

Constitutional Law - Section 4

Weeks 5 - 6

- I. Checks on Judicial Power continued
 - a. Political Question continued
 - i. Baker v. Carr
 1. The legal issue: whether a state legislature can apportion its representative districts such that there is unequal representation? Does this violate equal protection?
 2. Ultimately the court says that this violates equal protection. But first they had to decide whether this issue was justiciable. Is it a political question?
 - a. The non-justiciability of a political question is primarily a function of the separation of powers.
 - b. How to apportion state representatives is a question for the state legislatures? Maybe?
 - c. But we step on the legislature's toes all the time by overruling their laws when they are unconstitutional. What is the difference, or is there?
 - d. The question calls on the court to make a constitutional interpretation. Do they have the power to exercise their power on this issue, based on what the constitution says? Has this matter been left to the political branches such that judicial involvement would be improper?
 3. The court lays out several indicators of a political question
 - a. Textually demonstrable constitutional commitment of the issue to a coordinate political department;
 - b. Lack of judicially discoverable and manageable standards for resolving the issue;
 - c. Impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion;
 - d. Impossibility of a court's undertaking independent resolution without expressing lack of respect due coordinate branches of government;
 - e. Unusual need for unquestioning adherence to a political decision already made; or
 - f. The potential of embarrassment from multifarious pronouncements by various departments on one question.
 4. This formula is problematic. Even if the sole power to do something is designated to another branch, the court can still review the actions for constitutionality. It is more a question of what level of respect is due to the coordinate branches, rather than whether it is due.
 5. Luther v. Borden:
 - a. There was a rebellion in Rhode Island and there were two competing governments. Resolution of the case depended on

deciding which of the two governments were legitimate.

SCOTUS refused to hear the case.

- b. It is the power of the legislative branch to approve the addition of states to the union. SCOTUS can't decide which gov't is legitimate because they can't admit states to the union.
 - c. But potentially, they could hear a suit against Congress for somehow abusing discretion - taking bribes, etc.
 - d. Textual commitment. Art IV Sec 3. Congress shall have the power to admit states to the union. Congress also has the power to judge its members, the results of elections, etc. Taken all together, there is textual commitment to give this whole job to Congress.
6. In *Baker v. Carr*, the "Guaranty Clause" is not a textually demonstrable commitment to Congress to guarantee representative government. But you could reach the conclusion that the power has been left to Congress.
 7. But, the court decides to hear the case. The state legislature is not co-equal with SCOTUS, so political question doesn't apply!
 8. Notably, SCOTUS will frown on every kind of gerrymandering but political gerrymandering (organizing representation by party, so there is a party majority in every district).
 9. They limit "embarrassment" to foreign policy, they say they can interpret the constitution to find the "judicially discoverable standards for resolving the issue"
- ii. Other examples of political questions
 1. Whether a treaty has been effectively terminated
 2. Whether a war has ended
 3. How long a proposed constitutional amendment is open for ratification
 4. Effect on ratification of amendment of a state's later rejection of an amendment that it earlier ratified
 5. Whether certain Indian groups are recognized as a tribe.
 - iii. Some more comments about the doctrine
 1. There must be a discriminating inquiry into the precise facts and posture of the particular case
 2. Cannot determine whether an issue is a political question by semantic cataloguing
 3. A doctrine of political questions, not political cases.
 - iv. *Powell v. McCormick*
 1. Powell was a NY congressman who was neglecting his duties and abusing his funding. Somehow he was still popular in his district, because he was re-elected. At that point, his fellow house representatives refused to seat him. He sued to recover his seat. McCormick is the speaker of the house.
 2. What is the legal question?
 - a. Is Powell qualified to serve? Or,
 - b. Does congress have the power to deny him his seat?

- c. Mostly the second, but the first is implicated in the problem.
- 3. Congress is given the power to determine whether its members are qualified, but the requirements are 25 years old, citizen for 7 years, and a resident of the state which you represent. But those are requirements, not qualifications. And there is no indication that these are the only qualifications. There are other qualifications/bars: engaging in rebellion, being impeached, being an officer holder of the United States (a general, secretary of state, for example).
- 4. What does McCormick say in favor of his position (we can exclude whoever we want with broad discretion)
 - a. Their power to judge extends beyond the 3 qualifications.
 - b. Historical basis: the English parliament & American Colonial assemblies had been allowed to exclude members for whatever reasons, and Congress itself over the last hundred years had done the same.
 - i. The point about Congress doing it isn't especially persuasive – doesn't mean they were right, just means no one challenged it.
 - ii. The point about the parliament and colonial assemblies has about the same value – although this historical backdrop informed the constitution, we should look to the constitution itself first, and then to the assumptions and intentions of the framers. The majority rejects both arguments.
 - iii. But isn't an established practice by a co-equal branch that interprets their power in some way entitled to some weight? Sure, a little weight. But not a lot. It isn't Congress' job to interpret the constitution.
 - c. The court decides that the only "textually demonstrable" commitment to congress was the three standards: residency, age, citizenship. They hear his case.
 - d. Why couldn't Congress just try to get rid of him by saying he wasn't a resident in New York?
 - i. Because no one lives in the state they represent, they'd all get kicked out.
 - ii. Is his being an inhabitant of New York something that the Court could review?
 - e. What if a recently elected congress-person declined to take an oath. Can Congress refuse their seat?
 - i. It seems that Congress would have to refuse them their seat under the constitution. What if they let them take their seat anyways?
 - ii. Would it be a political question? Probably not. No textually demonstrable assignment to congress.