"[T]he mere fact that the suit seeks protection of a political right does not mean it presents a political question."—Justice BRENNAN

"In a democratic society like ours, relief must come through an aroused popular conscience that sears the conscience of the people's representatives."—Justice FRANKFURTER

Baker v. Carr

369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962)

The Supreme Court squarely confronted the issue of malapportionment of legislative districts in Colegrove v. Green (1946). For many decades the rural, Republican legislature of Illinois had declined to reapportion the state, thus maintaining district lines that did not reflect the great shift in population from farms to cities. Three professors from the Chicago area sued in a federal district court, claiming that this gerrymandering-by-default of congressional districts deprived them of an equal right to vote: Some districts in and around Chicago had nine times the population of those in rural regions.

The district court dismissed the suit and the professors appealed. One would have expected that, when the case reached the Supreme Court, Chief Justice Stone as author of footnote four of *Carolene Products* (reprinted above, p. **Error! Bookmark not defined.**) would have invoked the second paragraph of that footnote and asserted a special judicial role to protect a right of citizens to have their votes counted equally. He, however, wanted no part of this controversy and told the conference "This isn't court business."

Stone died before the decision in *Colegrove* was announced and Justice Jackson did not participate—he was at Nuremberg serving as chief Allied prosecutor at the trials of Nazi leaders. As the senior justice in the 4–3 majority for affirming, Frankfurter announced the *judgment* of the Court; but, because Rutledge had his own reasons, Frankfurter's *opinion* was not that of the Court. Still, because of the power and eloquence of that opinion, most commentators assumed that the Court had treated districting as a political question. And, indeed, the Court later dismissed several other challenges to malapportioned systems.

Then in 1960 Gomillion v. Lightfoot struck down, as a violation of the Fifteenth Amendment, Alabama's efforts to redraw the electoral districts in Tuskegee so as to exclude most African–American residents. Many observers construed *Gomillion*, especially since Frankfurter had written the opinion of the Court, as signalling a reversal of *Colegrove*; quickly new attacks on maldistricting began. The first to reach the Supreme Court came from Tennessee, which had not redrawn the lines for state legislative districts since 1901.

■ MR. JUSTICE **BRENNAN** delivered the opinion of the Court. . . .

IV

Justiciability

In holding that the subject matter of this suit was not justiciable, the District Court relied on Colegrove v. Green [1946] and subsequent *per curiam* cases. We understand the District Court to have read the cited cases as compelling the conclusion that since the appellants sought to have a legislative apportionment held unconstitutional, their suit presented a "political question" and was therefore nonjusticiable. . . .

Of course the mere fact that the suit seeks protection of a political right does not mean it presents a political question. Such an objection "is little more than a play upon words." Nixon v. Herndon [1927]. Rather, it is argued that apportionment cases . . . can involve no federal constitutional right except one resting on the guaranty of a republican form of government, and that complaints based on that clause have been held to present political questions which are

nonjusticiable. We hold that the claim pleaded here neither rests upon nor implicates the Guaranty Clause and that its justiciability is therefore not foreclosed by our decisions of cases involving that clause. . . .

Our discussion . . . requires review of a number of political question cases, in order to expose the attributes of the doctrine—attributes which, in various settings, diverge, combine, appear, and disappear in seeming disorderliness. . . . That review reveals that in the Guaranty Clause cases and in the other "political question" cases, it is the relationship between the judiciary and the coordinate branches of the Federal Government, and not the federal judiciary's relationship to the States, which gives rise to the "political question."

We have said that "in determining whether a question falls within [the political question] category, appropriateness under our system of government of attributing finality to the action of the political departments and also the lack of satisfactory criteria for a judicial determination are dominant considerations." Coleman v. Miller [1939]. The nonjusticiability of a political question is primarily a function of the separation of powers. Much confusion results from the capacity of the "political question" label to obscure the need for case-by-case inquiry. Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution. To demonstrate this requires no less than to analyze representative cases and to infer from them the analytical threads that make up the political question doctrine. We shall then show that none of those threads catches this case.

Foreign relations. There are sweeping statements to the effect that all questions touching foreign relations are political questions. Not only does resolution of such issues frequently turn on standards that defy judicial application, or involve the exercise of a discretion demonstrably committed to the executive or legislature; but many such questions uniquely demand single-voiced statement of the Government's views. Yet it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance. Our cases in this field seem invariably to show a discriminating analysis of the particular question posed, in terms of the history of its management by the political branches, of its susceptibility to judicial handling in the light of its nature and posture in the specific case, and of the possible consequences of judicial action. . . .

Dates of duration of hostilities. Though it has been stated broadly that "the power which declared the necessity is the power to declare its cessation, and what the cessation requires," Commercial Trust Co. v. Miller [1923], here too analysis reveals isolable reasons for the presence of political questions, underlying this Court's refusal to review the political departments' determination of when or whether a war has ended. Dominant is the need for finality in the political determination. . . .

Validity of enactments. In *Coleman* this Court held that the questions of 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. . . .

The status of Indian tribes. This Court's deference to the political departments in determining whether Indians are recognized as a tribe, while it reflects familiar attributes of political questions . . . also has a unique element in that "the relation of the Indians to the United States is marked by peculiar and cardinal distinctions which exist no where else. . . . " Cherokee Nation v. Georgia [1831]. . . .

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 identifies 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.

Unless one of these formulations is inextricable from the case at bar, there should be no dismissal for nonjusticiability on the ground of a political question's presence. The doctrine of which we treat is one of "political questions," not one of "political cases." The courts cannot reject as "no law suit" a bona fide controversy as to whether some action denominated "political" exceeds constitutional authority. . . .

But it is argued that this case shares the characteristics of decisions that constitute a category not yet considered, cases concerning the Constitution's guaranty, in Art. IV, § 4, of a republican form of government. A conclusion as to whether the case at bar does present a political question cannot be confidently reached until we have considered those cases with special care. We shall discover that Guaranty Clause claims involve those elements which define a "political question," and for that reason and no other, they are nonjusticiable. In particular, we shall discover that the nonjusticiability of such claims has nothing to do with their touching upon matters of state governmental organization. . . .

[The opinion then reviewed at length Luther v. Borden (1849) and other cases involving the "republican form of government" issue.]

We come, finally to the ultimate inquiry whether our precedents as to what constitutes a nonjusticiable "political question" bring the case before us under the umbrella of that doctrine. A natural beginning is to note whether any of the common characteristics which we have been able to identify and label descriptively are present. We find none: The question here is the consistency of state action with the Federal Constitution. We have no question decided, or to be decided, by a political branch of government coequal with this Court. Nor do we risk embarrassment of our government abroad, or grave disturbance at home if we take issue with Tennessee as to the constitutionality of her action here challenged. Nor need the appellants, in order to succeed in this action, ask the Court to enter upon policy determinations for which judicially manageable standards are lacking. 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. . . .

Reversed and remanded.

■ MR. JUSTICE **WHITTAKER** did not participate in the decision of this case.

■ MR. JUSTICE **DOUGLAS**, concurring. . . .

■ MR. JUSTICE **CLARK**, concurring. . . .

■ MR. JUSTICE **STEWART**, concurring. . . .

■ MR. JUSTICE **FRANKFURTER**, with whom MR. JUSTICE **HARLAN** joins, dissenting. . . .

We were soothingly told at the bar of this Court that we need not worry about the kind of remedy a court could effectively fashion once the abstract constitutional right to have courts pass on a state-wide system of electoral districting is recognized as a matter of judicial rhetoric, because legislatures would heed the Court's admonition. This is not only a euphoric hope. It implies a sorry confession of judicial impotence in place of a frank acknowledgment that there is not under our Constitution a judicial remedy for every political mischief. . . . In this situation as

in others of like nature, appeal for relief does not belong here. Appeal must be to an informed, civically militant electorate. In a democratic society like ours, relief must come through an aroused popular conscience that sears the conscience of the people's representatives. . . .

In sustaining appellants' claim . . . this Court's uniform course of decision over the years is overruled or disregarded. . . . The *Colegrove* doctrine . . . represents long judicial thought and experience. From its earliest opinions this Court has consistently recognized a class of controversies which do not lend themselves to judicial standards and judicial remedies. . . .

1. The cases concerning war or foreign affairs, for example, are usually explained by the necessity of the country's speaking with one voice in such matters. While this concern alone undoubtedly accounts for many of the decisions, others do not fit the pattern. . . . A controlling factor in such cases is that, decision respecting these kinds of complex matters of policy being traditionally committed not to courts but to the political agencies of government for determination by criteria of political expediency, there exists no standard ascertainable by settled judicial experience or process by reference to which a political decision affecting the question at issue between the parties can be judged. . . .

2. The Court has been particularly unwilling to intervene in matters concerning the structure and organization of the political institutions of the States. The abstention from judicial entry into such areas has been greater even than that which marks the Court's ordinary approach to issues of state power challenged under broad federal guarantees. . . .

3. The cases involving Negro disfranchisement are no exception to the principle. . . . For here the controlling command of Supreme Law is plain and unequivocal. An end of discrimination against the Negro was the compelling motive of the Civil War Amendments. . . .

4. The Court has refused to exercise its jurisdiction to pass on "abstract questions of political power, of sovereignty, of government." Massachusetts v. Mellon [1923]. . . . The crux of the matter is that courts are not fit instruments of decision where what is essentially at stake is the composition of those large contests of policy traditionally fought out in non-judicial forums, by which governments and the actions of governments are made and unmade. . . .

5. The influence of these converging considerations—the caution not to undertake decision where standards meet for judicial judgment are lacking, the reluctance to interfere with matters of state government in the absence of an unquestionable and effectively enforceable mandate, the unwillingness to make courts arbiters of the broad issues of political organization historically committed to other institutions and for whose adjustment the judicial process is ill-adapted—has been decisive of the settled line of cases, reaching back more than a century, which holds that Art. IV, § 4, of the Constitution, guaranteeing to the States "a Republican Form of Government," is not enforceable through the courts. . . .

The present case involves all of the elements that have made the Guarantee Clause cases non-justiciable. It is, in effect a Guarantee Clause claim masquerading under a different label. But it cannot make the case more fit for judicial action that appellants invoke the Fourteenth Amendment rather than Art. IV, § 4, where, in fact, the gist of their complaint is the same. . . .

Here appellants attack "the State as a State. . . . " Their complaint is that the basis of representation of the Tennessee Legislature hurts them. They assert that "a minority now rules in Tennessee," that the apportionment statute results in a "distortion of the constitutional system," that the General Assembly is no longer "a body representative of the people of the State of Tennessee," all "contrary to the basic principle of representative government. . . . " Accepting appellants' own formulation of the issue, one can know this handsaw from a hawk. Such a claim would be non-justiciable not merely under Art. IV, § 4, but under any clause of the Constitution, by virtue of the very fact that a federal court is not a forum for political debate. . . .

But appellants, of course, do not rest on this claim *simpliciter*. In invoking the Equal Protection Clause, they assert that the distortion of representative government complained of is produced by systematic discrimination against them, by way of "a debasement of their votes. . . . "

. . . Appellants invoke the right to vote and to have their votes counted. But they are permitted to vote and their votes are counted. They go to the polls, they cast their ballots, they send their representatives to the state councils. Their complaint is simply that the representatives are not sufficiently numerous or powerful. . . . What is actually asked of the Court in this case is to choose among competing bases of representation—ultimately, really, among competing theories of political philosophy—in order to establish an appropriate frame of government for the State of Tennessee and thereby for all the States of the Union.

. . . This is not a case in which a State has, through a device however oblique and sophisticated, denied Negroes or Jews or redheaded persons a vote, or given them only a third or a sixth of a vote. That was Gomillion v. Lightfoot [1961]. . . . What Tennessee illustrates is an old and still widespread method of representation—representation by local geographical division, only in part respective of population—in preference to others, others, forsooth, more appealing. Appellants contest this choice and seek to make this Court the arbiter of the disagreement. They would make the Equal Protection Clause the charter of adjudication, asserting that the equality which it guarantees comports, if not the assurance of equal weight to every voter's vote, at least the basic conception that representation ought to be proportionate to population, a standard by reference to which the reasonableness of apportionment plans may be judged.

To find such a political conception legally enforceable in the broad and unspecific guarantee of equal protection is to rewrite the Constitution. . . .

■ Dissenting opinion of MR. JUSTICE **HARLAN**, whom MR. JUSTICE **FRANKFURTER** joins. . . .

EDITORS' NOTES

(1) **Query:** In his *Memoirs* (New York: Doubleday, 1977), p. 306, Earl Warren said that not Brown v. Board of Education (1954; reprinted below, p. **Error! Bookmark not defined.**), but Baker v. Carr "was the most important case of my tenure on the Court." In what view of the Constitution does that claim make sense? How justified was the claim?

(2) **Query:** Arguments about "political questions" are a subspecies of arguments about the interrogative WHO may interpret the Constitution. In *Baker* the Court referred to itself "as the ultimate interpreter of the Constitution." Does that claim appear as uncontestable now as it did when we first encountered it in Chapter 7?

(3) **Query:** What approach(es) to constitutional interpretation did Frankfurter employ? How much did he argue from considerations of *prudence*? Brennan's approach, Frankfurter claimed, required the justices to choose "among competing theories of political philosophy." To what extent was he correct? To what extent did Brennan's and Frankfurter's disagreement stem from different conceptions of democracy, and to what extent from different conceptions of the proper roles of courts? Who was more faithful to the text of the constitutional document?

(4) The expectation that the Court would receive more cases involving reapportionment was quickly fulfilled. See Reynolds v. Sims (1964; reprinted next) and accompanying notes.

(5) Art. IV, § 4 of the constitutional text reads: "The United States shall guarantee to every State in this Union a Republican Form of Government." Luther v. Borden (1849) held that the question of which of two rival groups was the lawful state government was a nonjusticiable, political question for Congress to decide. *Baker* explicitly rejected *Colegrove*'s view that legislative apportionment raised a political question but explicitly adhered to *Luther*'s holding that claims under the Guarantee Clause are nonjusticiable. Although the Guarantee Clause itself thus has been virtually a dead letter for constitutional adjudication since *Luther*, the Court sometimes seems to draw inferences from political theories of a republican form of government. For analyses of the

Guarantee Clause, see William M. Wiecek, *The Guarantee Clause of the U.S. Constitution* (Ithaca, NY: Cornell University Press, 1972); Note, "A Niche for the Guarantee Clause," 94 *Harv.L.Rev.* 681 (1981).