

The next landmark in the struggle to bring apportionment questions under the rubric of judicial power was a decision from a federal district court in Mississippi, *Wood v. Broom*.⁴⁷ Here the Court was faced with the question it had been able to avoid in *Smiley*, the validity and applicability of the standards contained in the 1911 Federal Apportionment Statute. *Wood* involved review of a permanent injunction, granted by a three-judge court, restraining state officers from conducting a congressional election under a Mississippi redistricting act. Previous federal apportionment statutes had set forth certain standards,⁴⁸ but these were not specifically carried over in the Apportionment Act of 1929.⁴⁹ The plaintiffs in *Wood* argued that, in spite of the omission, the states were to be districted under the terms of the 1911 Act, and the district court took that view. The Supreme Court, however, held that the omission of standards in the 1929 Act was deliberate, and that the requirements of the earlier Acts were repealed. The district court was thus without power to disturb the state's action.⁵⁰

As was the case with *Smiley*, the precedent value of *Wood* is at best questionable. Hughes' opinion suggested that the Court would have had jurisdiction if the Act of 1911 had not expired, but a four-man minority would have dismissed the suit for "want of equity,"⁵¹ whatever that may have meant. Justice Brennan, speaking for the Court in *Baker v. Carr*, found *Wood* among "an unbroken line of our precedents [sustaining] the federal courts' jurisdiction of the subject matter of federal constitutional claims of this nature."⁵² The Court, he said,

⁴⁵ See 285 U.S. 355, 366-67 (1932).

⁴⁶ *Id.* at 375.

⁴⁷ 287 U.S. 1 (1932).

⁴⁸ The first statute, ch. 47, 5 Stat. 491 (1842), required the States to elect their Representatives from single-member districts hewn from contiguous territory. The Acts of 1901, ch. 93, 31 Stat. 733 and 1911, ch. 5, 37 Stat. 13, added the requirement of compactness. The 1929 Act, 46 Stat. 26 (1929), 2 U.S.C. § 2(a) (1958), omitted all references to compactness, contiguity and equality of population.

⁴⁹ As a matter of fact, the 1929 version did not even require that the States be divided into districts. See 46 Stat. 26 (1929), 2 U.S.C. § 2(a) (1958).

⁵⁰ 287 U.S. 1, 6-7 (1932). The same result was reached in *Mahan v. Hume*, 287 U.S. 575 (1932).

⁵¹ Justices Brandeis, Cardozo, Roberts, and Stone. 287 U.S. 1, 8 (1937).

⁵² 369 U.S. 186, 201 (1962).

“reviewed the federal question on the merits and reversed the District Court.”⁵³ Neither of the dissenting Justices in *Baker v. Carr* could make any use of the case.⁵⁴ Again, as with *Smiley*, perhaps the best thing that could be said for *Wood v. Broom* is that it cast some small doubt on the idea that courts had universally regarded apportionment issues as non-justiciable.

All of this set a rather uncertain stage for the case that was to become the major stumbling block in the malapportionment problem, *Colegrove v. Green*.⁵⁵ It seems correct to say that some state courts,⁵⁶ some lower federal courts,⁵⁷ and the United States Supreme Court⁵⁸ itself have taken jurisdiction of malapportionment cases. Courts at all levels have declined many more of such suits than they have accepted,⁵⁹ and instances of effective relief have been rare, but these statements do not alter the fact that precedents do exist for judicial intervention in apportionment difficulties.

The courts have been presented with three possible courses of action. First, they could have concluded that they lacked power, *i.e.*, jurisdiction, to entertain such cases. The rationale in the congressional districting cases would rest on the ground that the problem was committed to Congress, and that the courts could not act without specific Congressional mandate. As for the state legislative districts, the courts could have concluded that the Equal Protection clause was not self-executing in this area. The second possibility was that the courts could find that there existed substantive federal standards, in either the Constitution or statutes, that were self-executing, but that the Court should refrain from exercising its jurisdiction for reasons of sound public policy. The third alternative was, of course, that the courts had jurisdiction and that they ought to exercise it. A survey of the cases indicates that there has been little support for the first possibility, and by the time of *Colegrove* we seem, *sub silentio*, to have conceded that courts have jurisdiction. The argument then could turn on whether or not the courts should exercise it in this kind of dispute. It was with respect to this question that *Colegrove v. Green* had the greatest impact.

⁵³ *Ibid.*

⁵⁴ Justice Frankfurter included *Wood v. Broom* in an historical note, without comment: 369 U.S. 186, 270 (1962). Justice Harlan did not mention it at all.

⁵⁵ 328 U.S. 549 (1946).

⁵⁶ See text accompanying notes 23, 25, 29-32, 35 *supra*.

⁵⁷ See cases cited note 36 *supra*.

⁵⁸ See text accompanying notes 35 and 36 *supra*.

⁵⁹ See text accompanying note 26 *supra*.

V

A few salient points need to be made with respect to *Colegrove*. It involved a suit to restrain further use of Illinois' congressional districts, last malapportioned in 1901, on the ground that the inequality of population among the districts violated Article I and the Fourteenth Amendment. A three-judge district court dismissed on the authority of *Wood v. Broom*. The Supreme Court, a "bob-tailed" court, as Justice Clark called it,⁶⁰ split four to three in affirming the lower courts' decision, and three-one-three in its reasoning. Justice Frankfurter's opinion, in which Reed and Burton joined, was a rather curious judicial exercise. Frankfurter asserted that the Court could dispose of the case after the fashion of the district court, but that he also agreed with the "want of equity" reasoning urged by Brandeis in *Wood v. Broom*. He took further refuge in language suggestive of a lack of standing, the presumptions of the political question doctrine, an unwillingness to alter the delicate federal-state balance, and the absence of a realistic judicial remedy. More importantly, he made what might safely be called a "sound public policy" argument. "Courts," Justice Frankfurter said in that famed phrase, "ought not to enter this political thicket."⁶¹

Justice Rutledge, who joined Justices Frankfurter, Reed, and Burton in the disposition of the case, clearly felt that the Court had jurisdiction of the problem, but that the Court should not exercise its jurisdiction on policy grounds. The cure, he said, was worse than the disease. Justice Black, joined by Douglas and Murphy, dissented on the ground that the Court was possessed of jurisdiction, and that it ought to use it.

Where then, did the decision in *Colegrove* really rest? It seems clear, to begin with, that a minimum of four Justices⁶² took the position that the Court had jurisdiction of the problem, although Justice Rutledge was unwilling to exercise it. Moreover, if those portions of Frankfurter's plurality opinion which dealt with "want of equity" and the "political thicket" are taken at face value, all seven members of the Court admitted to having jurisdiction, splitting then four-to-three on the wisdom of exercising it. Subsequent decisions of the Supreme Court have tended to support this view. In *South v. Peters*,⁶³ for ex-

⁶⁰ Concurring in *Baker v. Carr*, 369 U.S. 186, 252 (1962).

⁶¹ 328 U.S. 549, 556 (1946).

⁶² *I.e.*, Justices Black, Douglas, Murphy, and Rutledge.

⁶³ 339 U.S. 276 (1950).

ample, the Supreme Court dismissed a challenge of Georgia's county unit system with a single sentence: "Federal courts consistently refuse to exercise their equity powers in cases posing political issues arising from a state's geographic distribution of electoral strength among its political subdivisions."⁶⁴ It has been suggested that "This language concedes jurisdiction but finds a policy basis for not acting."⁶⁵ Further support might be drawn from *MacDougall v. Green*,⁶⁶ a case which dealt with the geographical dispersion of signatures on nominating petitions. The Court must have assumed that such questions were justiciable, since it went on to sustain the requirements in a per curiam opinion.⁶⁷

VI

There remains only the "dragon in the thicket,"⁶⁸ *Gomillion v. Lightfoot*,⁶⁹ and a consideration of the extent to which it constituted a bridge between *Colegrove* and *Baker*. While it would be stretching matters to say that *Gomillion* clearly signalled the Court's shift in *Baker v. Carr* it did stand out sufficiently from the mainstream of cases to attract attention and even speculation. No doubt many students of constitutional law experienced a visceral twinge or two as they read *Gomillion*, but some of them may have been briefly comforted by Jo Desha Lucas' analysis. "It is quite possible . . .," he said, "that in the 1961 Term, when *Baker v. Carr* and *Scholle v. Secretary of State* force a reexamination of the Court's refusal to undertake the general job of pruning, the Justices will remember the thorns they encountered in the thicket of the Tuskegee dragon hunt."⁷⁰

There were a number of factors in the Tuskegee case that invited careful attention from those who chart the vagaries of Supreme Court doctrines, but the most intriguing aspect for present purposes was the Court's handling of the malapportionment precedents. These were

⁶⁴ *Id.* at 277.

⁶⁵ Dixon, *Legislative Apportionment and the Federal Constitution*, 27 LAW & CONTEMP. PROB. 329, 345 (1962).

⁶⁶ 335 U.S. 281 (1948).

⁶⁷ Note, however, that a number of apportionment suits from the federal district courts were dismissed per curiam in the interval between *Colegrove* and *Baker*. *Turman v. Duckworth*, 329 U.S. 675 (1946); *Cook v. Fortson*, 329 U.S. 675 (1946); *Colegrove v. Barrett*, 330 U.S. 804 (1947); *Remney v. Smith*, 342 U.S. 916 (1952); and *Radford v. Gary*, 352 U.S. 991 (1957). A district court had also dismissed *Baker v. Carr*. 179 F. Supp. 824 (M.D. Tenn. 1959).

⁶⁸ Lucas, *Dragon in the Thicket: A Perusal of Gomillion v. Lightfoot*, 1961 SUPREME COURT REV. 194.

⁶⁹ 364 U.S. 339 (1960).

⁷⁰ Lucas, *supra* note 68, at 244.

distinguished, it will be recalled, on the ground that they involved mere dilution of the vote rather than the loss of it. This could have been interpreted as an attempt to gloss over a disagreement among the Justices as to the validity of the holding in *Colegrove*, thus foreshadowing a reappraisal of the apportionment question in a proper case. The Court's elaborately careful disposition of the issue on fifteenth rather than fourteenth amendment grounds did little to dispel the uneasiness.

It was true that *Gomillion* was easily distinguishable from the malapportionment cases on at least two major grounds, the presence of the racial factor and the existence of a feasible remedy, but the racial gerrymander involved presented the Supreme Court with a unique opportunity to distinguish the apportionment cases in such a way as to foreclose immediate further consideration. The Court's failure to do so presaged, at least to a limited extent, the decision in *Baker v. Carr*.

VII

Coming a full circle, to what extent has the Court's decision to accept *Baker v. Carr* affected the doctrine of justiciability and political questions? It would seem fair to say that they will never be the same again. It seems clear that the court will no longer operate in terms of category of "untouchable subjects" beyond the scope of judicial power. It has adopted instead what it called a "case-by-case inquiry,"⁷¹ the implication being that even those elements retained as a valid core of the political question doctrine are rebuttable in individual cases.⁷² As to the effect of this on future decisions, we will simply have to wait and see. If *Baker v. Carr* is to serve as the model for the future disposition of political question cases, the doctrine will lose much of its vitality.

The bulk of this article has been directed at the twin problems of jurisdiction and justiciability, and a good case can be made for the position that neither state nor federal precedents had foreclosed the possibility of granting jurisdiction. In this sense, *Baker v. Carr* did not involve the "massive repudiation" attributed to it by Justice Frankfurter. As a matter of fact, Frankfurter himself admitted that the district court had jurisdiction of the malapportionment claim.⁷³ Of all the Justices only Harlan contended that the Court lacked jurisdiction.⁷⁴

⁷¹ 369 U.S. 186, 210-11 (1962).

⁷² These elements are summarized, *Id.* at 217.

⁷³ *Id.* at 330.

⁷⁴ *Id.* at 331.

Jurisdiction, however, implies only the power to look, without prejudice to the merits. Having looked, a court might conclude that it lacked facts or standards or remedies and, on the basis of this, decline to attempt relief on the merits. Justiciability, on the other hand, seems to imply a decision on the merits; the case is accepted, and after a consideration of the complaint and the available remedies, the court concludes that it cannot offer any relief. The difficulty is that few of the opinions prior to *Colegrove* made any real distinction between jurisdiction and justiciability. It is, therefore, extremely difficult to draw from the mass of precedent any kind of clear-cut rule. The district court in *Baker v. Carr*, for instance, indicated that it considered all the apportionment cases beginning with *Colegrove* to dictate a rule of judicial non-intervention, "whether from a lack of jurisdiction or from the inappropriateness of the subject matter for judicial consideration."⁷⁵

If the judicial past were as conclusive on this question as Frankfurter asserted it was in *Baker*, then the Tennessee district court ought to have had some clearer notion as to what it was about. It is difficult to assent to the notion that there was any "massive repudiation" present in the justiciability question. Frankfurter's opinion in *Colegrove* seems to say that legislative apportionment among geographic areas within a state is a political question beyond the cognizance of the courts. But a majority of the Court in *Colegrove* did not accept that view, and it cannot be reconciled with either of the two bracketing decisions, *Smiley v. Holm*⁷⁶ or *MacDougall v. Green*.⁷⁷

Baker v. Carr will not shed much light on the question of jurisdiction. The Court's handling of the problem was brutally short in the essentials, even though the discussion carried through five pages.⁷⁸ Justice Brennan seemed to say that the barest allegation of a violation of the Fourteenth Amendment would suffice. The complaint in *Baker* had "alleged" the violation: "Dismissal of the complaint upon the ground of lack of jurisdiction of the subject matter would, therefore, be justified only if that claim were 'so attenuated and unsubstantial as to be absolutely devoid of merit,' . . ."⁷⁹ This is liable to have the effect of letting nearly all litigants past the judicial threshold. It would have

⁷⁵ 179 F. Supp. 824, 826 (M.D. Tenn. 1959).

⁷⁶ 285 U.S. 355 (1932). Decided before *Colegrove*.

⁷⁷ 335 U.S. 281 (1948). Decided after *Colegrove*.

⁷⁸ 369 U.S. 186, 199-204 (1962).

⁷⁹ *Id.* at 199.

the advantage, however, of permitting an examination of justiciability by a full court on the merits, and would preclude the possibility of denying jurisdiction on the ground that the question was non-justiciable.

If *Baker* did little to illuminate the problem of jurisdiction, it may have done even less with justiciability. Brennan's main concern was to distinguish an unfavorable line of precedent. He offered no compelling reasons for the Court's new position on the justiciability of apportionment questions, and he failed to consider two important factors that have been at the heart of political questions reasoning since its emergence as a canon of judicial self-restraint, namely the absence of meaningful federal standards and the absence of appropriate and feasible remedies.

As for standards, Brennan disposed of the matter with a flick of the pen: "Judicial standards under the Equal Protection Clause are well developed and familiar, and it has been open to courts since the enactment of the Fourteenth Amendment to determine, if on the particular facts they must, that a discrimination reflects *no* policy, but simply arbitrary and capricious action."⁸⁰ As to remedies, *Baker* was remanded "for further proceedings consistent with this opinion."⁸¹ But neither *Baker*, nor any other federal opinion, has ever systematically examined the scope of a federal court's remedial power, let alone contained a discussion of how to bring about state action in a field committed to state authority.

In a very real sense, *Baker v. Carr* did not so much destroy or impair the political question doctrine as it did to ignore it. If this marked the end of its usefulness as a canon of self-restraint, a more ignoble death cannot be imagined.

⁸⁰ *Id.* at 226.

⁸¹ *Id.* at 237.