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The Political Question Doctrine in State Courts

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I. INTRODUCTION

The "political question" doctrine restricts the range of constitutional issues that the judiciary will decide. According to a conventional view, issues characterized as political questions "concern matters as to which departments of government other than the courts, or perhaps the electorate as a whole, must have the final say. With respect to these matters, the judiciary does not define constitutional limits."[1] The United States Supreme Court set forth the salient characteristics of political questions in *Baker v. Carr*.[2] These characteristics include:

> [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.[3]

The Supreme Court's discussions of political questions have aroused considerable debate over the doctrine's scope and validity. While some commentators have argued that the political question doctrine flows logically and inherently from the separa-

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1. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 72 (1978).
2. 369 U.S. 186 (1962).
3. *Id.* at 217.

tion of powers principle,[4] others perceive a substantial element of discretion in the Court's determination of whether a claim raises a nonjusticiable issue.[5] Some even contend that the Supreme Court's political question decisions do not present a single coherent doctrine at all.[6]

In a sense, however, controversy over the content and application of the Court's formal political question doctrine has subsided in importance if not intensity. The Court's willingness to decide cases widely regarded as presenting political questions[7] appears to have signaled the formal doctrine's decline as a rationale for refusal to adjudicate. Indeed, the invocation of the political question doctrine appears to have nearly fallen into desuetude; only once in the past two decades has the Court decided that an issue raised a nonjusticiable political question.[8] More typically the Court has rejected, with little discussion, attempts to dismiss suits on political question grounds.[9]

Despite this absence of serious evolution in Supreme Court opinions, the idea of political questions has not escaped judicial attention entirely. The supreme courts of the states—the "other supreme courts"[10]—have continued to address the notion of in-

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4. Wechsler, *Toward Neutral Principles of Constitutional Law,* 73 HARV. L. REV. 1, 7-9, 13-14 (1959); Weston, *Political Questions,* 38 HARV. L. REV. 296 (1925).

5. TRIBE, *supra* note 1, at 79; Bickel, *Foreward: The Passive Virtues,* 75 HARV. L. REV. 40, 46, 79 (1961); McCloskey, *Foreward: The Reapportionment Case,* 76 HARV. L. REV. 54, 62-64 (1962); Scharpf, *Judicial Review and the Political Question: A Functional Analysis,* 75 YALE L.J. 517 (1966); Schwartz and McCormack, *The Justiciability of Legal Objections to the American Military Effort in Vietnam,* 46 TEX. L. REV. 1033 (1968).

6. Board of Educ. v. Walter, 58 Ohio St. 2d 368, 384, 390 N.E.2d 813, 823-24 (1979)(Supreme Court's decision in Powell v. McCormack, 395 U.S. 486 (1969), "put to shambles any attempts by legal scholars to reconcile the court's pronouncements in this area."); Henkin, *Is There a "Political Question" Doctrine?,* 85 YALE L.J. 597 (1976); *see* Finkelstein, *Judicial Self-Limitation,* 37 HARV. L. REV. 338, 344 (1924)(referring to "chaos" in the Supreme Court's determinations of what issues qualify as political questions).

7. *See, e.g.,* McCloskey, *supra* note 5, at 63.

8. Gilligan v. Morgan, 413 U.S. 1 (1973)(holding nonjusticiable a suit by Kent State University students seeking injunctive relief against governor and other government officials to prevent recurrence of events in May 1970 in which the Ohio National Guard allegedly violated students' constitutional rights); *see* Scharpf, *supra* note 5, at 596 (Outside of matters relating to foreign relations, the political question doctrine "has been restricted to a few, narrowly circumscribed issues of constitutional law.").

9. *E.g.,* Immigration and Naturalization Serv. v. Chadha, 103 S. Ct. 2764, 2778-80 (1983).

10. Galie, *The Other Supreme Courts: Judicial Activism Among State Supreme*

herently nonjusticiable issues and have formulated their own political question doctrines. The past decade has witnessed a notable upsurge of interest in state law as an independent source of constitutional doctrine.[11] It is appropriate, therefore, to examine the state courts' approach to the political question doctrine, or stated differently, the threshold question of whether the judiciary should pass on the constitutional issue involved in a given dispute. Such an examination should shed light on the debate surrounding the meaning and legitimacy of the political question doctrine.[12] Further, such a review might contribute to the study of federalism itself by highlighting differences between the federal and state approaches.

II. DECIDING WHAT CONSTITUTES A POLITICAL QUESTION: TRENDS AMONG THE STATES

Each state supreme court is influenced by different constitutions, traditions and case law, so it is unsurprising that a uniform political question doctrine has not yet developed. Nevertheless, a certain parallelism can be discerned from the responses courts have made to similar issues and concerns when finding the problem of political questions apposite and in the disposition of the problem itself.

Courts, 33 SYRACUSE L. REV. 731 (1982).

11. *See, e.g.*, Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977); Falk, *Foreward: The State Constitution: A More Than "Adequate" Nonfederal Ground*, 61 CALIF. L. REV. 273 (1973); Linde, *First Things First: Rediscovering the States' Bills of Rights*, 9 U. BALT. L. REV. 379 (1980); Rees, *State Constitutional Law for Maryland Lawyers: Individual Civil Rights*, 7 U. BALT. L. REV. 299 (1978); Wilkes, *The New Federalism in Criminal Procedure: State Court Evasion of the Burger Court*, 62 KY. L.J. 421 (1974); Note, *Of Laboratories and Liberties: State Court Protection of Political and Civil Rights*, 10 GA. L. REV. 533 (1976); Note, *Project Report: Toward an Activist Role for State Bills of Rights*, 8 HARV. C.R.-C.L. L. REV. 271 (1973).

12. State supreme court rulings under state constitutions have sometimes anticipated similar United States Supreme Court federal constitutional decisions. *Compare* State *ex rel.* Barker v. Manchin, 279 S.E.2d 622 (W. Va. 1981)(invalidating state legislative veto) *and* People v. Anderson, 6 Cal. 3d 628, 493 P.2d 880, 100 Cal. Rptr. 152 (1972)(holding that the death penalty violated the state constitution) *with* Immigration and Naturalization Serv. v. Chadha, 103 S. Ct. 2764 (1983)(invalidating "legislative veto") *and* Furman v. Georgia, 408 U.S. 238 (1972)(holding imposition of death penalty "cruel and unusual punishment" in violation of the eighth amendment).

A. *The Conduct and Results of Elections*

State courts have usually resisted requests to intervene in the election process and to interpret election results. State courts generally regard the electoral process as "self-monitoring"[13] and presumptively exempt from judicial review. In the constitutional scheme of separation of powers, "[e]lections are a function of the political branch of the government, are a matter of political regulation, and are not per se the subject of judicial cognizance."[14]

State courts have remained aloof from the electoral process even when asked to enjoin allegedly flawed elections. The Hawaii Supreme Court, for example, cited the "inappropriateness of judicial intrusion into matters which concern the political branch of government"[15] in refusing to halt a county election which the plaintiff contended would be held pursuant to an illegal statutory provision. Similarly, the Arkansas Supreme Court declined to prohibit an election "at the eleventh hour,"[16] declaring that " 'an election is essentially the exercise of political power, and, during its progress, is not subject to judicial control. This comprehends the whole election, including every step and proceeding necessary to its completion.' "[17] Also, when the legislature has delegated to a board of elections the authority to determine candidates' qualifications, state courts have refused to review the board's decisions even when they " 'may be contrary to law.' "[18]

State court deference to the political branches on electoral matters becomes even more emphatic when such courts face challenges raised in the election's aftermath. When it is alleged that a winning candidate has failed to meet a constitutional qualification for candidacy, such as proper residency, courts

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13. The term is from Henkin, *supra* note 6, at 623.

14. State *ex rel.* Ford v. Board of Elections, 167 Ohio St. 449, 451, 150 N.E.2d 43, 45 (1958)(per curiam).

15. Bulgo v. County of Maui, 50 Hawaii 51, 56, 430 P.2d 321, 325 (1967).

16. Brown v. McDaniel, 244 Ark. 362, 365, 427 S.W.2d 193, 194 (1968).

17. *Id.* at 366, 427 S.W.2d at 195 (quoting Leslie v. Griffin, 25 S.W.2d 820, 821 (Tex. Civ. App. 1930)).

18. People *ex rel.* Schlaman v. Electoral Bd., 4 Ill. 2d 504, 508, 122 N.E.2d 532, 535 (1954)(quoting People *ex rel.* Murray v. Rose, 211 Ill. 249, 251, 71 N.E. 1123, 1123 (1904)); *see also* State *ex rel.* Ford v. Board of Elections, 167 Ohio St. 449, 150 N.E.2d 43 (1958)(per curiam).

have interpreted the applicable constitutional provisions literally and categorically: the legislature is the judge of its members' qualifications. Consequently, the state courts have consistently refused to adjudicate such disputes, usually leaving them for legislative resolution.[19] Several state courts have also held that the issue of legislators' qualifications presents a political question;[20] for the courts to decide this issue "would constitute an encroachment upon the legislature . . . and do violence to . . . separation of powers."[21] In deciding that contested elections were not within the jurisdiction of the judiciary branch, one state supreme court relied, in part, on a provision of the state constitution delegating to the legislature the power to resolve questions regarding the election of its members.[22]

Initially, this judicial refusal to pass on election results seems unremarkable. Abstention here can be viewed as a logical application of the political question doctrine as formulated in *Baker v. Carr*.[23] State courts have explicitly inferred legislative prerogative from a "textually demonstrable constitutional commitment of the issue to a coordinate political department,"[24] the impossibility of undertaking independent resolution without expressing lack of the respect due coordinate branches of government,[25] and the potentiality of embarrassment from multifarious pronouncements by various departments on one question.[26]

Yet, state supreme court decisions considering the justiciability of election results are not necessarily congruent with the federal political question doctrine. *Powell v. McCormack*[27] suggests potential divergence between the two approaches. In *Powell*, the Supreme Court held that congressional determina-

19. State *ex rel.* Turner v. Scott, 269 N.W.2d 828 (Iowa 1978)(per curiam); State *ex rel.* Carrington v. Human, 544 S.W.2d 538 (Mo. 1976); State v. Banks, 454 S.W.2d 498 (Mo. 1970); Harrington v. Carroll, 428 Pa. 510, 239 A.2d 437 (1968); State *ex rel.* Schieck v. Hathaway, 493 P.2d 759 (Wyo. 1972).

20. State *ex rel.* Turner v. Scott, 269 N.W.2d 828, 831 (Iowa 1978)(per curiam); State v. Banks, 454 S.W.2d 498, 500 (Mo. 1970); State *ex rel.* Schieck v. Hathaway, 493 P.2d 759, 763 (Wyo. 1972).

21. State v. Banks, 454 S.W.2d 498, 500 (Mo. 1970).

22. Witten v. Sternberg, 475 S.W.2d 496, 497-98 (Ky. 1971).

23. 369 U.S. 186 (1962).

24. State v. Banks, 454 S.W.2d 498, 500 (Mo. 1970); State *ex rel.* Schieck v. Hathaway, 493 P.2d 759, 763 (Wyo. 1972).

25. State *ex rel.* Schieck v. Hathaway, 493 P.2d 759, 763 (Wyo. 1972).

26. *Id.*

27. 395 U.S. 486 (1969).

tions of its members' qualifications are not entirely immune from judicial scrutiny. Adam Clayton Powell, Jr., had been elected to the House of Representatives from a district in New York. Although he met the federal constitutional requirements for age, citizenship, and residency,[28] the House refused to seat him because of certain allegations regarding misappropriation of public funds and abuse of process in the New York courts. The Supreme Court granted Powell's request for a declaratory judgment and held that his exclusion was unconstitutional. The Court also dismissed the House's argument that the dispute involved a "textually demonstrable" blanket commitment to Congress to judge its members' qualifications. The Court concluded instead that article I, section 5[29] "is at most a 'textually demonstrable commitment' to Congress to judge only the qualifications expressly set forth in the Constitution."[30]

Technically, the holding in *Powell* is not inconsistent with the political question decisions of state courts that referred disputes over legislators' qualifications to their respective legislatures for resolution. Powell was seeking the vindication of his own right to be seated, rather than the disqualification of the winning candidate, as the issue has been framed in the state cases. Also, in theory at least, *Powell* left Congress with plenary authority to judge whether its members have met the qualifications imposed by article I, section 2.[31] Finally, the Supreme Court's decision hinged in substantial part on its interpretation of the history underlying article I, section 5.[32]

Still, state courts appear to deviate from *Powell's* tone in their attitude toward the scope of justiciability. In *Powell*, the Supreme Court summarily rejected the contention that adjudication of Powell's claim would produce a "potentially embarrassing confrontation" with the House of Representatives: "Our sys-

28. *Id.* "No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that state in which he shall be chosen." U.S. CONST. art. I, § 2.

29. "Each House shall be the Judge of the Elections, Returns, and Qualifications of its own Members. . . ." U.S. CONST. art. I, § 5.

30. 395 U.S. at 548.

31. It is unclear, however, whether the Court would have reviewed a wrongful determination that Powell was not a bona fide resident of New York.

32. 395 U.S. at 522-48.

tem of government requires that federal courts on occasion interpret the Constitution in a manner at variance with construction given the document by another branch. The alleged conflict that such an adjudication may cause cannot justify the courts' avoiding their constitional responsibility."[33] In contrast, state court responses to suits challenging a legislator's qualifications are characterized by strong expressions of deference to legislative prerogative and the separation of powers principle. One court explained the necessity of judicial nonintervention: " 'For any one of three equal and co-ordinate branches of government to police or supervise the operations of the others strikes at the very heart and core of the entire structure.' "[34] In exercising similar restraint, another court relied upon a section of its state's constitution which provided that no one "charged with the exercise of powers properly belonging to one of these [executive, legislative and judicial] departments shall exercise any powers properly belonging to either of the others, except as in this constitution expressly directed or permitted."[35]

Such an explicit separation of powers provision, as well as the judicial strictness of its interpretation, suggests a distinctness in state constitutional doctrines which extends beyond election issues. Many state constitutions, under state supreme court construction, envision a more rigid compartmentalization of the three departments of government than does the federal constitution. The Supreme Judicial Court of Maine, for example, has observed that "the separation of governmental powers mandated by the Maine Constitution is much more rigorous than the same principle as applied to the federal government."[36] Thus, the unswerving state court refusal to resolve disputes involving the electoral process forms part of a larger insistence that each department not engage in or infringe upon the functions of the others. Since state constitutions are said to limit rather than

33. *Id.* at 549.

34. State v. Banks, 454 S.W.2d 498, 500-01 (Mo. 1970)(quoting 16 AM. JUR. 2D *Constitutional Law* § 213 (1979)), *cert. denied*, 400 U.S. 991 (1971); *see also* State *ex rel.* Carrington v. Human, 544 S.W.2d 538, 540 (Mo. 1976).

35. WYO. CONST. § 1, art. 2 (quoted in State *ex rel.* Schieck v. Hathaway, 493 P.2d 759, 761 (Wyo. 1972)).

36. State v. Hunter, 447 A.2d 797, 799 (Me. 1982). *See* Malone v. Meekins, 650 P.2d 351, 357 (Alaska 1982); State *ex rel.* Barker v. Manchin, 279 S.E.2d 622 (W. Va. 1981).

grant legislative power,[37] the sharp demarcations between the branches tend to produce judicial restraint when the legislative action in question does not clearly threaten to overstep explicit constitutional bounds. Conversely, state courts have resisted legislative attempts to vest in the judiciary powers that the courts perceive as belonging to the executive or legislative branches.[38]

Thus, in classifying electoral disputes as "political questions," state courts are not assuming a posture of passive deference to the political branches. Rather, judicial detachment in this context represents the state courts' reaffirmation of their preeminent role as guardian of the strict boundaries that state constitutions have erected between the branches of government. Just as Chief Justice Marshall in *Marbury v. Madison*[39] established the power of judicial review by denying the jurisdiction that Congress had sought to confer upon the Supreme Court, so the state courts, by declining to judge the validity of elections and their results, reaffirm judicial power to decide who shall be the ultimate decider of constitutional issues.

B. The Machinery of Government

The separation of powers concept reflected in state court decisions involving the election process has also fostered the belief that the machinery of government should regulate itself with minimal judicial interference. That is, state courts have avoided dictating to the executive and legislative branches how government should be structured and how decisions should be made. In general, only when a particular governmental act may violate an express constitutional prohibition is the issue removed from the ambit of political questions.

The Supreme Court has held that state decisions involving

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37. Gilbert v. Gladden, 87 N.J. 275, 283, 432 A.2d 1351, 1355 (1981); Marks v. Thompson, 282 N.C. 174, 182, 192 S.E.2d 311, 316-17 (1972); Mitchell v. North Carolina Indus. Dev. Fin. Auth., 273 N.C. 137, 145, 159 S.E.2d 745, 750 (1968).

38. *See, e.g.*, State v. Hunter, 447 A.2d 797 (Me. 1982); Konkel v. Common Council, 68 Wis. 2d 574, 229 N.W.2d 606 (1975).

39. 5 U.S. (1 Cranch) 137 (1803). Many commentators believe that Marshall deliberately chose *Marbury* as a politically appealing vehicle for asserting the power of judicial review. *See* M. COHEN, THE FAITH OF A LIBERAL 178-80 (1946); C. WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 232, 242-43 (1922); Redlich, *The Supreme Court—1833 Term Foreward: The Constitution—"A Rule for the Government of Courts, As Well as of the Legislature,"* 40 N.Y.U. L. REV. 1, 4-5 (1965).

legislative apportionment[40] and municipal boundaries[41] are subject to the fourteenth amendment guarantee of equal protection.[42] While state courts have faithfully followed these rulings, the following has not been with great alacrity. "[W]e are reluctant to undertake to make an apportionment except where the legislative body concerned has indicated that it can or will not perform that task in a lawful manner."[43] State courts have manifested this reluctance by refusing to impose a more stringent standard than the Supreme Court's minimum federal constitutional requirements. For example, after striking down a plan that deviated from the fourteenth amendment's requirement of substantial equality in district populations,[44] the California Supreme Court rejected a state constitutional challenge to the resulting reapportionment.[45] The decision followed the court's earlier pronouncement that:

> The makeup and apportionment of the Legislature involve peculiarly political questions that are not appropriate for this court to decide. They are far better entrusted to the collective political wisdom of the Legislature subject to the power of initiative and referendum reserved to the people. Our function . . . is to assure adherence to the requirements of the equal protection clause, not to resolve the purely political questions also inherent in legislative apportionment.[46]

Most challenges to a state government's structure or form, other than those grounded in equal protection, have met similar fates. When Cleveland's municipal charter was challenged as vi-

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40. Reynolds v. Sims, 377 U.S. 533 (1964); Baker v. Carr, 369 U.S. 186 (1962).

41. Gomillion v. Lightfoot, 364 U.S. 339 (1960).

42. City of Birmingham v. Community Fire Dist., 336 So. 2d 502 (Ala. 1976); Curtis v. Board of Supervisors, 7 Cal. 3d 942, 501 P.2d 537, 46 Cal. Rptr. 308 (1972); Silver v. Brown, 63 Cal. 2d 270, 405 P.2d 132, 46 Cal. Rptr. 308 (1965); *In re* Apportionment of State Legislature, 376 Mich. 410, 137 N.W.2d 495 (1965); *In re* Independent School Dist. No. 381, 213 N.W.2d 631 (Minn. 1973); State *ex rel.* Lockert v. Crowell, 631 S.W.2d 702 (Tenn. 1982); Smith v. Craddick, 471 S.W.2d 375 (Tex. 1971); State v. Zimmerman, 22 Wis. 2d 544, 126 N.W.2d 551 (1964).

43. Miller v. Board of Supervisors, 63 Cal. 2d 343, 349, 405 P.2d 857, 861, 46 Cal. Rptr. 617, 621 (1965); *see generally* State *ex rel.* Lockert v. Crowell, 631 S.W.2d 702, 706 (Tenn. 1982)(Apportionment "is primarily a legislative function, and . . . the courts should act only if the legislature fails to act constitutionally after having had a reasonable opportunity to do so.").

44. Silver v. Brown, 63 Cal. 2d 270, 405 P.2d 132, 46 Cal. Rptr. 308 (1965).

45. Silver v. Brown, 63 Cal. 2d 841, 409 P.2d 689, 48 Cal. Rptr. 609 (1966).

46. Silver v. Brown, 63 Cal. 2d at 280, 405 P.2d at 139, 46 Cal. Rptr. at 315.

olating the federal constitution's guarantee of a republican form of government,[47] the Ohio Supreme Court rejected the complaint and stated: "[A]doption of such a form of government raises a political question, and not a judicial question, and cannot be challenged in the courts."[48]

Consistent with this approach to judicial restraint, state courts have been particularly reluctant to review legislative decisions that are not impermissible in substance but are challenged as having been reached or enacted in contravention of a constitutionally prescribed process. The New Jersey Supreme Court declined to pass on a complaint alleging that the manner of a bill's presentment to the governor violated the state constitution, holding that such a claim presented a nonjusticiable political question. The court based its decision on the New Jersey Constitution's "textually demonstrable commitment" to the legislature of the presentment question.[49] Similarly, the Kansas Supreme Court declared nonjusticiable a claim involving the state requirement that the Kansas Senate hold hearings on a governor's appointment before refusing to confirm the appointee:

> [T]here has been a constitutional commitment to the Kansas Legislature for each house of the legislature to be the sole judge of its procedure. For the court to involve itself in determining the advisability and wisdom of the senate's procedure would result in the court "expressing lack of the respect due coordinate branches of government."[50]

Also, even when the Alaska House of Representatives' election may have been conducted at a technically unauthorized meeting, the Alaska Supreme Court refused to invalidate the election:

> Such a declaration would . . . be an unwarranted intrusion into the business of the House.
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> . . . .
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> . . .[C]ourts should not attempt to adjudicate "political questions."

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47. U.S. CONST. art. IV, § 4.

48. Fuldauer v. City of Cleveland, 32 Ohio St. 2d 114, 119, 290 N.E.2d 546, 550 (1972)(quoting Hile v. Cleveland, 107 Ohio St. 144, 145, 141 N.E. 35, 37 (1923)). The court relied in part on Pacific States Tel. & Tel. v. Oregon, 223 U.S. 118 (1912), which held that claims brought under the guaranty clause were nonjusticiable.

49. Gilbert v. Gladden, 87 N.J. 275, 282, 432 A.2d 1351, 1354-55 (1981).

50. Leek v. Theis, 217 Kan. 784, 814, 539 P.2d 304, 328 (1975).

> . . . .
> . . .[I]nvolved here is the element of due respect which the judiciary owes to the independent and coequal legislative branch of government. One of the primary purposes of our separation of powers is "to safeguard the independence of each branch of the government and protect it from domination and interference by the others."[51]

Again, judicial unwillingness to intrude upon the domain of political questions emerges not as meek deference, but rather as the judiciary's assertion of its role as the ultimate decider of constitutional spheres of authority.

C. Deference to the Political Branches' Policymaking Function

State courts frequently refer to the wisdom or reasonableness of a political branch's action as a "political question." Under formal doctrine the designation is misapplied; in " 'pure theory' a political question is one in which the courts forego their unique and paramount function of judicial review of constitutionality."[52] The judicial imprimatur on the political branches' latitude in formulating policy, however, does not entail renunciation of judicial review. Instead, state courts in these instances are simply upholding the principle that they are "bound to accept decisions by the political branches within their constitutional authority."[53] Nevertheless, state courts have persistently designated a wide variety of governmental matters as "political questions": the reasonableness of utility rates;[54] the wisdom of a city charter provision;[55] the adequacy of community banking facilities;[56] the determination of whether a certain pub-

51. Malone v. Meekins, 650 P.2d 351, 356-57 (Alaska 1982). *But see* Zemprelli v. Daniels, 496 Pa. 247, 436 A.2d 1165 (1981).

52. Henkin, *supra* note 6, at 599.

53. *Id.* at 622; *see* Scharpf, *supra* note 5, at 578-83.

54. Georgia Power Co. v. Allied Chem. Corp., 233 Ga. 558, 563, 212 S.E.2d 628, 631-32 (1975).

55. Ivancie v. Thornton, 250 Or. 550, 556, 443 P.2d 612, 616 (1968), *cert. denied*, 393 U.S. 1018 (1969).

56. First Nat'l Bank v. Board of Bank Incorporation, 361 Mass. 381, 383, 280 N.E.2d 400, 401 (1972); Natick Trust Co. v. Board of Bank Incorporation, 337 Mass. 615, 617, 151 N.E.2d 70, 72 (1958).

lic use should be modified or extinguished;[57] a department of public utilities proceeding for reaching a decision;[58] the fitness of a county board of registrars to remain in office;[59] the manner in which municipal boundaries are to be extended or revised;[60] and the nonenforcement of statutes.[61]

While mention of political questions in these contexts might be ascribed simply to confused or imprecise usage, the pattern that emerges from within the opinions suggests a more significant explanation. In particular, state court decisions invoking the political question doctrine as a basis for withholding review in these circumstances often include asseverations of other circumstances under which the court will exercise review. State courts have stated that fraud or other similar abuses constitute an exception to the conventional political question doctrine involving electoral matters.[62] Similarly, courts that consign the wisdom or expediency of governmental policy to the political branches as presenting a political question often take pains to describe the power of review that continues to reside with the judiciary.

The impetus for both practices seems apparent: state courts, in circumscribing judicial power under the rubric of political questions, wish to send a clear signal that judicial restraint does not mean judicial abdication. Since the conventional political question doctrine represents a limited exception to the normal presumption of justiciability of constitutional issues,[63] state courts may intend to restrict the potential expansiveness of nonjusticiability by employing this more general usage of "polit-

57. Marks v. Whitney, 6 Cal. 3d 251, 260-61, 419 P.2d 374, 381, 98 Cal. Rptr. 790, 797 (1971).

58. Town of Carlisle v. Department of Pub. Util., 353 Mass. 722, 724, 234 N.E.2d 752, 754 (1968).

59. Smith v. Walker, 215 Ga. 385, 386, 110 S.E.2d 640, 641 (1959).

60. School Bd. of Marshall v. State, 162 Tex. 9, 11, 343 S.W.2d 247, 248-49 (1961).

61. Benson Realty Corp. v. Beame, 50 N.Y.2d 994, 996, 409 N.E.2d 948, 949, 431 N.Y.S.2d 475, 476-77 (1980). *Cf.* Linda R.S. v. Richard D., 410 U.S. 614 (1973).

62. People *ex rel.* Schlaman v. Electoral Bd., 4 Ill. 2d 504, 509, 122 N.E.2d 532, 535 (1954); State *ex rel.* Ford v. Board of Elections, 167 Ohio St. 449, 450-51, 150 N.E.2d 43, 45 (1958)(per curiam); *see* Akizaki v. Fong, 51 Hawaii 354, 358, 461 P.2d 221, 224 (1969); Wallace v. Cash, 328 S.W.2d 516, 518-19 (Ky. 1959); School Bd. of Marshall v. State, 162 Tex. 9, 10, 343 S.W.2d 247, 248 (1961).

63. "As delineated in *Baker [v. Carr]*, this limitation on judicial power [the political question doctrine] is a narrow one." State *ex rel.* Meshel v. Keip, 66 Ohio St. 2d 379, 384, 423 N.E.2d 60, 64 (1981).

ical questions" with qualifications as to its scope. Thus, by couching deference to the political branches' policymaking functions as political questions, state courts paradoxically may be preserving their power to resolve such disputes and order remedies when the occasion warrants.

State court treatment of municipal annexations illustrates the sharp dichotomy between essentially nonconstitutional political questions and the assertion of judicial review over certain disputes connected with these questions. State courts have held that the merits of a proposed annexation are a political question.[64] One court found "[a] mere citation of the many cases stating that the wisdom or expediency of particular annexations is not a judicial question" sufficient to dismiss a challenge to an annexation.[65] Nevertheless, these same courts have not hesitated to review and overturn boundary commission decisions even when the claim did not raise equal protection or due process challenges.[66] The Alaska Supreme Court, for example, held that the question of whether the defendant boundary commission had properly developed standards and procedures before commencing annexation proceedings was "readily decided by traditional judicial techniques."[67] Also, the Michigan Supreme Court, while conceding that the judiciary could not evaluate the desirability of any given annexation, still remanded an annexation petition to the Michigan State Boundary Commission after determining that the commission had misunderstood its options for dealing with the petitioner.[68]

Characterizing the wisdom of governmental action as presenting a political question so as to underscore the authority still reserved to the judiciary has been even more conspicuous in the area of takings. State courts have repeatedly described the

64. United States Smelting, Ref. & Mining Co. v. Local Boundary Comm'n, 489 P.2d 140, 143 (Alaska 1971); People *ex rel.* Averna v. City of Palm Springs, 51 Cal. 2d 38, 45-46, 331 P.2d 4, 8 (1958); Township of Midland v. Michigan State Boundary Comm'n, 401 Mich. 641, 673, 259 N.W.2d 326, 342 (1977), *appeal dismissed*, 435 U.S. 1004 (1978); Texfi Indus., Inc. v. City of Fayetteville, 301 N.C. 1, 7, 269 S.E.2d 142, 147 (1980).

65. People *ex rel.* Averna v. City of Palm Springs, 51 Cal. 2d 38, 45, 331 P.2d 4, 8 (1958).

66. *See infra* notes 74-86.

67. United States Smelting, Ref. & Mining Co. v. Local Boundary Comm'n, 489 P.2d 140, 143 (Alaska 1971).

68. Township of Midland v. Michigan State Boundary Comm'n, 401 Mich. 641, 674, 682, 259 N.W.2d 326, 342, 344 (1977), *appeal dismissed*, 435 U.S. 1004 (1978).

necessity or expediency of eminent domain under state law as a political question not subject to judicial scrutiny.[69] These same state courts, however, have adopted an approach similar to the federal courts' approach in construing the federal constitution's taking clause:[70] the question of "public" use is subject to judicial determination.[71] "[W]hether or not land is being taken for a public use is a judicial question regardless of any legislative declaration that the use is public."[72] Nor have these courts confined their inquiry to the category of the proposed use; they have also asserted authority to invalidate takings made in "bad faith" or amounting to an "abuse of discretion."[73] Once again, this reference to a zone of political questions beyond judicial resolution does not accentuate the limits of judicial power. Instead, this reference merely highlights that zone's sharp judicially imposed demarcations and the courts' retention of the right to enforce those demarcations.

D. Rejecting an Enlarged Sphere of Political Questions: Individual Rights and Public Necessity

State courts uniformly ignore the political question doctrine in certain categories of controversial cases. This tendency demonstrates that the state courts' frequent invocation of the political question doctrine in other situations does not reflect exces-

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69. *In re* Bangor Hydro-Electric Co., 314 A.2d 800, 803 (Me. 1974); State *ex rel.* State Highway Comm'n v. Curtis, 359 Mo. 402, 409-10, 222 S.W.2d 64, 68 (1949); Board of Regents for Northeast Missouri State Teachers College v. Palmer, 356 Mo. 946, 951, 204 S.W.2d 291, 294 (1947); Oakes Mun. Airport Auth. v. Wiese, 265 N.W.2d 697, 699-700 (N.D. 1978); Thormyer v. Irvin, 170 Ohio St. 276, 278, 164 N.E.2d 420, 422 (1960); Sargent v. City of Cincinnati, 110 Ohio St. 444, 451, 144 N.E. 132, 134 (1924); Bountiful v. Swift, 535 P.2d 1236, 1238 (Utah 1975).

70. Schoemaker v. United States, 147 U.S. 282, 298 (1983)(construing U.S. CONST. amend. V).

71. State *ex rel.* State Highway Comm'n v. Curtis, 359 Mo. 402, 411, 222 S.W.2d 64, 68 (1949); Board of Regents for Northeast Missouri State Teachers College v. Palmer, 356 Mo. 946, 951, 204 S.W.2d 291, 294 (1947), Thormyer v. Irvin, 170 Ohio St. 276, 279, 164 N.E.2d 420, 422 (1960); Emery v. City of Toledo, 121 Ohio St. 257, 264, 167 N.E. 889, 891-92 (1929).

72. *See* State *ex rel.* State Highway Comm'n v. Curtis, 359 Mo. 402, 409, 222 S.W.2d 64, 68 (1949)(condemnations).

73. Oakes Mun. Airport Auth. v. Wiese, 265 N.W.2d 697, 700 (N.D. 1978); Thormyer v. Irvin, 170 Ohio St. 276, 279, 164 N.E.2d 420, 422 (1960); Emery v. City of Toledo, 121 Ohio St. 257, 264, 167 N.E. 889, 891-92 (1929); Bountiful v. Swift, 535 P.2d 1236, 1238 (Utah 1975).

sive judicial modesty. State courts emphatically resist claims of nonjusticiability in cases involving individual rights or the judicially perceived public need for intervention. In both situations, state courts do not hesitate to reject arguments that judicial resolution of the dispute would invade the province of a political branch of government.

1. *Individual Rights*

As discussed previously,[74] claims alleging that an apportionment scheme violates the fourteenth amendment's guarantee of equal protection are exempt from the normal judicial reluctance to review governmental structure. The rationale for this exception is that courts perform a special role in enforcing individual rights such as equal protection.[75] Accordingly, state courts have entertained equal protection challenges to the apportionment of both state resources and legislatures, notwithstanding the argument that such challenges pose nonjusticiable political questions.[76] The Wyoming Supreme Court, for example, emphatically upheld the judiciary's role to determine whether that state's system of financing public education violated the state equal protection clause:

> This [issue of whether the state's system violates the state equal protection clause] is no more a political question than any other challenge to the constitutionality of statutes. Declaring the validity of statutes in relation to the constitution is a power vested in the courts as one of the checks and balances contemplated by the division of government into three departments. . . .[77]

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74. *See supra* notes 40-43 and accompanying text.

75. *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938); TRIBE, *supra* note 1, at 1000; Lupu, *Untangling the Strands of the Fourteenth Amendment*, 77 MICH. L. REV. 981, 1039-40 (1979).

76. McKenney v. Byrne, 82 N.J. 304, 319 n.5, 412 A.2d 1041, 1048 n.5 (1980)(courts may review apportionment of state tax proceeds for compliance with state equal protection standards); Board of Educ. v. Walter, 58 Ohio St. 2d 368, 390 N.E.2d 813, 823-24 (1979)(state's public education financing system subject to review under state equal protection clause); Washakie County School Dist. No. One v. Herschler, 606 P.2d 310, 317-18 (Wyo. 1980), *cert. denied*, 449 U.S. 824 (1980); *see* Board of Educ., v. Nyquist, 94 Misc. 2d 466, 408 N.Y.S. 606 (N.Y. Sup. Ct. 1978); Seattle School Dist. No. 1 v. State, 90 Wash. 2d 476, 585 P.2d 71 (1978).

77. Washakie County School Dist. No. One v. Herschler, 606 P.2d 310, 318 (Wyo. 1980), *cert. denied*, 449 U.S. 824 (1980).

Equal protection is not the only right that state courts will protect even when the challenge implicates the form or internal operation of government. In *Ivancie v. Thornton*,[78] the Oregon Supreme Court held that while the wisdom of a city charter provision governing eligibility for office was a political question, the court would nevertheless review the provision for compliance with first amendment standards.[79] In *Sweeney v. Tucker*,[80] the Pennsylvania Supreme Court reviewed the procedural due process claim of a legislator expelled from the Pennsylvania House of Representatives. The court rejected the House's argument that expulsion of a member pursuant to the Pennsylvania Constitution was "a matter which has been exclusively committed to the House by the Pennsylvania Constitution and is not subject to judicial review";[81] rather, the court stated that "the determination of the requirements of procedural due process is undeniably within the judicial power vested in the Pennsylvania judiciary" by Pennsylvania's Constitution.[82] The political question doctrine, declared the court, "is disfavored when a claim is made that individual liberties have been infringed."[83]

Even in the electoral arena, state court concern for protecting individual rights has outweighed arguments to dismiss based on the political question doctrine. When a candidate for the Iowa House of Representatives challenged denial of his seat primarily on equal protection grounds, the Iowa Supreme Court asserted that "Iowa courts have power to adjudicate substantial claims of deprivation of federal or Iowa constitutional rights by the houses of the Iowa General Assembly in the exercise of the houses' election contest powers."[84] With respect to the political question argument, the court observed that "the trend is away from the former completely hands-off doctrine when the charge is that a legislative body substantially violated a constitutional guarantee while exercising an express constitutional power."[85] In contrast, the same court held that a challenge to a state sena-

78. 250 Or. 550, 443 P.2d 612 (1968).
79. *Id.* at 557-59, 443 P.2d at 616-17.
80. 473 Pa. 493, 375 A.2d 698 (1977).
81. *Id.* at 506-07, 375 A.2d at 704.
82. *Id.* at 517, 375 A.2d at 709.
83. *Id.*, 375 A2d at 709.
84. Luse v. Wray, 254 N.W.2d 324, 328 (Iowa 1977).
85. *Id.*

tor's qualifications presented a nonjusticiable political question because the case did not involve "a claim that anyone's personal constitutional rights are being 'chilled' or infringed upon."[86]

2. *Public Necessity*

While some commentators believe that courts often decide that an issue is nonjusticiable solely because of its "sheer momentousness,"[87] sometimes the opposite is true. That is, a court may become involved in a normally sensitive area because the court views itself as the only avenue for immediate resolution of an important public issue. Some commentators have asserted that the main impetus for *Baker v. Carr* was that malapportionment is inherently not susceptible to resolution through the normal political processes.[88]

State courts have on occasion acknowledged that public necessity plays a role in the decision of whether to adjudicate a dispute. In *Baker v. Democratic State Central Committee*,[89] the Louisiana Supreme Court put aside objections based on the political question doctrine and the plaintiff's standing to settle the validity of a Louisiana Democratic State Central Committee resolution regarding the qualifications for the party's primary election. The court stated that "exigencies" of the case demanded adjudication of the issue.[90]

In *Dudley v. Kerwick*,[91] the New York Court of Appeals considered a challenge to a town assessor's broad grant of tax exemptions to members of a particular church despite political question concerns.[92] The court rejected the argument that the nonchurch members' complaint raised a nonjusticiable political question, citing grounds similar to those in *Baker v. Carr*[93] to justify adjudication of the dispute:

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86. State *ex rel.* Turner v. Scott, 269 N.W.2d 828, 832 (Iowa 1978)(per curiam).

87. A. BICKEL, THE LEAST DANGEROUS BRANCH 184 (1962); Finkelstein, *supra* note 6, at 344-45, 363; *see* Scharpf, *supra* note 5, at 396-97.

88. *See* Bonfield, Baker v. Carr: *New Light on the Constitutional Guarantee of Republican Government*, 50 CALIF. LAW. REV. 245, 252-54 (1963); Pollak, *Judicial Power and "The Politics of the People,"* 72 YALE L.J. 81, 88 (1962).

89. 262 La. 1033, 266 So. 2d 199 (1972).

90. *Id.* at 1050, 266 So. 2d at 205.

91. 52 N.Y.2d 542, 421 N.E.2d 797, 439 N.Y.S.2d 305 (1981).

92. *Id.* at 552, 421 N.E.2d at 800, 439 N.Y.S.2d at 308.

93. 369 U.S. 186 (1962).

> There is little likelihood that the populace of the Town of Hardenburgh will exercise the ballot to remove [the present assessor]. In this town, if the petitioners are to be believed, the only assessor likely to be removed is not the one who acts to create the injustice, but instead one who terminates it.[94]

It is the responsibility of the judiciary, the court held, not to tolerate this type of "tyranny of the majority."[95]

III. POLITICAL QUESTIONS, FEDERALISM, AND JUDICIAL STRATEGY

As indicated previously, the implications of the state court treatment of political questions extend beyond specific doctrinal content. With respect to federalism, state courts refusal to slavishly parrot the federal judiciary's conception of political questions demonstrates that the states can indeed function as an independent source of constitutional doctrine. These decisions suggest how judges may employ ideas, such as the political question doctrine, as a tool for asserting or preserving judicial autonomy.

Also, the willingness of state courts to develop their own political question doctrine supports federalism's theory of the states as laboratories for experimentation in judicial and legislative matters. Judicial attitudes toward issues involving elections or the internal operation of government, for example, may offer an alternative vision to federal activism. That is, the heightened readiness of state supreme courts to assign these kinds of issues to the political branches implies that state courts believe the political process can be trusted without the need for judicial intervention.[96] Thus, to proponents of judicial restraint who argue that the Supreme Court has sometimes too lightly overridden concerns about limitations on justiciability,[97] these state court opinions provide authority for a more modest view of judicial power.

More important than the relative merits of the state and

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94. 52 N.Y.2d at 551, 421 N.E.2d at 800, 439 N.Y.S.2d at 308.

95. *Id.*, 421 N.E.2d at 800, 439 N.Y.S.2d at 308.

96. The absence of state court decisions striking down malapportionment prior to *Baker v. Carr* tends to support this theory.

97. *See* Ely, *Foreword: On Discovering Fundamental Values*, 92 HARV. L. REV. 1, 21-22, 52-54 (1978); McCloskey, *supra* note 5, at 70; Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363, 1393 (1973).

federal political question doctrines, however, is the presence of doctrinal pluralism. State court independence produces a diversity of outlook that makes possible a testing of ideas and standards. Such testing would not exist under a regime of monolithic acceptance of Supreme Court pronouncements on similar or analogous federal issues. As the Supreme Judicial Court of Massachusetts has declared: "[W]e have never explicitly incorporated the Federal doctrine [of political questions] into our State jurisprudence. We decline to avoid deciding the issue before us by applying the conclusory label that it is a 'political question.' "[98] In that instance, the Supreme Judicial Court proposed a more contracted version of the federal political question doctrine. Nevertheless, the essential point is that the court performed its own analysis of the problem, thus contributing to the ongoing diversity and occasional debate[99] that prevents judicial doctrine from lapsing into intellectual complacency and rigidity.

In contrast, state courts often rely upon the political questions' special position in United States Supreme Court jurisprudence when invoking the doctrine as a means of protecting judicial review. In this manner, state courts subtly underscore the exceptional nature of a particular issue by referring to the legislative and executive branches' normal policy choices as "political questions." In other words, by placing certain carefully defined issues into the presumably narrow category of political questions, state courts create precedents for the exercise of judicial power in other more important categories. This approach reinforces both the limitations on the spectrum of nonjusticiable issues and the judiciary's ultimate authority to define that spectrum.

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98. Backman v. Commonwealth, 387 Mass. 549, 554, 441 N.E.2d 523, 527 (1982); *see also* Brennan, *supra* note 11, at 501 ("[S]tate courts that rest their decisions wholly or even partly on state law need not apply federal principles of standing and justiciability that deny litigants access to the courts.").

99. That is, divergent approaches under a federal constitutional provision and its state counterpart often accompany a debate over which is the superior approach. Where the issue involves solely the federal constitution, state judicial interpretation must, of course, yield to the Supreme Court's authority. Martin v. Hunter's Lessee, 140 U.S. (1 Wheat.) 304 (1816).