EXCISING FEDERALISM: THE CONSEQUENCES OF *BAKER V. CARR* BEYOND THE ELECTORAL ARENA

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INTRODUCTIONB

WHEN Justice Brennan formulated his six-factor articulation of the political question doctrine in *Baker v. Carr*,[1] he left one potential factor on the cutting-room floor: federalism.[2] Given the historical roots of the doctrine, the failure to accord federalism any weight in deciding the justiciability of a particular issue marked a significant turn of events.

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[1] 369 U.S. 186, 217 (1962).

[2] See, e.g., id. at 218.

Although Justice Brennan did not err in arguing that other factors have played a role in deciding the nonjusticiability of an issue—for example, if the case involved a foreign policy question better left to another branch[3]—a cursory glance at major precedents in this area illustrates a historical sensitivity as to whether reaching the merits of a dispute would entangle federal courts in matters of internal state governance.

In *Luther v. Borden*,[4] the landmark 1849 case that made Guarantee Clause claims nonjusticiable, Chief Justice Taney, in his opinion for the Court, emphasized that "the sovereignty in every State resides in the people of the State, and . . . they may alter and change their form of government at their own pleasure."[5] Similarly, in a case in which the Court dismissed a telephone company's challenge to a tax passed via a state's initiative procedure for lack of justiciability, the Court stated that the company's challenge was not an attack "on the tax as a tax, but on the State as a State."[6] Finally, in a state legislative apportionment case that preceded *Baker* by less than twenty years, the Court dismissed the plaintiffs' claims, and Justice Frankfurter declared for a plurality that "[c]ourts ought not to enter this political thicket," thereby leaving matters of electoral apportionment to state governments or Congress.[7] In light of this long history of considering state interests in deciding justiciability, Justice Frankfurter can hardly be accused of hyperbole in his *Baker* dissent when he referred to the "impressive body of rulings . . . cast aside" by Justice Brennan in his reformulation of the political question doctrine.[8]

Justice Brennan did not play hide-the-ball when he cast aside this body of precedent and declined to include federalism in the six-factor list. Far from quietly removing federalism, he aggressively expunged it from the doctrine. In seven separate points in his opinion,[9] Justice Brennan emphasized how "[t]he nonjusticiability of a political question is primarily a function of the separation of powers,"[10] and that it "has noth-

[3] Id. at 211–13.
[4] 48 U.S. (7 How.) 1 (1849).
[5] Id. at 47.
[6] Pac. States Tel. & Tel. Co. v. Oregon, 223 U.S. 118, 150 (1912).
[7] Colegrove v. Green, 328 U.S. 549, 556 (1946) (plurality opinion).
[8] *Baker*, 369 U.S. at 267 (Frankfurter, J., dissenting).
[9] Id. at 210, 217, 218, 229, 231, 232 (majority opinion).
[10] Id. at 210.

ing to do with . . . matters of state governmental organization."[11] The removal of federalism is significant because courts continue to employ the *Baker* factors to decide whether a case involves a nonjusticiable political question.[12] If Justice Brennan did ignore a large body of precedent in which the Court considered federalism in the justiciability determination, understanding the consequences of *Baker* is just as important as understanding how the factors that did make the final cut affect the political question doctrine's use. Indeed, the vast majority of scholarly work in this area investigates the consequences of the *Baker* factors, with scholars criticizing the use of the political question doctrine,[13] praising it,[14] suggesting ways to redefine the *Baker* factors,[15] and investigating *Baker*'s effect in the electoral arena, particularly with regard to partisan gerrymandering and other apportionment issues.[16] On the other hand, the

[11] Id. at 218; see also Elrod v. Burns, 427 U.S. 347, 352 (1976) (Brennan, J.) (plurality opinion) ("[T]he separation-of-powers principle, like the political-question doctrine, has no applicability to the federal judiciary's relationship to the States.").

[12] See, e.g., Zivotofsky ex rel. Zivotofsky v. Clinton, 132 S. Ct. 1421, 1427 (2012) (identifying the *Baker* factors as the ingredients of a political question); Kerr v. Hickenlooper, 880 F. Supp. 2d 1112, 1141–52 (D. Colo. 2012) (providing an extensive discussion and application of all six *Baker* factors in the context of a challenge to a state law barring tax increases without voter approval).

[13] Martin H. Redish, Judicial Review and the "Political Question," 79 Nw. U. L. Rev. 1031, 1033 (1985) ("This Article is designed to explain why the political question doctrine should play no role whatsoever in the exercise of the judicial review power.").

[14] Rachel E. Barkow, More Supreme Than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy, 102 Colum. L. Rev. 237, 244 (2002) (arguing that the political question doctrine forces the Court to make an "initial determination of how much deference" to another branch is appropriate, "a valuable function" that "reminds the Court that not all constitutional questions require independent judicial interpretation").

[15] Jesse H. Choper, The Political Question Doctrine: Suggested Criteria, 54 Duke L.J. 1457, 1462–63 (2005) (suggesting that four factors—textual commitment of an issue to another branch; an attention to the functional role of judicial review; whether or not a judicially manageable standard exists for an issue; and whether an issue is a widely-shared, constitutional injury—should replace the *Baker* factors).

[16] See, e.g., Peter W. Low, John C. Jeffries, Jr. & Curtis A. Bradley, Federal Courts and the Law of Federal-State Relations 171–73 (7th ed. Supp. 2013) (summarizing several key cases where the Court has struggled to apply the *Baker* factors in cases involving challenges to a state's partisan gerrymandering of electoral districts); Choper, supra note 15, at 1486–92 (describing the problems with partisan gerrymanders and how the difficulty in coming up with workable judicial standards for these types of cases has the "potential to effectively nullify the right to an equally weighted vote guaranteed by *Baker v. Carr*"); Daniel Tokaji & Owen Wolfe, *Baker*, *Bush*, and Ballot Boards: The Federalization of Election Administration, 62 Case W. Res. L. Rev. 969, 971, 978 (2012) (arguing that *Baker* ushered in a new era of federal court oversight of electoral administration, and that "the partisan transfer of power

removal of federalism has garnered only passing comment[17] and relatively scant analysis.[18]

This Note will seek to fill this scholarly gap by shying away from the normative debates over whether the *Baker* factors are good or bad and how they have affected apportionment. Instead, it will take a more descriptive approach that analyzes the historical roots of the political question doctrine and the consequences of a federal court's failure to consider state interests when determining if an issue is justiciable. The line of precedents involving challenges to state apportionment schemes illustrates one area where federal courts have confronted the issue of adjudicating the merits of a plaintiff's attack on a state's political system.[19] However, there are other areas of internal state governance where a political question may arise. For example, *Pacific Telephone & Telegraph Co. v. Oregon*[20] involved a challenge to a state tax passed through the state's initiative system,[21] while in *Wilson v. North Carolina*[22] the Court dealt with a Fourteenth Amendment challenge to the manner in which North Carolina's Governor replaced the state's Railroad Commissioner.[23]

over districting from the state to the federal level is one of the most important aspects of *Baker's* legacy").

[17] See Tokaji & Wolfe, supra note 16, at 978 ("We are not the first commentators to note that *Baker* changed the law by taking federalism off the table as a justification for the political question doctrine. What is interesting is that, while many have noted this aspect of *Baker*, most do not dwell on it—other than to observe that federalism is missing from *Baker's* test for what counts as a political question. The scholarship on this aspect of *Baker* is limited.").

[18] A key exception is Robert J. Pushaw, Jr., Judicial Review and the Political Question Doctrine: Reviving the Federalist "Rebuttable Presumption" Analysis, 80 N.C. L. Rev. 1165, 1165 (2002). Pushaw notes how the Court's handling of legislative apportionment cases evinced a clear respect for state decisions, as federalism "prohibited judicial second-guessing of state officials' political judgment in balancing the numerous and complex policy considerations involved." Id. at 1172. He notes that "the *Baker* Court simply cast aside a core structural and theoretical principle—federalism," in its reformulation of the political question doctrine. Id. at 1177. However, Pushaw discusses how the lack of federalism affected legislative apportionment, id., and then proceeds to argue that the "rebuttable presumption" of judicial review should replace the *Baker* approach to the political question. Id. at 1185–90, 1196–1201. While Pushaw thus deviates from the scholarship in his focus on federalism, he falls back in line with his attention to electoral matters and suggestion for a replacement of the *Baker* factors.

[19] See Low, Jeffries, Jr. & Bradley, supra note 16, at 171–73 (describing cases).

[20] 223 U.S. 118, 150 (1912).

[21] Id. at 136–37.

[22] 169 U.S. 586 (1898).

[23] Id. at 590–92.

This Note will shed light on these lesser-known applications of the political question doctrine by analyzing whether the pre-*Baker* Court was less willing to intervene in matters of state government when compared to post-*Baker* courts. This analysis will reveal that the political question doctrine in the post-*Baker* era does indeed operate differently if the case involves a state government instead of the federal government, a practice that runs contrary to the historical application of the doctrine and therefore presents the question of whether it should be applied differently simply because the federal government is not in the picture.

A hypothetical illustrates this point more clearly.[24] Suppose the President happened to pick a cabinet composed entirely of white males, and perhaps disappointed women or African Americans under consideration for the job sued on Equal Protection Clause grounds. A federal court faced with this question would almost surely dismiss the case on the grounds that such decisions were wholly a matter of executive discretion and thereby barred by the political question doctrine.[25] However, if the exact same case occurred with a state governor and state-level cabinet (or its equivalent) instead of the President and the federal cabinet, would a federal court respond differently solely because it happened at the state level, or would it also invoke the political question doctrine?

I will seek to answer this question by exploring the pre-*Baker* historical roots of the political question doctrine and its post-*Baker* application in areas outside the electoral arena. Part I will examine the role federalism played in the *Luther* Court's decision to invoke the political question doctrine and how the *Baker* Court then expunged it from the doctrine. Part II will explore the consequences of this choice in light of the history that preceded it, focusing on the role that federalism played in several key political question cases. Finally, Part III will analyze several post-*Baker* cases that roughly track the scenarios of some of the pre-*Baker* cases dealing with disappointed state officials. This examination will show that *Baker*'s excision of federalism from the political question doctrine carried consequences beyond those cases directly implicating the apportionment problems of *Baker* itself.

[24] I am indebted to Professor Caleb Nelson for this example.

[25] See, e.g., Marbury v. Madison, 5 U.S. (1 Cranch) 137, 165–66 (1803) ("[T]he President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience. To aid him in the performance of these duties, he is authorized to appoint certain officers, who act by his authority and in conformity with his orders.").

Combining an attention to the role that federalism historically played in the Court's political question doctrine cases with a look at several more recent cases provides a perch from which we can look out on the Court's political question jurisprudence and see features that the scholarship has largely ignored. Although the *Baker* factors strongly suggest—and indeed, by removing federalism, require—that the Court use the political question doctrine as a tool of interbranch management at the federal level, historically this was not the case. Looking at the political question doctrine through this Note's perspective brings a different picture into focus: the use of the justiciability determination as a tool of federal-state management—a way to police the boundary between permitting states to have discretion in their own political affairs versus deciding constitutional claims that would force the Court to interfere in those affairs. By declining to reach into this sphere of state discretion, the Court evinced a respect for state decisions that *Baker* upended, with consequences going beyond the electoral arena.

I. *LUTHER* AND *BAKER*—COMPETING CONCEPTIONS OF FEDERALISM'S ROLE IN THE POLITICAL QUESTION DOCTRINE

A. Luther v. Borden*: The Roots of Federalism in the Political Question Doctrine*

The basic premise of the political question doctrine is that the political branches of government are better equipped to handle and resolve certain types of questions than the federal courts.[26] The doctrine's origins trace back to *Marbury v. Madison*,[27] but the seminal case in which the Court articulated and applied the doctrine was decided almost fifty years later in *Luther v. Borden*.[28] *Luther* arose out of an altercation in Rhode Island in 1841 due to resentment over the state's voting laws

[26] See id. at 160; see also 13 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice & Procedure § 3534.1 (3d ed. 2015) ("Political-question doctrine takes its name from the conclusion that . . . certain matters are confined to the political branches.").

[27] *Marbury*, 5 U.S. (1 Cranch) at 165–66 ("By the constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion . . . ."). The Court went on to note that in such cases involving discretionary powers, the "subjects are political. They respect the nation, not individual rights, and being entrusted to the executive, the decision of the executive is conclusive." Id. at 166. Of course, it goes without saying that the political question doctrine does not preclude the Court from hearing politically-charged issues. See Wright, Miller & Cooper, supra note 26, § 3534.1.

[28] 48 U.S. (7 How.) 1 (1849).

(which many believed to be too restrictive).[29] After failing to achieve legislative reform, the supporters of wider suffrage held their own convention, ratified a new constitution, and declared that constitution to be the highest law of Rhode Island.[30] When the leaders of the old charter government declared that all acts performed by the new government were illegal, supporters of the new government organized an armed rebellion.[31] In the midst of this disturbance, the defendant, an officer of the charter government, broke into the home of the plaintiff, a supporter of the new government.[32] The plaintiff sued for trespass, arguing that the creation of a new government in 1841 annulled the charter government and hence the defendant (who argued that the authority of the charter government justified his actions) acted without legitimate governmental authority.[33] The case therefore presented the question of which government—the charter one or the new one—was the legal government at the time of the trespass.[34]

The Court rebuffed the plaintiff's argument that it could decide that the new government annulled the old one,[35] refusing to rule on the legitimacy of the competing governments.[36] Chief Justice Taney pointed to Article IV of the Constitution (the Guarantee Clause)[37] as authority for this position.[38] Insofar as the Constitution allowed the federal government to "interfere in the domestic concerns of a State," Chief Justice Taney argued that it "treated the subject as political in its nature, and placed the power in the hands of [Congress]."[39] Article IV therefore gave Congress the power of deciding "what government is the established one in a State," and only Congress could decide the proper means

[29] Id. at 35–36; see also John Harrison, The Lawfulness of the Reconstruction Amendments, 68 U. Chi. L. Rev. 375, 424 n.241 (2001) [hereinafter Harrison, Reconstruction Amendments] (providing a general background on the events leading up to *Luther v. Borden*).

[30] *Luther*, 48 U.S. (7 How.) at 35–36.

[31] Id. at 36–37.

[32] Id. at 2.

[33] Id. at 34–35, 38.

[34] Id. at 38.

[35] Id. at 35.

[36] Id. at 47.

[37] Article IV provides that the "United States shall Guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence." U.S. Const. art. IV, § 4.

[38] *Luther*, 48 U.S. (7 How.) at 42.

[39] Id. at 2, 42.

for fulfilling the terms of the Guarantee Clause. Once Congress decided on the legitimacy of a state government (for example, by admitting its representatives and senators), that decision bound "every other department of the government, and could not be questioned in a judicial tribunal."[40]

In *Luther*, the Court argued that Congress delegated a portion of this decisional power to the President via a prior law that empowered him to call up troops, upon the request of a state's governor, to put down a rebellion.[41] The Court found that the President, by agreeing to call up troops upon the old governor's request, had thereby recognized him as the state's executive.[42] This decision was therefore binding on the courts, just the same as if Congress had decided the issue itself.[43] Ultimately, regardless of whether Congress or the President made the final call as to the legitimacy of a state government, that decision certainly did not rest with the Supreme Court. As Chief Justice Taney put it, "[T]he courts must administer the law as they find it."[44] While Chief Justice Taney affirmed the power of states to alter and abolish their constitutions, he asserted that "whether they have changed it or not by abolishing an older government, and establishing a new one in its place, is a question to be settled by the political power."[45]

The Court's resolution of *Luther* not only laid down the basic conception of the political question doctrine, but also established a framework for considering the different ways in which courts might apply the doctrine in practice. Professor John Harrison argues that there are "two distinct but related manifestations" of the doctrine.[46] The Court resolved *Luther* on the basis of the first manifestation of the political question doctrine—that it requires courts to accept "as final the resolution of legal questions made in other contexts by the political branches."[47] Professor Harrison calls this the "collateral estoppel" or "non-judicial finality"

[40] Id.

[41] Id. at 43–44.

[42] Id. at 44. Chief Justice Taney equated the President's ability to recognize the sovereignty of a state government with his power to recognize the existence of a foreign nation; both decisions are binding on the courts. Id.

[43] Id.

[44] Id. at 45.

[45] Id. at 47.

[46] John Harrison, The Relation Between Limitations on and Requirements of Article III Adjudication, 95 Calif. L. Rev. 1367, 1372–73, 1373 n.10 (2007) [hereinafter Harrison, Article III Adjudication].

[47] Id. at 1373.

version,[48] based on the premise that nonjudicial actors can resolve legal disputes or make factual determinations that are then binding on courts.[49] In *Luther*, Chief Justice Taney argued that the President or Congress held the power to decide which government existed in Rhode Island, and "when that power has decided, the courts are bound to take notice of its decision, and to follow it."[50] In other words, Chief Justice Taney essentially "plugged in" the resolution of a legal question (the legality of Rhode Island's government) into the Court's own deliberations,[51] and that resolution was binding on the Court.

Chief Justice Taney's use of the political question doctrine here occurred on a horizontal level—taking the decision of another federal branch and incorporating it into the Court's resolution of the case. However, it is critical to highlight the role state interests played in the Court's decision.[52] Chief Justice Taney argued that the Court should "examine very carefully its own powers"[53] before finding the charter government invalid, as doing so would mean that any laws passed by the government during the time in question were null, its taxes wrongly collected, salaries to public officials illegally paid, and "the judgments and sentences of its courts in civil and criminal cases null and void."[54] As Professor Harrison points out, giving the political branches the power to pass upon the validity of a state's decisions with respect to its internal political organization corresponds with the basic idea that courts should make legal

[48] Id. at 1375.

[49] See Caleb Nelson, Adjudication in the Political Branches, 107 Colum. L. Rev. 559, 563 (2007).

[50] *Luther*, 48 U.S. (7 How.) at 47.

[51] See Harrison, Reconstruction Amendments, supra note 29, at 424 n.241 ("In order to understand the power of this form of the political question doctrine, it is important to see that the doctrine is not exactly one of judicial abstention. Rather, it is one of non-judicial finality under which the courts are bound by the political branches' judgments and must decide cases in accordance with that judgment. The Court did not dismiss *Luther* for want of jurisdiction; it decided the case on the merits based on what it took to be the political branches' decision as to the identity of the rightful government of Rhode Island.").

[52] See Anya J. Stein, Note, The Guarantee Clause in the States: Structural Protections for Minority Rights and Necessary Limits on the Initiative Power, 37 Hastings Const. L.Q. 343, 349–50 (2010) (stating that the "Court framed the issue as one of both separation of powers and federalism," and that the Court "was very concerned with protecting the balance of federalism").

[53] *Luther*, 48 U.S. (7 How.) at 39.

[54] Id.

decisions, not policy ones, as the questions surrounding the political status of a state are often fraught with the latter type of issues.[55]

While the nonjudicial finality branch of the political question doctrine provided the driving rationale for the Court's decision in *Luther*, Chief Justice Taney also gestured toward another problem that implicates the second manifestation of the political question doctrine. This second branch is predicated on limits to courts' remedial powers, in that courts should shy away from interfering in areas that would require "direct[ing] the performance of a politically sensitive function of the government" (such as military decisions).[56] Those concerns cropped up in *Luther*. Chief Justice Taney raised the question of how a court could inquire into the new constitution's validity, as that question necessarily depended on whether it was ratified by a majority of voters (as defined under the charter constitution).[57] That question, in turn, would require a court to hear the (likely conflicting) evidence from each side about the number of voters and their qualifications.[58] And if that task was not complicated enough, Chief Justice Taney noted that a jury would have to hear a case like this because it was a suit at common law—and one jury might decide the question of whether the people ratified the new constitution differently from another.[59] Wading into this quagmire would cause great uncertainty within the state itself, as well as undermining the court's mission to "expound the law, not to make it."[60] Just as Chief Justice

[55] See Harrison, Reconstruction Amendments, supra note 29, at 426 ("It is virtually impossible to decide a dispute like this [the validity of a state government] without deciding questions that are political in the sense of being normative. In part that is because the applicable standards are fuzzy, in part because the standards may be to some extent explicitly normative, and in part because individuals' convictions tend to be so strongly held."). Justice Woodbury, who dissented on other grounds, provided a thorough explanation as to why a state government's validity was a political question. See *Luther*, 48 U.S. (7 How.) at 51–52 ("But, fortunately for our freedom from political experiments in judicial duties, this court can never with propriety be called on officially to be the umpire in questions merely political. The adjustment of these questions belongs to the people and their political representatives, either in the State or general government. These questions relate to matters not to be settled on strict legal principles. They are adjusted rather by inclination,—or prejudice or compromise, often. Some of them succeed or are defeated even by public policy alone, or mere naked power, rather than intrinsic right. . . . Judges, for constitutions, must go to the people of their own country, and must merely enforce such as the people themselves, whose judicial servants they are, have been pleased to put into operation.").

[56] Harrison, Article III Adjudication, supra note 46, at 1375.

[57] *Luther*, 48 U.S. (7 How.) at 41.

[58] Id. at 41–42.

[59] Id. at 42.

[60] Id. at 41.

Taney was sensitive to how ignoring the collateral force of a political branch's decision on the validity of Rhode Island's government could affect state laws, taxes, and officers, he was equally sensitive to how it would push the Court into a quicksand from which it could not easily escape.[61]

B. Baker v. Carr*: The Excision of Federalism from the Political Question Doctrine*

Whereas the *Luther* Court sought to avoid the quicksand that would accompany federal courts' entry into complex areas of state politics, one hundred years later the *Baker* Court took the leap. As in *Luther*, the factual backdrop of *Baker* revolved around voting disputes. The plaintiffs alleged that Tennessee's apportionment scheme for state legislative districts unconstitutionally deprived them of an effective vote because years of population growth and movement had made the current plan unreflective of the actual voter distribution (the scheme had not been changed since 1901).[62]

The problem facing the plaintiffs was that the Court had heard, and uniformly rejected, this type of claim several times in previous decades. *Colegrove v. Green*[63] is an apt example of the set of political question cases that precipitated *Baker*. In *Colegrove*, Illinois voters sued state officials on the grounds that the failure to redraw congressional electoral districts in light of large population growth and redistribution diluted their voting power and thereby violated the Guarantee Clause.[64] Justice Frankfurter, writing for two other Justices,[65] rejected this challenge on the grounds that challenges under that clause were nonjusticiable.[66] The Court reached the same conclusion in several other cases before *Baker*.[67]

[61] See Tokaji & Wolfe, supra note 16, at 975 ("[T]he [*Luther*] Court suggested that respect for state power is what precluded the federal courts from articulating a judicially manageable standard under which the case could be decided.").

[62] Id. at 972.

[63] 328 U.S. 549 (1946).

[64] Id. at 550, 552.

[65] Justice Jackson took no part in the case, id. at 556, and Justice Rutledge argued that the case should be dismissed for lack of jurisdiction, as opposed to nonjusticiability, id. at 566.

[66] Id. at 556.

[67] See, e.g., South v. Peters, 339 U.S. 276, 276–77 (1950) (rejecting claim that a Georgia statute violated the Fourteenth Amendment because it diluted the votes of the residents in the state's most populous county to one-tenth of the weight as votes in other counties); MacDougall v. Green, 335 U.S. 281, 283–84 (1948) (rejecting the claim that an Illinois law governing primary elections was so discriminatory to voters in the state's largest county that it

Colegrove is significant because it provided a preview of two key issues in *Baker*—whether courts could craft standards to handle apportionment claims and, if so, whether those standards would unduly infringe on the states' political processes. For example, Justice Frankfurter stated in his *Colegrove* opinion that "sustain[ing] this action would cut very deep into the very being of Congress" and hence the courts should not "enter this political thicket,"[68] indicating his fear that thrusting the federal courts into state apportionment issues would lead to intractable remedial problems due to the lack of workable standards for resolving disputes. Federalism concerns were also not wholly absent from *Colegrove*. Justice Frankfurter pointed to the limited power of a federal court to resolve the problem, as the plaintiffs essentially asked the Court to either redraw the Illinois electoral map (which the Court could not do with any effectiveness) or to invalidate it entirely (which might lead to more pernicious results).[69] Likewise, Justice Rutledge, in his concurrence, noted that reaching the merits of the case would "pitch[] [the] Court into delicate relation to the functions of state officials and Congress."[70] Similarly, in *MacDougall v. Green*,[71] a case decided two years later, the Court declared that "[i]t would be strange indeed, and doctrinaire, for this Court, applying such broad constitutional concepts as due process and equal protection of the laws, to deny a State the power to assure a proper diffusion of political initiative" because the Constitution made "no such demands on the States."[72]

The issues in pre-*Baker* cases like *Colegrove* presaged three main questions the Court faced in *Baker*: (1) Was the plaintiffs' claim justiciable; (2) if so, what kind of standard could the Court use to decide such cases; and (3) how would such a standard affect federalism? Justice Brennan handled the first question by stating that the issue in *Baker* implicated the Equal Protection Clause, not the Guarantee Clause.[73] This maneuver took the plaintiffs' claim out of the *Colegrove* line of cases (as

violated equal protection and due process rights under the Fourteenth Amendment); see also Pushaw, Jr., supra note 18, at 1171 n.40 (citing cases).

[68] *Colegrove*, 328 U.S. at 556.

[69] Id. at 552–53; see also *Baker*, 369 U.S. at 277 (Frankfurter, J., dissenting) (stating that a "predominant concern" of *Colegrove* was "avoiding federal judicial involvement in matters traditionally left to legislative policy making").

[70] *Colegrove*, 328 U.S. at 565 (Rutledge, J., concurring).

[71] 335 U.S. 281.

[72] Id. at 284.

[73] *Baker*, 369 U.S. at 209, 237.

well as the general nonjusticiability of Guarantee Clause cases, which originated in *Luther*), thus circumventing the justiciability problem. Classifying the case as an Equal Protection Clause one also solved the second problem. Whereas the Guarantee Clause might not have provided a workable standard for such cases,[74] Justice Brennan stated that "[j]udicial standards under the Equal Protection Clause are well developed and familiar."[75]

Turning to the Equal Protection Clause to handle the justiciability issue and the lack of a judicially manageable standard was only two-thirds of the battle. As Justice Frankfurter argued in response to the Court's classification of the claim as an equal protection one, the case presented a "Guarantee Clause claim masquerading under a different label."[76] Justice Brennan therefore conducted an exhaustive review of the Court's political question jurisprudence in order to show that these prior cases did not in fact prevent the Court from reaching the merits of an apportionment case.[77] He reviewed several groups of cases in which the Court had invoked the political question doctrine, such as those involving foreign affairs, relations with Indian tribes, and disputes over when a war had ended.[78]

From this review, Justice Brennan concluded that "[p]rominent on the surface of any case held to involve a political question" was one or more of six different elements.[79] He argued that Guarantee Clause claims were nonjusticiable solely because they involved one or more of these factors (such as the lack of judicially manageable standards).[80] Critically, he argued that "the nonjusticiablity of such claims has nothing to do with

[74] Id. at 226; id. at 223 ("[T]he only significance that *Luther* could have for our immediate purposes is in its holding that the Guaranty Clause is not a repository of judicially manageable standards which a court could utilize independently in order to identify a State's lawful government.").

[75] Id. at 226.

[76] Id. at 297 (Frankfurter, J., dissenting).

[77] Id. at 209–10, 217–18 (majority opinion).

[78] Id. at 211–17.

[79] Id. at 217. Justice Brennan's six factors are: (1) "a textually demonstrable constitutional commitment of the issue to a coordinate" political branch; (2) a lack of "judicially manageable standards" for resolving the issue; (3) the "impossibility of deciding without an initial policy determination" from a nonjudicial actor; (4) the inability of a court to resolve the issue without evincing a lack of respect for "coordinate branches of government"; (5) an "unusual need for unquestioning adherence to a political decision already made"; and (6) the potential for embarrassing another branch of government. Id.

[80] Id. at 217–18.

their touching upon matters of state governmental organization."[81] He made it abundantly clear that the political question doctrine was based solely on the separation of powers,[82] and that the Court's past decisions declaring Guarantee Clause cases nonjusticiable stemmed solely from the presence of one or more of these factors, as opposed to whether the claims "touch[ed] upon matters of state governmental organization."[83]

Several scholars have noticed this aggressive excision of federalism from the doctrine,[84] but it has so far escaped more extensive study.[85] Justice Brennan's opinion leaves little doubt, however, that he both purposely expunged federalism from the doctrine and, by implication, considered it to be a legitimate obstacle to hearing apportionment claims.

II. *LUTHER* TO *BAKER*—FEDERALISM AND THE POLITICAL QUESTION CASES

A. Taylor *&* Marshall *and Collateral Estoppel with State Decisions*

Justice Frankfurter argued in dissent that federalism was not only a legitimate obstacle to hearing apportionment claims, but a historically-grounded one that the Court should not have so cavalierly tossed aside.[86]

[81] Id. at 218.

[82] See, e.g., id. at 210 ("[I]t 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.'"); see also id. ("The nonjusticiability of a political question is primarily a function of the separation of powers."); id. at 217 (noting that, while different types of cases might give rise to a political question, "each has one or more elements which identify it as essentially a function of the separation of powers").

[83] Id. at 218; see also id. at 228–29 ("[W]e emphasize that it is the involvement in Guaranty Clause claims of the elements thought to define 'political questions,' and no other feature, which could render them nonjusticiable. Specifically, we have said that such claims are not held nonjusticiable because they touch matters of state governmental organization.").

[84] Barkow, supra note 14, at 264 (stating that *Baker* held that the political question doctrine only applied to the federal branches, even though "the Court's prior Guarantee Clause cases had suggested that some questions were left to the state political process"); Tokaji & Wolfe, supra note 16, at 972 (arguing that *Baker* eliminated "one of the primary justifications—maybe the primary justification—for the political question doctrine that had existed in prior decades: respect for state sovereignty").

[85] Tokaji & Wolfe, supra note 16, at 978 ("We are not the first commentators to note that *Baker* changed the law by taking federalism off the table as a justification for the political question doctrine. What is interesting is that, while many have noted this aspect of *Baker*, most do not dwell on it—other than to observe that federalism is missing from *Baker*'s test for what counts as a political question. The scholarship on this aspect of *Baker* is limited."). But see Pushaw, Jr., supra note 18, at 1172 (describing how Justice Frankfurter's arguments in dissent were based on concerns over how the Court's decision would affect federalism).

[86] *Baker*, 369 U.S. at 266–67 (Frankfurter, J., dissenting).

In his dissent, he reviewed many of the same cases that Justice Brennan did and reached the opposite conclusion. He argued that "[t]he Court [had] been particularly unwilling to intervene in matters concerning the structure and organization of the political institutions of the States," stating that "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."[87] Fully understanding the role that federalism played in the political question doctrine before *Baker* therefore requires an examination of the cases that Justice Frankfurter cited to support his view that federalism was something the Court did and should consider when deciding these types of cases.

Taylor & Marshall v. Beckham (No. 1)[88] is one of the key cases that Justice Frankfurter referred to when he made the point about the Court's hesitation to intervene in state affairs.[89] *Taylor & Marshall* arose from a disputed election in Kentucky. After the State Board of Election Commissioners declared Republican candidates William Taylor and John Marshall the respective winners in the governor and lieutenant governor races, the losers (Democratic candidates William Goebel and J.C.W. Beckham) challenged the results based on allegations of massive election fraud.[90] Pursuant to Kentucky law, each house of the State General Assembly selected members for a Board of Contests to decide the election; the Board essentially conducted a trial (complete with hearings, evidence, and similar features) and determined that Goebel and Beckham received the highest number of votes.[91]

After Goebel and Beckham were sworn in as Governor and Lieutenant Governor, Beckham sued Taylor and Marshall for usurping the respective offices, alleging that they refused to step down after the Board of Contests decided the race.[92] Taylor and Marshall defended themselves by alleging that the Board's decision was void due to an unlawful con-

[87] Id. at 284.

[88] 178 U.S. 548 (1900).

[89] Indeed, this was one of the cases that Justice Frankfurter cited after the above-quoted passage. See *Baker*, 369 U.S. at 284 (Frankfurter, J., dissenting).

[90] *Taylor & Marshall*, 178 U.S. at 549. Among other complaints, Goebel alleged that the use of extremely thin paper in certain counties destroyed the secrecy of the ballots (because the voters' marks bled onto the back of the ballots), that the governor unlawfully called out the military in order to keep Democrats from voting, and that a judge issued an injunction to force the Louisville election officer to admit unauthorized individuals into the polling place so that they could fraudulently count the votes. Id. at 552 n.1.

[91] Id. at 549–50.

[92] Id. at 550–51. Goebel died shortly after taking office. Id. at 551.

spiracy among its members,[93] which deprived them of property (the offices) without due process of law and denied the state a republican government.[94] This argument did not fare well in the Kentucky courts. The Kentucky Court of Appeals stated that, with respect to the allegations that the Board of Contests was unfairly selected, the state constitution made the General Assembly "the sole tribunal to determine such contests."[95] The Board's decision was therefore final, and the court was "not at liberty to go behind their findings," leading it to affirm the trial court's decision in favor of Goebel and Beckham.[96]

Chief Justice Fuller's opinion affirming the Kentucky court's decision breaks down into two parts. First, Chief Justice Fuller reached the merits of Taylor and Marshall's Fourteenth Amendment claim that they were being deprived of their offices without due process of law. The Court pointed to a long line of cases holding that public offices were not property within the scope of the Due Process Clause.[97] At first glance, this decision seems to deprive *Taylor & Marshall* of much of its force in terms of illustrating the connection between federalism and the political question doctrine. As Justice Brennan pointed out in *Baker*, the Court did not ignore a colorable Fourteenth Amendment violation solely by accepting as final the decision of a nonjudicial actor (the state governmental body).[98]

Justice Brennan's point is well taken—the Court's use of the political question doctrine in *Taylor & Marshall* should not be overstated. However, the second part of the opinion addressing this issue should also not be ignored. The Court flatly rejected the argument that the Guarantee Clause required them to examine whether the actions of the Kentucky General Assembly violated the Constitution, citing the political question doctrine.[99] Most significantly, the Court acknowledged that, notwithstanding its finding that the plaintiffs had no property right in their offic-

[93] Id. at 552. For example, Taylor and Marshall alleged that the Board members were fraudulently selected, that a majority of the members' political loyalties were known in advance, and that entries on the Journal of the General Assembly pertaining to the matter were fraudulent. Id. at 552.

[94] Id. at 557.

[95] Id. at 566.

[96] Id. at 567, 561.

[97] Id. at 575–77.

[98] *Baker*, 369 U.S. at 231–32.

[99] *Taylor & Marshall*, 178 U.S. at 578 ("It was long ago settled that the enforcement of this guarantee belonged to the political department.").

es, their "grounds of complaint may have been in fact well founded."[100] Whatever the merits of their complaint, however, the Court argued that the only remedy available to them was the process defined in the Kentucky Constitution, and that "this proved ineffectual as to them . . . was the result of the constitution and laws under which they lived and by which they were bound."[101] By affirming the decision of the Kentucky Court of Appeals "in declining to go behind the decision of the tribunal vested by the state constitution and laws, with the ultimate determination of the right to these offices,"[102] the Court effectively deployed the "collateral estoppel" prong of the political question doctrine by treating the decision of a state body as final.[103]

Justice Harlan's blistering dissent provides further support for Justice Frankfurter's reading of *Taylor & Marshall*. Arguing that the initial election outcome at least gave Taylor and Marshall a prima facie right to the office, he argued that depriving them of that right illegally injured both Taylor and Marshall and the state as a whole.[104] Arguing that public offices did fall under the purview of the Fourteenth Amendment,[105] Justice Harlan blasted the Court's endorsement of "legislative absolutism," stating that the majority's decision meant that "no redress can be had in the courts when a legislative body, or one recognized as such by the courts," deprived an individual of property without due process of law.[106] Justice Harlan argued that, in addition to violating whatever rights belonged to Taylor and Marshall, the Board's decision also wronged "a large majority" of Kentucky's electors, and he similarly could not "believe that the judiciary [was] helpless in the presence of such a crime."[107] He went on to state that "[t]o say that in such an emergency the judiciary cannot interfere is to subordinate right to mere power, and to recognize the Legislature of a State as above the supreme law

[100] Id. at 580.
[101] Id.
[102] Id. at 578.
[103] See also id. at 580–81 (citing with approval Chief Justice Taney's statement in *Luther* that the Court should "take care not to involve itself in discussions which properly belong to other forums").
[104] Id. at 586 (Harlan, J., dissenting).
[105] Id. at 602.
[106] Id. at 609.
[107] Id. at 608.

of the land,"[108] a clear rejection of the nonjudicial finality that the Court bestowed on the Kentucky Legislature's decision.

Other pre-*Baker* decisions illustrate the Court's hesitancy to entangle itself in state affairs where a state court or legislature had previously acted. For example, in *Walton v. House of Representatives*,[109] the plaintiff, an impeached state officer, sued the Oklahoma officials who conducted his impeachment before the chief justice and state senate for due process and equal protection violations.[110] The Court quickly affirmed the dismissal of the case, citing *Taylor & Marshall* for the point that federal courts sitting in equity did not have jurisdiction over appointment and removal of state officers.[111]

Two years before *Taylor & Marshall*, the Court heard another case in which a North Carolina railroad commissioner (James Wilson) sued the Governor after he suspended Wilson for allegedly violating a certain state law.[112] Wilson argued that the unfairness of the procedures through which the Governor removed him[113] violated the Fourteenth Amendment,[114] but the Court affirmed the decision of the North Carolina Supreme Court rejecting Wilson's complaint. In particular, the Court noted that it "should be very reluctant to decide that [it] had jurisdiction in such a case, and thus in an action of this nature to supervise and review the political administration of a state government by its own officials and through its own courts."[115] The Court's decision not to intervene here, though not invoking the political question doctrine per se, nevertheless aligns with *Taylor & Marshall* in illustrating the Court's pre-*Baker* willingness to defer to the decisions of state governmental bodies where a plaintiff's complaint presented sensitive issues of state political administration.[116]

[108] Id. at 608.
[109] 265 U.S. 487 (1924).
[110] Id. at 489.
[111] Id. at 490.
[112] Wilson v. North Carolina, 169 U.S. 586, 587–88 (1898).
[113] Id. at 588–89. Wilson informed the governor that he would not leave his office until he was removed "by a tribunal other than a self-constituted 'star chamber.'" Id.
[114] Id. at 590.
[115] Id. at 596.
[116] See also id. at 596 ("The jurisdiction of this court would only exist in case there had been, by reason of the statute and the proceedings under it, such a plain and substantial departure from the fundamental principles upon which our government is based that it could with truth and propriety be said that if the judgment were suffered to remain, the party aggrieved would be deprived of his life, liberty or property in violation of

B. Pacific States*: Attacking "a State as a State"*

In addition to relying on cases like *Taylor & Marshall* and *Wilson*, Justice Frankfurter also pointed to *Pacific States Telephone and Telegraph Co. v. Oregon*[117] to bolster his argument that federalism concerns had indeed influenced the Court's decisions in this area. Oregon's constitution allowed its citizens to bypass the legislature and enact laws directly through a popular initiative process.[118] In 1906, Oregon voters employed this provision to enact a law that would tax telephone and telegraph companies (and penalize them for not paying the tax).[119] After Pacific States failed to pay its tax bill on time, the state of Oregon sued to enforce the payment.[120] Pacific States invoked the Fourteenth Amendment, arguing that the initiative and tax measure violated the Equal Protection Clause.[121] It also cited the Guarantee Clause, arguing that the initiative mechanism violated the guarantee of a republican government by substituting a popular ballot measure for the passage of laws through elected representatives.[122]

The Court's decision to hold Pacific States' claim nonjusticiable based on the Guarantee Clause drew simultaneously on separation-of-powers rhetoric and federalism concerns. The Court made clear that Guarantee Clause questions implicated the division of power at the national level. For example, the Court asked whether the provisions of the Guarantee Clause were designed to "obliterate the division between judicial authority and legislative power upon which the Constitution rests? In other words, do they authorize the judiciary to substitute its judgment as to a matter purely political for the judgment of Congress on a subject

the . . . Constitution."). Justice Frankfurter cited *Wilson* as another example of where the pre-*Baker* Court paused before entangling itself in state political organization. *Baker*, 369 U.S. at 284 (Frankfurter, J., dissenting).

[117] 223 U.S. 118 (1912).

[118] Under Oregon's constitution, anyone who wished to put forth an initiative would have to garner the support of a prescribed number of voters to put the proposal on the ballot for the next election. If the proposal's supporters met that requirement, then the proposal would become law if it passed by a popular vote. Id. at 134.

[119] Id. at 135.

[120] Id. at 136.

[121] Id. at 137.

[122] Id. at 137–38. The company argued that democracy and republicanism were two different forms of government, and by authorizing the former, the initiative undermined the latter. Id. at 138. Because the Constitution guaranteed a republican form of government to the states, that provision (according to the company's arguments) necessarily required the passage of laws through representative legislatures, not through popular ballot measures. Id.

committed to it[?]"[123] As in *Luther v. Borden*, the Court emphasized that Congress, not the federal courts, had the ultimate say over whether a state government was republican for purposes of Article IV.[124]

The Court's emphasis on how Guarantee Clause questions lay within the jurisdiction of Congress, and not the federal courts, seemingly provides strong support for Justice Brennan's assertion in *Baker* that the doctrine solely revolves around separation-of-powers concerns. However, a deeper look into the Court's reasoning reveals that federalism was also a driving force behind the Court's insistence that such political questions belong to Congress. In language that Justice Frankfurter would later use in his *Baker* dissent,[125] the Court emphatically asserted that the telephone company's argument against the tax was an attack not on "the tax as a tax, but on the State as a State."[126] The Court further emphasized that Pacific States' argument was "addressed to the framework and political character of the government . . . . It is the government, the political entity, which (reducing the case to its essence) is called to the bar of this court."[127]

The Court's focus on how Pacific States attacked Oregon as a sovereign political entity is significant for two reasons. First, it illustrates that characterizing the political question doctrine, as Justice Brennan did, solely by reference to separation of powers wholly papers over how Congress (and not the courts) must handle these questions. They do not involve the kinds of individual rights that lie within judicial power, but instead implicate the pre-judicial notion of sovereignty itself. Put differently, the political question doctrine implicates the horizontal relationship between Congress and the federal courts partly because these cases can present difficult questions implicating the relationship between the branches of the national government and state governments that are not easily resolved by the judiciary.[128] Justice Brennan later recasted *Pacific States* as nonjusticiable because it rested on a lack of judicially manage-

[123] Id. at 142.

[124] Id. at 151 (stating that the issues in the case were "definitely determined to be political and governmental, and embraced within the scope of the powers conferred upon Congress, and not therefore within the reach of judicial power").

[125] *Baker*, 369 U.S. at 298 (Frankfurter, J., dissenting).

[126] *Pac. States*, 223 U.S. at 150.

[127] Id.

[128] Cf. Tokaji & Wolfe, supra note 16, at 975 (discussing this point in the context of *Luther*).

able standards,[129] and some language in *Pacific States*[130] does illustrate the Court's fear that deciding Guarantee Clause cases on the merits would lead it into a political maelstrom which it could not easily sail out of. However legitimate these fears were, reducing the opinion to a fear about the consequences that would flow from exercising judicial power simply ignores the Court's emphasis on federalism. *Pacific States* drives home how the Guarantee Clause cases that formed a substantial part of the Court's political question jurisprudence necessarily involved both separation-of-powers and federalism concerns—the two issues, like the braided strands that compose a rope, were inextricably linked.

The second key point from *Pacific States* concerns the relationship between Pacific States' Fourteenth Amendment and Guarantee Clause claims. The Court dealt with Pacific States' arguments by collapsing them into one. It noted that the Fourteenth Amendment argument was "merely superficial," and that the Guarantee Clause question formed the core dispute of the case.[131] It emphasized that by "dispelling any mere confusion resulting from forms of expression and considering the substance of things," it was obvious that the Fourteenth Amendment claim was entirely based on the Guarantee Clause claim.[132] The Court acknowledged that had the telephone company argued that it was denied a hearing or that the tax itself was unconstitutional, then there would be a justiciable question that it would reach on the merits.[133] However, the Court's disposal of Pacific States' Fourteenth Amendment claim illustrates a certain wariness at the attempt to "bootstrap" a nonjusticiable Guarantee Clause claim onto a justiciable Fourteenth Amendment claim. This hesitancy to allow a party to use the Fourteenth Amendment as a vehicle for bringing otherwise nonjusticiable claims not only sharply contrasts with Justice Brennan's later handling of the *Baker* plaintiffs'

[129] *Baker*, 369 U.S. at 223.

[130] See *Pac. States*, 223 U.S. at 142 (noting that the ability of courts to declare a state government unconstitutional would necessarily force it "to build by judicial action upon the ruins of the previously established government a new one," or watch the state descend into anarchy).

[131] Id. at 140.

[132] Id.

[133] Id. at 150.

Equal Protection Clause claim,[134] but underscores the pre-*Baker* Court's desire to stay out of cases that it believed were better left to Congress because of the sensitive state interests that they implicated.[135]

C. A Historical Perspective on Federalism and the Political Question Doctrine

Looking back at the array of cases Justices Brennan and Frankfurter argued over in *Baker*, three points become clear. First, Justice Brennan's insistence that the Court's political question jurisprudence had never taken federalism into account is an overstatement in light of cases like *Pacific States*, where the Court was clearly attuned to how deciding the merits might affect the state as a separate political entity.[136] Even in cases like *Taylor & Marshall*, where the Court did address the Fourteenth Amendment question on the merits,[137] it also employed the political

[134] Compare *Baker*, 369 U.S. at 227 ("But because any reliance on the Guaranty Clause could not have succeeded it does not follow that appellants may not be heard on the equal protection claim which in fact they tender."), with id. at 297 (Frankfurter, J., dissenting) (arguing that plaintiffs' Fourteenth Amendment claim was substantively a Guarantee Clause claim).

[135] See Ohio ex rel. Davis v. Hildebrandt, 241 U.S. 565 (1916). This case involved a challenge to Ohio's referendum provision after the people voted down a redistricting plan. Id. at 566. The Court found the claim nonjusticiable based on *Pacific States*, reciting that it was a state decision as to whether it wished to vest legislative power directly in the people, id. at 568–69, and that any Guarantee Clause problems arising from such a decision could only be resolved by Congress, id. at 570 (noting that Guarantee Clause claims were within Congress's "exclusive control free from judicial interference").

[136] Cf. Robert F. Nagel, Separation of Powers and the Scope of Federal Equitable Remedies, 30 Stan. L. Rev. 661, 674 (1978) (discussing the role of federalism in the context of federal courts' equity powers and stating that *Baker*'s holding that separation of powers does not apply to the states did not conform with prior case law).

[137] Justice Brennan used this point to distinguish away *Taylor & Marshall*, and he also pointed to several other cases where the Court had reached the merits on Fourteenth Amendment claims. *Baker*, 369 U.S. at 229. For example, in *Kennard v. Louisiana ex rel. Morgan*, 92 U.S. 480, 481 (1875), the Court examined whether Louisiana law afforded Kennard (a judge booted out of office by the governor) the appropriate procedural protections under the Constitution. The Court considered this question on the merits, concluding that Louisiana law gave "ample provision" for Kennard to seek redress in state court. Id. at 483. While Justice Brennan used *Kennard* as an example of the Court reaching the merits in a case implicating state administrative affairs, *Baker*, 369 U.S. at 229, the *Kennard* Court also stated that "irregularities and mere errors in the proceedings can only be corrected in the State courts. Our authority does not extend beyond an examination of the power of the courts

question argument as a further reason to decline reopening the decision of the Kentucky Board of Contests. Justice Frankfurter's own suggested list of factors underlying the political question doctrine included "the reluctance to interfere with matters of state government in the absence of an unquestionable and effectively enforceable mandate,"[138] a list that certainly seems more reflective of and more respectful to the Court's precedents in this area than Justice Brennan's list.

Second, the concept of nonjudicial finality played a role in the Court's handling of these cases. This point is most obvious in *Taylor & Marshall*, but Justice Frankfurter argued in his *Baker* dissent that this concept undergirded many of the Court's decisions in this area. For example, he stated that in "probing beneath the surface of cases in which the Court has declined to interfere with the actions of political organs of government, of decisive significance is whether in each situation the ultimate decision has been to intervene or not to intervene."[139] In particular, he went on to say that the reason why the Court had refused to intervene was because "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."[140] For Justice Frankfurter, political decisions made by nonjudicial actors at the federal *and* state level warranted respect.

The third point concerns the impact that *Baker* had on the cases dealing with apportionment, state referenda procedures, and state legislative decisions. Perhaps the best way to group these cases is to visualize a dart board. In the center, the apportionment cases form the "bulls-eye" group of political question cases—those cases (like *Colegrove*) that *Baker* di-

below to proceed at all." *Kennard*, 92 U.S. at 481. Therefore, it seems that the *Kennard* Court potentially left open the possibility that, where a state afforded the proper procedures, even if those procedures were not correctly followed, then the decision of a state court (or a tribunal like the Board of Contests in *Taylor & Marshall*) might be afforded finality by a federal court as the Court in *Taylor & Marshall* hinted at. See *Taylor & Marshall*, 178 U.S. at 580 (acknowledging that the plaintiffs' "grounds of complaint may have been in fact well founded," but declining to review the Board's decision anyway).

[138] *Baker*, 369 U.S. at 289 (Frankfurter, J., dissenting). Besides this factor, Frankfurter's list largely tracked Brennan's. For example, he pointed to whether judicially manageable standards existed as another consideration underlying the political question doctrine. Id.

[139] Id. at 285.

[140] Id. at 287.

rectly targeted and essentially overruled by finding the plaintiffs' equal protection claim justiciable. Just outside the bulls-eye lies the next ring of cases covered by the doctrine—those like *Pacific States* that dealt with state referenda procedures. Finally, at the outer ring lie cases like *Taylor & Marshall*—those that involve a mix of merits-based decisions and the use of the political question doctrine. The next Part will ask whether Justice Brennan's excision of federalism from the political question doctrine affects the more peripheral cases in which federal courts are called upon to redress claims implicating states' political organization.

III. BEYOND THE ELECTORAL ARENA—THE IMPACT OF *BAKER* ON STATE GOVERNMENTS

A. Baker *Outside the Electoral Arena*

In order to gauge the consequences of excising the role of federalism from the political question doctrine, the place to begin is with the category of cases most directly affected by *Baker*—cases involving questions of proper legislative apportionment for electoral districts. After *Baker* and, three years later, *Reynolds v. Sims*,[141] plaintiffs could bring complaints alleging unconstitutional apportionment schemes in federal court without the fear that the court would bar them with the political question doctrine.[142] After *Baker*, the argument that federalism considerations should preclude a federal court from reviewing state electoral procedures on the basis of the political question doctrine is no longer viable.[143] While the increased ability of a federal court to involve itself in

[141] 377 U.S. 533, 577 (1964) (holding that a state must make "an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable").

[142] See, e.g., Tokaji & Wolfe, supra note 16, at 978–79 ("By taking respect for state sovereignty off the table as a justification for the political question doctrine, *Baker v. Carr* set the stage for the federal judiciary's more active involvement in the process of drawing legislative districts . . . .").

[143] See, e.g., Vander Linden v. Hodges, 193 F.3d 268 (4th Cir. 1999). The facts of this case resemble those of *Baker*. Citizens of South Carolina sued the state's governor, legislature, and other government officials on the grounds that the state's legislative delegation system unlawfully diluted the voting power of South Carolinians living in more populated areas. Id. at 270–72. The plaintiffs alleged that the system violated the Voting Rights Act and the Fourteenth Amendment's Equal Protection Clause because it unfairly discriminated against

state electoral processes certainly implicates federalism concerns, extensive scholarship in this area already explores these issues and hence reviewing them here would yield little discovery.[144]

Given the scholarly attention to the impact of *Baker* in the electoral arena, the more interesting question is how *Baker* may have affected state administrative and governmental proceedings *outside* of apportionment. In other words, if cases like *Pacific States Telephone and Telegraph Co. v. Oregon*[145] or *Taylor & Marshall v. Beckham (No. 1)*[146] were decided after *Baker*, would a federal court show a similar sensitivity to state affairs as the pre-*Baker* Court did? A hypothetical based on *United States v. Nixon*[147] helps illustrate this point. The facts of *Nixon* are straightforward. Walter L. Nixon Jr., the Chief Judge of the U.S. District Court for the Southern District of Mississippi, was convicted of two counts of making false statements to a federal grand jury and sentenced to prison after a bribery investigation.[148] After refusing to resign from the judiciary, the House of Representatives sent articles of impeachment to the Senate.[149] The Senate, exercising its power under Sen-

African American voters. Id. at 272. In overturning the district court's ruling that the apportionment scheme was constitutional, the Fourth Circuit relegated the state's political question argument to a footnote—"[t]he State's contention that the political question doctrine totally precludes judicial consideration of this case cannot prevail in the face of *Reynolds*, *Baker v. Carr*, and their progeny." Id. at 272 n.2 (citation omitted).

[144] See sources cited supra note 16; see also Daniel Hays Lowenstein et al., Election Law: Cases and Materials 71 (5th ed. 2012) (stating that "[n]ot surprisingly, *Baker*, *Reynolds*, and the other redistricting cases prompted a flood of commentary," and citing sources).

[145] 223 U.S. 118 (1912).

[146] 178 U.S. 548 (1900).

[147] 506 U.S. 224 (1993).

[148] Id. at 226.

[149] Id. at 226–27.

ate Rule XI,[150] formed a committee to investigate the matter.[151] After extensive trial-like proceedings,[152] the Senate impeached Judge Nixon.[153]

After the Senate's conviction, Nixon sued in federal court, alleging that Senate Rule XI violated the constitutional requirement that the Senate "try" impeachments.[154] He argued that the Constitution required the full Senate—not an appointed committee—to hear the evidence and conduct the proceedings in a full judicial trial.[155] The Court rebuffed this argument by invoking the political question doctrine to hold that Nixon's claim was not justiciable because the Constitution committed the impeachment power to the Senate.[156] In addition to pointing to this *Baker* factor, Chief Justice Rehnquist also pointed to how reaching the merits of the case would present two problems. First, judicial review of the merits could impose tremendous problems with finality, as that federal judicial position might remain unfilled while the Court conducted its review and the Senate re-tried Nixon (if required to do so).[157] Second, deciding the case on the merits would pose potential remedial difficulties—could the Court order Nixon to be reinstated or order Congress to create another judgeship if the seat were already filled?[158]

While aspects of *Nixon* might be limited to the relationship among the federal branches of government, we can easily imagine this exact sce-

[150] As its name suggests, Senate Rule XI was not mandated by the Constitution, which prescribes only the following for impeachments: "The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present." U.S. Const. art. I, § 3, cl. 6.

[151] *Nixon*, 506 U.S. at 227. Senate Rule XI provided that in an impeachment trial the Presiding Office of the Senate would "appoint a committee of Senators to receive evidence and take testimony," and that the Senate's impeachment rules would govern the procedure of the committee. Id. at 227 n.1.

[152] For example, the Committee gathered evidence and held four days of hearings involving ten witnesses, including Chief Judge Nixon. Id. at 227.

[153] Id. at 228.

[154] Id.

[155] Id. at 228–29.

[156] Id. at 238.

[157] Id. at 236. The Court noted the finality problem would be worse if the President was impeached, as his successor would "be impaired severely, not merely while the judicial process was running its course, but during any retrial that a differently constituted Senate might conduct if its first judgment of conviction were invalidated." Id.

[158] Id.

nario at the state level. A state judge engages in wrongdoing, is found guilty, is imprisoned, and refuses to give up his judgeship. The state legislature, pursuant to the state constitution but proceeding under its own rules (as the Senate did with Senate Rule XI), conducts trial-like proceedings and impeaches the judge. Like Nixon, the judge files suit in federal court in a last-ditch effort to regain his robes. While our hypothetical state judge could not base his claim on Article I, Section 6, Clause 3, he could bring some sort of due process claim under the Fourteenth Amendment by alleging that the state legislature took his position without due process of law. The federal court would then face the question of whether to reach the merits of the constitutional claim.

Nixon clearly forecloses such a merits inquiry at the federal level due to the Court's invocation of the political question doctrine.[159] Before *Baker*, however, our state judge would likely have a plausible argument based on cases like *Taylor & Marshall* or even *Kennard v. Louisiana ex rel. Morgan*[160] that the political question doctrine also foreclosed a merits inquiry out of respect for the state-level decision-making process. The question remains, however, as to whether *Baker*'s excision of the political question doctrine had ripple effects beyond the core group of apportionment cases that it directly addressed.

*B. Federal Courts and State Governments in the Post-*Baker *Era*

The applicability of *Nixon v. United States* loomed large in *Larsen v. Senate of the Commonwealth of Pennsylvania*,[161] a near carbon-copy of *Nixon* but for the fact that it involved a state judge and a state impeachment. Rolf Larsen, a Pennsylvania Supreme Court Justice elected in

[159] It is important not to overstate this point. As Justice Souter noted in his concurring opinion, one can "envision different and unusual circumstances that might justify a more searching review of impeachment proceedings." *Nixon*, 506 U.S. at 253 (Souter, J., concurring). If the Senate acted "in a manner seriously threatening the integrity of its results," such as deciding Nixon's fate based on a coin flip, then "judicial interference might well be appropriate." Id. at 253–54. He argued that in such a situation, "the Senate's action might be so far beyond the scope of its constitutional authority . . . as to merit a judicial response." Id. at 254. Notwithstanding Justice Souter's point, a fairly large sphere of action would remain to the Senate in which it might adopt less than constitutionally sound procedures, but which would not be "so far beyond" its authority as to merit judicial investigation of the merits.

[160] 92 U.S. 480 (1875).

[161] 152 F.3d 240, 246–47 (3d Cir. 1998).

1977, was beginning his second ten-year stint in 1988 when the Pennsylvania Judicial Inquiry Review Board charged him with violating the Pennsylvania Constitution.[162] After several years of reports and investigations, a grand jury recommended criminal charges after it found that he used the names of his staff to get extra prescription drugs from doctors.[163] Larsen was charged with violating Pennsylvania law. The Pennsylvania Supreme Court relieved him of his duties, and Larsen was convicted in April 1994.[164]

After the conviction, the Pennsylvania House of Representatives adopted seven articles of impeachment against Larsen based on its own investigation.[165] Similar to *Nixon*, the Pennsylvania Senate handled the impeachment according to its own internal rules, under which the President Pro Tempore appointed a six-person committee to conduct hearings and gather evidence.[166] One month after the hearings began, Larsen presented several pretrial motions to the full Senate asking that his trial be held before the full body (instead of the committee), that several senators recuse themselves from the proceedings, and that he be allowed to conduct discovery.[167] The Senate denied Larsen's motions without debate, and several weeks later the full body convicted Larsen in a lopsided vote on one article (it acquitted him on the others), as well as voting unanimously to bar him from holding any Pennsylvania public office in the future.[168]

After the impeachment, Larsen filed a Section 1983 suit in federal district court against the Pennsylvania Senate, the Pennsylvania Supreme Court, and other state bodies.[169] Among other allegations, he stated that the procedures used in his impeachment violated his Fourteenth

[162] Id. at 243.
[163] Id.
[164] Id.
[165] See id. at 243–44. The articles included the aforementioned violations of Pennsylvania's drug laws: The source mentions obtaining prescription drugs, but does not characterize it as a violation of state law in this cited section, as well as lying to the grand jury, engaging in ex parte communications with counsel during a case (and voting for that counsel's position), and giving special treatment to the petitions of friends who contributed money to him. Id. at 243–44.
[166] Id. at 244.
[167] Id.
[168] Id.
[169] Id.

Amendment due process rights, citing almost twenty instances where procedures allegedly fell below the constitutional threshold.[170] He sought compensatory and punitive damages against the individuals in their personal capacity, as well as an injunction against the Senate that would void the impeachment.[171]

A major question on appeal was whether Larsen's claims were even justiciable. The impact of *Baker* in this context—federal court review of state legislative procedures—is crystal clear from the court's analysis of this issue. The Senators admitted in their brief that their justiciability defense was "not so much a 'political question' as it [was] one of federalism and of a proper respect for state functions."[172] The court agreed, reciting Justice Brennan's point in *Baker* that the political question doctrine involved only separation-of-powers questions, not federalism questions.[173] As the court put it, "because the issues raised by Larsen call upon us to review the actions of a state legislature as opposed to the acts of one of the political branches of the federal government, the case does not present a typical 'political question' as that term has come to be defined."[174]

The Senators argued that the same concerns underlying the Court's decision in *Nixon*—the textually demonstrable commitment to another branch, the problems of finding judicially manageable standards to resolve the case, and finality issues—applied equally in this context.[175] As with the Senators' political question argument, however, the court would have none of it. The court followed *Baker* in noting that the Fourteenth Amendment provided sufficient judicial standards to resolve the case,[176] and rejected the other arguments by noting, "There is no indication in *Nixon* . . . that, absent a textual commitment to a coordinate branch of the federal government, concerns for finality and the difficulty in formulating appropriate relief alone would suffice to render a case nonjusticia-

[170] Id.
[171] Id.
[172] Id. at 246 (quoting Brief for Appellant at 24, id. (No. 00-4434)).
[173] Id.
[174] Id.
[175] Id.
[176] Id. at 246–47.

ble."[177] The Senators made one last plea to "Our Federalism," but the court rejected this argument, citing both the lack of precedent for applying the *Baker* factors at the state level and arguing that Section 1983 was premised on the need for greater federal oversight of state governments.[178]

Larsen is not the only case in which a federal court rejected legislators' argument that the political question doctrine precluded review of their actions in the legislature. In *Davids v. Akers*,[179] the plaintiffs were sixteen Democratic members of Arizona's House of Representatives and eight Democratic voters.[180] They alleged that Speaker of the House Akers, a Republican, ignored the recommendations of Democratic members for committee placement and filled the committees in such a way that they composed only thirty-four percent of the memberships, despite the fact that Democrats held forty-five percent of the seats in the House as a whole.[181] The plaintiffs argued that this committee system deprived both the Democratic members and the voters who supported them of their rights under the First and Fourteenth Amendments.[182]

The Ninth Circuit acknowledged from the outset that the prospect of a federal judge telling the speaker of a state legislative house how to assign committee members was "startlingly unattractive."[183] Moreover, the court recognized that the ability of the Arizona Speaker to assign committee members in the way he saw fit according to that body's own rules was a critical governmental function.[184] Nevertheless, the court summarily rejected the defendant's argument that the case was nonjusticiable under the political question doctrine, simply stating that *Baker* "set[] that question at rest."[185]

[177] Id. at 247.

[178] Id. at 247–48. The Court concluded that the Senators were protected by legislative immunity from the suit and therefore dismissed the complaint. Id. at 254.

[179] 549 F.2d 120 (9th Cir. 1977).

[180] Id. at 122.

[181] Id.

[182] Id.

[183] Id. at 123.

[184] Id.

[185] Id.

The Northern District of Georgia's decision in *DeJulio v. Georgia*[186] provides a third example of the dramatic decoupling of federalism from the political question doctrine in the post-*Baker* era in areas outside of the core group of electoral cases. At first glance, *DeJulio* presented exactly the kind of claim that clearly fell within *Baker*'s confines. The plaintiffs, two Georgia voters, sued the State of Georgia, Georgia's House and Senate, and various state officials, alleging that procedures used by the Georgia General Assembly to handle certain types of legislation diluted their votes in violation of the Equal Protection Clause.[187] However, this case involved a twist on the typical malapportionment claim. The plaintiffs did not challenge Georgia's electoral apportionment scheme, but instead argued that the Georgia General Assembly's *internal* rules violated the "one person, one vote" requirement established in *Reynolds*.[188]

In order to handle the large volume of "local legislation"[189] in the General Assembly, the Georgia House and Senate each established a similar system in which each county or municipality had a "local delegation," consisting of those members who represented any part of that jurisdiction.[190] In both the House and the Senate, the local delegation could introduce bills to the whole body, which would then be referred to the proper committee after a majority vote by the members of the local delegation.[191] House rules called for a unanimous vote by the local delegation to report the bill out of committee to the full House for a vote, while the Senate called for only a majority of the local delegation's support.[192] When the local delegation mustered enough support, neither chamber spent much time debating the local bills and instead essentially rubber-stamped them, a custom based on the idea that the full body

[186] 127 F. Supp. 2d 1274 (N.D. Ga. 2001).

[187] Id. at 1281–82.

[188] See id. at 1280.

[189] Id. Because local governments existed under the auspices of the state, the General Assembly had the responsibility of passing "local legislation," which encompassed those bills that only applied to a certain jurisdiction. Id.

[190] Id.

[191] Id.

[192] Id. at 1280–81.

should defer to the local delegations because they had the requisite knowledge of their jurisdiction's needs.[193]

The plaintiffs' problem with this system stemmed from the fact that a member would be considered part of a local delegation even if that person's electoral district only encompassed a small slice of a county or municipality.[194] For example, Fulton County (which includes Atlanta) contained eighteen house districts, meaning that each member from that district had one vote on local matters.[195] The Fulton County House delegation also included a representative from a "split district"—a member whose district included Fulton County voters, but also included voters from a neighboring county.[196] The plaintiffs argued that, in both the House and the Senate, these "split districts" unconstitutionally diluted the votes of those who lived outside of them (that is, within the all-Fulton districts) when compared to the votes of those who voted for a member representing a smaller proportion of the jurisdiction's population.[197]

As in *Davids v. Akers*, the court acknowledged that the federal judiciary should not lightly interfere in these kinds of internal procedural matters.[198] Nevertheless, the court dug into the merits after rejecting the defendants' political question argument. As in *Larsen* and *Davids*, the court stated that the post-*Baker* political question doctrine did not implicate federalism, as it is "based on concepts that underlie the separation of powers among the three branches of the federal government rather than notions of federalism between the federal government and the states,"[199] a point that the court emphasized several times.[200]

[193] Id. at 1281.

[194] Id. at 1282.

[195] Id. at 1283.

[196] Id. In this instance, 14.7% of that member's constituent population came from outside Fulton County. Id.

[197] Id. at 1282.

[198] Id. at 1302 ("It . . . is not the province of the federal judiciary in the name of the equal protection of the laws to interfere in such internal political matters as how a state legislature seeks to reach consensus on local legislation.").

[199] Id. at 1291.

[200] See, e.g., id. at 1292 ("Because this case does not touch issues related to the separation of powers among the federal Executive, Legislative, and Judicial branches, the Court must conclude that this case does not implicate the political question doctrine.").

C. Baker, *State Governments, and the Fourteenth Amendment*

That the *Larsen*, *Davids*, and *DeJulio* courts found for the defendants on the merits[201] might raise the question of whether the inability of a state defendant to invoke the political question doctrine really matters. The first response to this point is that not all plaintiffs are so unlucky.[202] The second (and more important) point is that regardless of a court's sensitivity to the federalism issues as stake,[203] these cases aptly illustrate the consequences of *Baker* in areas outside the electoral arena.[204] Although these cases did not require the courts to fashion relief for the plaintiffs given their outcome, these types of state governmental cases would present similar remedial challenges as other areas of "structural reform" or "public law" litigation.[205] In this regard, perhaps the chief consequence of *Baker* is its potential to put federal courts in the position

[201] *Larsen*, 152 F.3d at 254; *Davids*, 549 F.2d at 127. The *DeJulio* court dismissed the plaintiffs' claims, *DeJulio*, 127 F. Supp. 2d at 1302, and the Eleventh Circuit affirmed. DeJulio v. Georgia, 290 F.3d 1291, 1297 (11th Cir. 2002).

[202] See *Kerr v. Hickenlooper*, 880 F. Supp. 2d 1112 (D. Colo. 2012), where the plaintiffs challenged a tax law passed by voter initiative (as in *Pacific States*) that forbade the legislature from hiking taxes or passing new ones without voter approval. Id. at 1117. The court addressed the political question defense in-depth, concluding that *Pacific States* did not control the case because the plaintiffs only challenged a single measure passed through the initiative system, as opposed to the system as a whole. Id. at 1146. The court thus went on to apply the *Baker* factors, finding that none of them supported dismissal for nonjusticiability. See, e.g., id. at 1148–52 ("Plainly, there is no textually demonstrable commitment of this issue to Congress or to the Executive Department.").

[203] *DeJulio*, 127 F. Supp. 2d at 1302.

[204] See also Gordon v. Texas, 153 F.3d 190, 194 (5th Cir. 1998). The plaintiffs were beachfront property owners who sued various Texas state agencies and Galveston County due to actions that allegedly worsened beach erosion. Id. at 191–92. As the court noted, the plaintiffs only directed their claims against state officials, not federal ones. Id. at 194. The court overturned the district court's dismissal on political question grounds, citing *Baker* for the point that the "potential for a clash between a federal court and other branches of the *federal* government is fundamental to the existence of a political question; a simple conflict between a federal court and state agencies does not implicate the doctrine." Id.

[205] See, e.g., Abram Chayes, The Role of the Judge in Public Law Litigation, 89 Harv. L. Rev. 1281, 1284 (1976) (describing the differences between traditional litigation and public law litigation and noting that in the latter the judge "has increasingly become the creator and manager of complex forms of ongoing relief, which have widespread effects on persons not before the court and require the judge's continuing involvement in administration and implementation").

of refashioning state legislative procedures or reinstating state officials in the same way that courts have had to oversee state institutions ranging from public schools[206] and hospitals[207] to state electoral systems.[208] *Baker* puts federal courts in the position of having to decide these difficult questions, which could crop up in situations similar to those of *Larsen* or *Nixon*.[209]

At first glance, it might seem a simple task to require a state legislature to reinstate a judge (as Judge Larsen asked for), but upon closer review some difficulties crop up. What would happen if the state legislature refused to hold the necessary vote—would they be put in contempt? What if the party leaders could not round up the necessary votes? What if the legislature, before the federal court order, had already replaced Larsen's empty seat with a new judge? The point of these questions is not to suggest that requiring a legislature to reinstate an official is any more burdensome than refashioning a complex state institution like a school or prison.[210] The point is simply that, whatever the normative merits of using federal courts to refashion state institutions to redress constitutional wrongs,[211] at the very least, the history of these cases

[206] See, e.g., Milliken v. Bradley (*Milliken II*), 433 U.S. 267, 289–90 (1977) (upholding a variety of remedial programs that required prospective compliance from state officials).

[207] See Wyatt v. Aderholt, 503 F.2d 1305, 1309, 1314–15 (5th Cir. 1974) (upholding a district court order requiring the state to remedy constitutional violations in a state mental health hospital, and rejecting Alabama's argument that the expenditure of state funds to comply with the programs wrongly invaded "a province of decision-making exclusively reserved for the state legislature").

[208] See Nagel, supra note 136, at 662 n.8 (citing cases).

[209] See California Senate Votes to Suspend 3 Democrats, Politico (Mar. 28, 2014, 1:52 PM), http://www.politico.com/story/2014/03/leland-yee-california-democrats-105139.html. The California Senate voted to suspend three members who faced various criminal charges. Id. If one of the members decided to challenge the legislature's decision or processes on Fourteenth Amendment grounds, then a federal court would very likely reach the merits, as seen in *Larsen*, in contrast to the Court's hands-off approach in *Nixon*.

[210] Cf. Brown v. Plata, 131 S. Ct. 1910, 1923–28 (2011) (describing the difficulties in reforming the California prison system so as to comply with district court orders to end overcrowding).

[211] As one might expect, much scholarly debate exists over the scope and propriety of federal courts using their remedial powers to refashion state institutions. For an example of this debate as it relates to the role that federalism should play in restraining federal courts, compare Nagel, supra note 136, at 664, 667 (suggesting that "separation of powers clearly does impose limitations on the authority of federal courts to undertake executive and legislative

clearly shows that the task is not a simple one[212] and that we should think twice before pushing federal courts into an area of sensitive state functions.[213]

Besides the immediate practical problems that have arisen (and could arise) as a consequence of *Baker*, the decision to remove federalism from the political question doctrine is significant from a historical perspective. *Baker* presaged a series of decisions in which the Court began to incorporate the Bill of Rights via the Fourteenth Amendment, thereby applying the rights to the states.[214] Although *Baker* did not incorporate the Equal Protection Clause (which applies to the states on its own terms), the decision nevertheless reflected the growing dominance of the Fourteenth Amendment in American constitutional law. For example, the shift in how the Court treated the Fourteenth Amendment claim in *Pacific States* (by essentially saying it was just a cover for the Guarantee Clause claim),[215] versus how it treated the *Baker* plaintiffs' claim (by

functions when ordering relief against state officials," and arguing that the assumption that separation of powers and federalism are unconnected is erroneous), with Theodore Eisenberg & Stephen C. Yeazell, The Ordinary and the Extraordinary in Institutional Litigation, 93 Harv. L. Rev. 465, 494–95 (1980) (arguing that federalism does not pose "any fatal obstacles" to institutional reform litigation, and doubting whether federalism concerns "are realistic in the context of present institutional litigation").

[212] *Brown v. Plata* provides a recent example of how arduous and drawn out the reform process can be. The litigation giving rise to *Brown* began twenty-one years before the case itself, when a class of mentally-ill California prisoners sued the state in federal district court. *Brown*, 131 S. Ct. at 1926 (citing Coleman v. Wilson, 912 F. Supp. 1282, 1316 (E.D. Cal. 1995)). The *Brown* Court described the numerous attempts to reform the California prison system during this intervening span, id. at 1923–28, and noted that it could not "ignore the political and fiscal reality behind this case. California's Legislature has not been willing or able to allocate the resources necessary to meet this crisis absent a reduction in overcrowding," id. at 1939. The Court's reference to the California legislature points to how these cases can run up against the reality of state politics.

[213] Cf. Nagel, supra note 136, at 724 (arguing that, in the context of fashioning equitable remedies for state institutions, the courts should "define[] the limits of their own function in the same way that they traditionally define the limits of the functions of the other branches of the federal government").

[214] Ronald Jay Allen et al., Comprehensive Criminal Procedure 91 (3d ed. 2011) ("[I]n the 1960s, a series of decisions incorporated every one of the rights [in the Fourth, Fifth, and Sixth Amendments] except for the right to a grand jury."). Incorporation technically began the year before *Baker* with *Mapp v. Ohio*, 367 U.S. 643 (1961), see Allen et al., supra, but *Baker* preceded the bulk of the incorporation cases.

[215] Pac. States Tel. & Tel. Co. v. Oregon, 223 U.S. 118, 140 (1912).

holding that it was viable under the Equal Protection Clause and distinct from the Guarantee Clause, over Justice Frankfurter's objection)[216] is a microcosm of the broader shift that elevated federal constitutional rights over state interests during this time period.[217]

CONCLUSION

Some scholars argue that, because the post-*Baker* political question doctrine only implicates separation of powers at the federal level, the doctrine should be subsumed into standing doctrine, as the latter is similarly grounded in separation-of-powers concerns.[218] This Note illustrates

[216] *Baker*, 369 U.S. at 209, 237; id. at 297 (Frankfurter, J., dissenting).

[217] The removal of federalism from the political question doctrine and the elevation of the Fourteenth Amendment is not the only area of the Court's political question jurisprudence in which the Court began to chip away at the doctrine's limiting power. The same transition occurred in the context of immigration law. For example, in *Fong Yue Ting v. United States*, 149 U.S. 698, 700, 704 (1893), the plaintiffs challenged an act of Congress that required all Chinese laborers to obtain documentation from the Collector of Internal Revenue. Any Chinese individual who did not obtain such documentation could be arrested and deported, unless he or she could obtain "at least one credible white witness" who could testify that the laborer was a resident of the United States when Congress passed the law. Id. at 699 n.1; see also Curtis A. Bradley & Jack L. Goldsmith, Foreign Relations Law: Cases and Materials 191 (5th ed. 2014) (describing the factual background of the case). The plaintiffs (who had been arrested) argued that the act itself was unconstitutional and that their arrests violated due process of law under the Fifth Amendment. *Fong Yue Ting*, 149 U.S. at 704. The Court refused to pass on the constitutionality of the law or arrests, stating that it "behoove[ed] the court to be careful that it [did] not undertake to pass upon political questions, the final decision of which has been committed by the Constitution to the other departments of the government." Id. at 712. The Court went on to state that the "question whether, and upon what conditions, these aliens shall be permitted to remain within the United States being one to be determined by the political departments . . . the judicial department cannot properly express an opinion upon the wisdom, the policy or the justice of the measures enacted by Congress . . . ." Id. at 731. However, as Curtis Bradley and Jack Goldsmith note, this deference to the political branches has "eroded in recent years" due to the Court's more aggressive use of procedural due process in immigration law. Bradley & Goldsmith, supra, at 155.

[218] Rebecca L. Brown, When Political Questions Affect Individual Rights: The Other Nixon v United States, 1993 Sup. Ct. Rev. 125, 127 ("[T]he political-question doctrine itself—never really a doctrine in any meaningful sense—would be better abandoned at this point as a thorn in the side of separated powers, properly understood. The interests that such a doctrine might or should serve, such as judicial respect for the processes of the coordinate branches and efficient use of judicial capital, can be protected adequately by thoughtful adherence to the principles of standing."); Linda Sandstrom Simard, Standing Alone: Do We Still Need the Political Question Doctrine?, 100 Dick. L. Rev. 303, 306 (1996) ("[D]uring

that we should not be too quick to relegate the political question doctrine to the doctrinal dustbin. As the history of the doctrine shows, a concern with federal courts' involvement in the affairs of state governments informed the Court's application of the doctrine before Justice Brennan transformed it in *Baker*. And as the examples of post-*Baker* cases like *Larsen* illustrate, there are areas of state governance where federal courts could use a doctrinal hook to avoid entangling themselves in state governmental procedures.[219]

Justice Frankfurter argued in his *Baker* dissent that any list of factors for deciding justiciability should include federalism. As he put it, the "reluctance to interfere with matters of state government in the absence of an unquestionable and effectively enforceable mandate,"[220] along with factors similar to those in Justice Brennan's list, had "been decisive of the settled line of cases" dealing with Guarantee Clause challenges to state governmental action.[221] As this Note has shown, Justice Frankfurter's view not only carries historical weight, but his own list of relevant factors in political question cases could better handle cases like *Larsen*. Justice Brennan stated in *Baker*, "The political question doctrine, a tool for maintenance of governmental order, will not be so applied as to

the last several decades, the Court has rarely applied the political question doctrine. In light of these developments, this Article submits that the separation of powers concerns, which have historically led the Court to declare an issue to be a nonjusticiable political question, could lead the Court today to find a lack of standing. Since the political question doctrine apparently retains little or no functional purpose, it should be abolished."). Like the post-*Baker* political question doctrine, separation-of-powers considerations also undergird modern standing doctrine. See Lujan v. Defenders of Wildlife, 504 U.S. 555, 559–61 (1992) (linking the three requirements of standing to separation-of-powers principles); see also Antonin Scalia, The Doctrine of Standing as an Essential Element of the Separation of Powers, 17 Suffolk U. L. Rev. 881, 881 (1983) (arguing that standing is a "crucial and inseparable element" of the principle of separation of powers).

[219] The other potential candidate for fulfilling this function is the abstention doctrine. However, given the high threshold that the Court has set for the application of this doctrine, it is unlikely to be of much practical use for the courts. See, e.g., Cnty. of Allegheny v. Frank Mashuda Co., 360 U.S. 185, 188 (1959) ("The doctrine of abstention . . . is an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it."); see also Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 817 (1976) (describing the "virtually unflagging obligation of the federal courts to exercise the jurisdiction given them").

[220] *Baker*, 369 U.S. at 289 (Frankfurter, J., dissenting).

[221] Id.

promote only disorder."[222] Ironically, his excision of federalism from the political question doctrine could promote the disorder he feared in cases like *Larsen* or *DeJulio*. Reincorporating federalism into the political question doctrine would therefore not only adhere to historical practice, but would also promote the "maintenance of governmental order"[223] between the federal government and the states.

[222] Id. at 215.
[223] Id.