Nebraska Coalition for Educational Equity & Adequacy v. Heineman, 273 Neb. 531, 731 N.W.2d 164 (2007)-The Political Question Doctrine: A Thin Black Line Between Judicial Deference and Judicial Review

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**Nebraska Coalition for Educational Equity & Adequacy v. Heineman, 273 Neb. 531, 731 N.W.2d 164 (2007)—The Political Question Doctrine: A Thin Black Line Between Judicial Deference and Judicial Review**

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*Michelle L. Sitorius, B.A., 2002, University of Nebraska-Lincoln; M.A., 2005, McGill University; J.D. expected 2009, University of Nebraska College of Law (NEBRASKA LAW REVIEW, Articles Editor, 2008). Thank you to my husband Kane for his patience and perspective during the writing of this Note.*
The line is often very thin between the cases in which the Court felt compelled to abstain from adjudication because of their "political" nature, and the cases that so frequently arise in applying the concepts of "liberty" and "equality."  

I. INTRODUCTION

The power to interpret the Constitution is not vested solely in the judicial branch. Although Marbury v. Madison has been used to assert the preeminence of judicial review and elevate the judiciary to the status of "ultimate interpreter of the Constitution," the Framers anticipated that all branches would have a "concurrent right to expound the [Constitution]." This decision left room for judicial deference to the political branches. However, the judicial branch wields a potent weapon in the exercise of its authority as the courts alone determine when they should defer to another branch or exercise judicial review. The thin line between judicial deference and judicial review is manned exclusively by the justices of the courts.

The political question doctrine is one of the methods for abstaining from the exercise of judicial review. Like other justiciability doctrines such as standing, ripeness, or mootness, the political question doctrine provides the courts with a means to avoid deciding a case on its merits. Although the doctrine was originally tied exclusively to the text of the Constitution, the current doctrine has evolved into two different strands: the classical version and the prudential version. The original, or classical strand, is tied to the determination of whether an issue has been committed to another branch of government or whether an act of another branch exceeds the authority committed to that branch. The prudential strand, on the other hand, suggests that the courts should abstain from judicial review in order to protect the courts' legitimacy, to circumvent legitimizing a questionable policy choice by another branch, and to avoid disputes with the political branches. The ostensible purpose of both the classical strand and the prudential strand of the doctrine is to provide the courts with methods

2. 5 U.S. (1 Cranch) 137 (1803).
6. See Baker, 369 U.S. at 211.
7. See Alexander M. Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics 71, 194 (2d ed. 1986).
for avoiding a decision on the merits of the case, albeit for different purposes.

Although the political question doctrine was fully explicated by the U.S. Supreme Court in *Baker v. Carr*\(^8\) almost fifty years ago, the Nebraska Supreme Court first made use of the doctrine in *Nebraska Coalition for Educational Equity & Adequacy v. Heineman* in 2007.\(^9\) In *Coalition*, the Nebraska Supreme Court addressed a constitutional challenge to the adequacy of Nebraska's funding system for education, holding that the challenge was a non-justiciable political question under four of the criteria articulated by the U.S. Supreme Court in *Baker*.\(^10\) In an attempt to avoid a decision on the merits of the case, the Nebraska Supreme Court sought to resurrect the political question doctrine in its entirety.

The decision in *Coalition* emphasized that the political question doctrine, in its current diminished state, rarely shields the courts from determining the merits of the case. The status of the doctrine can be attributed to three factors. First, since *Baker*, the use of the doctrine by the U.S. Supreme Court has steadily declined.\(^11\) The Court has found a political question in only three cases and has limited its discussion of the doctrine to the first two *Baker* criteria.\(^12\) Second, the first two criteria, which have been tied principally to the classical strand of the doctrine, have been criticized as a thinly veiled attempt to mask the Court's decision on the merits of the case. Although the remaining prudential considerations stated in *Coalition* do present viable arguments for finding a non-justiciable political question, the use of prudential considerations after a decision has been made on the merits of the case is superfluous given that the purpose of the doctrine is already thwarted. Third, the courts are increasingly more confident in asserting judicial authority in regard to interpretation of a variety of issues, to the detriment of the doctrine.

In order to explain the manner in which the political question doctrine produced a decision on the merits in *Coalition*, this Note proceeds in three stages. Part II provides the historical background of the political question doctrine, the creation of the *Baker* criteria, and the aftermath of the *Baker* decision. Part III analyzes the Nebraska Supreme Court's decision in *Coalition* and evaluates the utilization of the classical and prudential versions of the doctrine. Part IV con-

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8. 369 U.S. 186.
10. *Id.* The *Baker* criteria are detailed in full in section II.B., *infra*.
includes the preceding analysis with a brief discussion on the prospects for future usage of the political question doctrine.

II. HISTORICAL BACKGROUND

A. The Political Question Doctrine

The political question doctrine rests on the premise that some constitutional questions are outside the scope of judicial review. Similar to other justiciability doctrines, such as standing, mootness, or ripeness, the doctrine allows the judicial branch to avoid a substantive decision on the merits of the case. In determining whether a political question exists, the courts make a threshold determination of whether a matter has been constitutionally committed to another branch, or whether an action by a coordinate branch surpasses the authority committed to that branch. Thus, the court's decision does not address whether there has been a violation of the constitution—which is a substantive decision—but acknowledges that a constitutional provision may be "entrusted exclusively and finally to the political branches of government for 'self-monitoring'"—which is a procedural decision. This distinction between substantive and procedural decisions can be traced back to the constitutional foundations of the United States.

1. Concurrent Rights and Constitutional Interpretation

In arguing for the ratification of the Constitution, James Madison wrote that all departments—the branches of government—had a "concurrent right to expound the [C]onstitution" and were coequal in "their respective powers." However, Madison recognized that "the exposition of the laws and Constitution devolves upon the Judiciary." Madison's acquiescence was based, in part, on the assumption that constitutional review would be rare and that the judiciary would...
serve as a check against "unwise and unjust measures" and the "tendency in the [l]egislature to absorb all power into its vortex."\textsuperscript{20} Alexander Hamilton posited a more distinct argument in regard to judicial review, contending that the courts would serve as an intermediary between the people and the legislature in order to "keep the latter within the limits assigned to their authority."\textsuperscript{21} The "natural presumption" was that the legislature could not determine its own power unless there was a particular constitutional provision specifying otherwise.\textsuperscript{22} Hamilton's argument hit upon the distinction central to the classical political question doctrine—that "[t]he interpretation of the laws is the proper and peculiar province of the courts."\textsuperscript{23} The rule is preempted only if a provision of the Constitution grants otherwise.

2. The Effect of Marbury v. Madison

Although \textit{Marbury v. Madison}\textsuperscript{24} has come to represent the inception of judicial review, Chief Justice Marshall also advanced the far more pedestrian proposition that political questions are different from legal questions.\textsuperscript{25} Marshall argued that political questions "respect the nation, not individual rights."\textsuperscript{26} Therefore, political questions, not surprisingly, should be examined politically. However, an individual may resort to the courts for satisfaction in instances "where a specific duty is assigned by law, and individual rights depend upon the performance of that duty."\textsuperscript{27} This distinction emphasized the idea that some questions are not proper for judicial review as well as the growing assumption that laws pertaining to individual rights "belonged exclusively to the courts."\textsuperscript{28} Although Marshall could not articulate where the distinction lay between political questions and legal questions, he asserted that "[i]f some acts be examinable, and others not, there must be some rule of law to guide the court in the exercise of its

\begin{footnotesize}
\begin{itemize}
  \item[20.] ROBERT LOWRY CLINTON, \textit{MARBURY V. MADISON AND JUDICIAL REVIEW} 59 (1989) (arguing that the Framers of the Constitution were particularly concerned with implementing institutional protections against the power of the legislature given their experience with the British Parliament and the American legislatures).
  \item[21.] THE FEDERALIST No. 78, at 435 (Alexander Hamilton) (Clinton Rossiter ed., 1999).
  \item[22.] Id.
  \item[23.] Id.
  \item[24.] 5 U.S. (1 Cranch) 137 (1803).
  \item[25.] Deference to the legislature was still the norm during the Marshall Court; the \textit{Marbury} decision would not gain significance until the middle of the twentieth century with the rise of the Warren Court. CLINTON, \textit{supra} note 20, at 102–09, 121–27.
  \item[26.] \textit{Marbury}, 5 U.S. (1 Cranch) at 166.
  \item[27.] Id.
\end{itemize}
\end{footnotesize}
jurisdiction." This decision carries additional gravitas due to the fact that Marshall, and the early Court in general, deferred to the political branches' judgment to a far greater degree than the courts today. For instance, in *Martin v. Mott*, the Court held that the President had the exclusive authority to determine when to call the militia and, consequently, that his authority was not subject to judicial review. The decision in *Martin* was indicative of the general deference afforded to the political branches and helped establish general categories that were considered inappropriate for judicial review. Thus, when dealing with a political question, a court was to examine the view of the political branches and apply that view so that the "expressed view of the political department becomes a rule of decision for the court." By the early twentieth century, the Court had applied this rationale to constitutional questions in cases involving the Guarantee Clause, the enactment of statutes, constitutional enactments, the duration of a state of war, international boundaries, and foreign policy.

3. The Development of Prudential Considerations

Central to the doctrine's development was the proliferation of prudential considerations in the decisions of the Court. In reviewing classical political questions, the Court increasingly turned to considerations outside the text of the Constitution in abdicating judicial review. Prudential considerations played a critical role in the Court's decision-making process, even in the application of the classical version of the doctrine. For instance, in *Luther v. Borden*, the Court faced the issue of determining whether the charter government of Rhode Island complied with the Guarantee Clause. Invoking the classical formulation of the political question doctrine, the Court found that the Guarantee Clause vested final authority with Con-

31. 25 U.S. 19 (1827). Congress had delegated a portion of its authority under Article I, Section 8, Clause 15 of the U.S. Constitution to the President in a 1785 act. *Id.* at 29.
33. *Id.* at 485.
36. 48 U.S. 1, 46 (1849).
37. U.S. CONST. art. IV, § 4 (stating that "[t]he 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").
gress, stating that "its decision is binding on every other department of the government, and could not be questioned in a judicial tribunal." However, prudential considerations clearly played some role in the decision, as Chief Justice Taney articulated numerous consequences stemming from invalidating the Rhode Island government and its actions since inception. Similarly, when the Court faced the same issue in *Pacific States Telephone & Telegraph Co. v. Oregon*, Chief Justice White minutely detailed the practical, undesirable consequences of deciding the issue on the merits, instead of simply relying on *Luther* or constitutional language.

Following President Roosevelt's proposed Court-packing bill, the Court used prudential rationales outlined in *Luther* and *Pacific States* as justification to defer to Congress in regard to New Deal legislation and thereby further expanded the prudential strand of the doctrine. For instance, in *Coleman v. Miller*, Chief Justice Hughes found that the Court could not determine how long a constitutional amendment's proposal could be left open for ratification. Therefore, until Congress proposed the limits for amendment ratification, the Court lacked the authority to review the issue on its merits or to establish these limits themselves. Prudential considerations, such as those used in *Coleman*, thereafter became commonplace.

Alexander Bickel, perhaps the most well-known advocate of the prudential approach, argued that the political question doctrine provides a means to maintain the courts' legitimacy and to ensure that the courts have the opportunity for principled decision-making at the appropriate time. Bickel argued that techniques for not deciding a case on its merits "allow leeway to expediency without abandoning principle." If there is no judicial review on the merits, no check on

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38. *Luther*, 48 U.S. at 42.
39. *Id.* at 38–39.
40. 223 U.S. 118, 141–42 (1912).
41. In 1937, U.S. President Franklin D. Roosevelt proposed legislation that, among other things, would have allowed the President to appoint a new justice for each justice over the age of seventy. The legislation—the Judiciary Reorganization Act of 1937—was a response to numerous Supreme Court decisions during that time overturning Roosevelt's New Deal legislation. The Judiciary Reorganization Act of 1937 is commonly referred to as the Court-packing bill. See Barry Cushman, *Rethinking the New Deal Court*, 80 Va. L. Rev. 201, 208–10 (1994).
43. See, e.g., *Colegrove v. Green*, 328 U.S. 549, 552–56 (1946) (holding that the Court lacked the ability to remap the Illinois districts and that any failure by Congress to address a failure in representation was to be addressed by the people).
45. *Id.*
47. *Bickel*, supra note 7, at 71.
48. *Id.*
political action, and no legitimization of existing policies in regard to an issue, then the courts have the opportunity to "elicit partial answers and reactions from the other institutions, and to try tentative answers itself."\textsuperscript{49} For instance, in the decade prior to Bickel's writing, the Court had adhered to the principle that the "races must not be segregated by authority of the state."\textsuperscript{50} However, Bickel argued that the Court's dismissal of \textit{Naim v. Naim}\textsuperscript{51} was a prudent choice given the recent decision in \textit{Brown v. Board of Education},\textsuperscript{52} which furthered the principle of integration.\textsuperscript{53} For Bickel, uncompromising adherence to principle was unpalatable for society, and methods for circumventing judicial action were not only wise but also reflected the discretion normally utilized by the courts.\textsuperscript{54} Thus, for advocates of the prudential version of the political question doctrine, the courts' discretion in invoking the doctrine, when compared to the general act of constitutional interpretation, is "something greatly more flexible."\textsuperscript{55}

Bickel's argument flew in the face of advocates of the classical political question doctrine, such as Herbert Wechsler, who argued that the most the doctrine could possibly infer was that the courts must determine whether the issue was constitutionally committed to another branch of government.\textsuperscript{56} For Wechsler, the political question doctrine represented nothing more than a normal exercise of judicial review, using the "standards that should govern the interpretive process generally."\textsuperscript{57} The caveat to Wechsler's argument was that the only proper reason for abstaining from judicial review was that the "autonomous determination" of the issue rested with another branch.\textsuperscript{58} The judicial process, including the political question doctrine, needed to be genuinely principled, "transcending the immediate result that is achieved," regardless of the consequences of that decision.\textsuperscript{59} Unlike Bickel, Wechsler argued that the duty of the courts to interpret the Constitution does not grant the courts the "discretion to

\begin{itemize}
\item \textsuperscript{49} \textit{Id.} at 194, 240.
\item \textsuperscript{50} \textit{Id.} at 240.
\item \textsuperscript{51} 90 S.E.2d 849 (1956). The issue in \textit{Naim} was the constitutionality of an antimiscegenation statute. \textit{Bickel, supra} note 7, at 174.
\item \textsuperscript{52} 347 U.S. 483 (1954) (finding the segregation of educational facilities to be a violation of the Equal Protection Clause of the Fourteenth Amendment to the Constitution).
\item \textsuperscript{53} \textit{Bickel, supra} note 7, at 174.
\item \textsuperscript{54} \textit{Id.} at 64, 125–26. Bickel cites the denial of certiorari and dismissal of appeals as two common methods of avoiding judicial review.
\item \textsuperscript{55} \textit{Id.} at 125–26.
\item \textsuperscript{56} Herbert Wechsler, \textit{Toward Neutral Principles of Constitutional Law}, 73 \textit{Harv. L. Rev.} 1, 7–8 (1959).
\item \textsuperscript{57} \textit{Id.} at 9.
\item \textsuperscript{58} \textit{Id.} at 7–8.
\item \textsuperscript{59} \textit{Id.} at 15.
\end{itemize}
abstain or intervene” at will.60 Thus, the prudential strand of the doctrine only opened the door to decisions based on considerations outside the Constitution.61 The controversy between Bickel and Wechsler centered primarily on the basis on which the political question doctrine is invoked and, ultimately, the method necessary to achieve principled decision-making. It was within the context of this debate that the Court decided Baker v. Carr, creating a principled structure for evaluating the application of the doctrine that would eventually result in the diminution of prudential considerations altogether.62

B. Baker v. Carr: Creating the Criteria

In 1962, the Warren Court addressed the justiciability of a suit alleging that a state apportionment statute violated the Equal Protection Clause in Baker v. Carr.63 In finding the issue justiciable and, thus, reviewable on its merits, Justice Brennan catalogued numerous cases that encapsulated the characteristics that placed an issue under the doctrine’s “umbrella.”64 These six characteristics, which independently indicate the presence of a political question, are

[a] textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the determination of a kind clearly for nonjudicial discretion; or the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.65

The court found that one of these criteria must be present in order for the court to abdicate judicial review.66

In extracting the doctrine’s characteristics, the Court emphasized that the doctrine is “primarily a function of the separation of powers.”67 As such, the doctrine involves a “delicate exercise in constitutional interpretation” to determine whether a matter has been committed to another branch or whether an action by a coordinate branch surpasses the authority committed to that branch; this reflects

60. Id. at 9.
61. Id.
63. 369 U.S. 186 (1962).
64. Id. at 226. Brennan’s review of previous political question cases included issues addressing foreign relations, dates of duration of hostilities, validity of enactments, the status of Indian tribes, and republican forms of government.
65. Id. at 217.
66. Id.
67. Id. at 210.
the classical version of the doctrine. Referring back to Coleman \textit{v. Miller}, the Court also stated that dominant considerations in determining if there is a political question included the finality of the actions of the political department and the presence of satisfactory criteria for the judicial determination; these criteria are tied to the prudential version of the doctrine. Correspondingly, the first two \textit{Baker} criteria have been considered the classical factors, and the remaining four criteria have been identified with the prudential factors. \textit{Baker} wove the classical and prudential strands of the doctrine together in a cohesive legal standard that appeared, on the surface, to provide the courts with flexibility in utilizing the doctrine. Shortly after \textit{Baker} was decided, Bickel stated that the point of \textit{Baker} was, "not what function the Court is to perform in legislative apportionment . . . but whether it can play any role at all." Despite this optimism, the decision would eventually mark the decline of the doctrine.

The Court's decision in \textit{Baker}, as well as its subsequent decision in \textit{Powell \textit{v. McCormack}}, led some to believe that the political question doctrine was in jeopardy due to the expansive view of judicial review in these cases. Whatever the intentions of the Court were in articulating the \textit{Baker} criteria, the years following the case only saw three instances in which the Court found a political question. In addition, analysis under the \textit{Baker} criteria has been limited almost exclusively to the classical aspects of the doctrine.

\textbf{C. Baker's Aftermath}

1. Developing the \textit{Baker} Criteria

Following \textit{Baker}, the Court began to develop the meaning of the decision's criteria. However, there was a marked tendency to evaluate only the first two criteria—whether there was a "textually demonstrable constitutional commitment of the issue to a coordinate political de-

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68. \textit{Id.} at 211. In this section of the opinion, Brennan refers to the Court as the "ultimate interpreter of the Constitution," indicating the Warren Court's shift away from the foundational concept of joint interpretive power.


70. \textit{See Barkow, supra} note 11, at 265.


72. BICKEL, supra note 7, at 196.

73. \textit{See, e.g., Tushnet, supra} note 62, at 1208.


75. Nagel, supra note 71, at 647 (citing PAUL M. BATOR ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 235 (2d ed. 1973)).


partment; or a lack of judicially discoverable and manageable standards for resolving it." 78 For instance, in *Nixon v. United States*, Chief Justice Rehnquist listed only the first two *Baker* criteria as relevant to the Court’s analysis and restricted the discussion to the textual meaning of the Impeachment Clause. 79 Furthermore, following *Powell v. McCormack*, the Court no longer delved into an analysis of the *Baker* criteria when a matter was justiciable, but instead simply denied the applicability of the doctrine. 80 Although the Court would make some mention of concerns relating to the prudential criteria listed in *Baker*, in no case were these criteria the determining factors. 81 In fact, the Court would state that the *Baker* criteria were "probably listed in descending order of both importance and certainty." 82 Thus, the primary emphasis in evaluating whether the political question doctrine is applicable in a case has been on the first two elements.

In evaluating whether there is a textual commitment to another branch, the Court has held that the text in question must be interpreted in order to determine to what extent the issue is textually committed to another branch or, in other words, the scope of that branch’s authority. 83 As noted by Justice White,

the issue in the political question doctrine is not whether the constitutional text commits exclusive responsibility for a particular governmental function to one of the political branches . . . . Rather, the issue is whether the Constitution has given one of the political branches final responsibility for interpreting the scope and nature of such a power. 84

The fact that the text names one department as having the responsibility to carry out a function does not necessarily mean that the provision is beyond judicial review on the merits.

For instance, in *Powell v. McCormack*, the Court addressed the issue of whether Congress had the final say in determining the qualifications of its members. 85 Despite a broad, constitutional grant of

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78. Baker v. Carr, 369 U.S. 186, 217 (1962); see also Vieth, 541 U.S. 267 (concluding "that political gerrymandering claims are non-justiciable because no judicially discernable and manageable standards for adjudicating such claims exist"); *Nixon*, 506 U.S. 224 (quoting *Baker*, 369 U.S. at 217); *Goldwater v. Carter*, 444 U.S. 996 (1979) (adhering strictly to the classical political question doctrine, with a plurality of the Court finding that constitutional silence left the issue of whether the President could abrogate a treaty without Senate approval up to the political branches); *Powell*, 395 U.S. 486 (also quoting *Baker*, 369 U.S. at 217).

79. 506 U.S. at 238.


82. Vieth, 541 U.S. at 278.


84. See *Nixon*, 506 U.S. at 240 (White, J., concurring).

85. 395 U.S. 486.
authority to Congress,\textsuperscript{86} the Court found that the textual commitment was restricted by "the standing qualifications prescribed in the Constitution."\textsuperscript{87} In turn, the Court reviewed the case on its merits, determining that Congress had acted outside of its proscribed constitutional authority.\textsuperscript{88} Similarly, in \textit{INS v. Chadha}, the textual commitment to Congress to establish a "Rule of Naturalization" did not prohibit the Court from reviewing whether Congress had chosen a "constitutionally permissible means of implementing that power."\textsuperscript{89} From these decisions, it does not seem that the first Baker criterion is determined by a textual commitment allocating responsibility of a government function to another branch. The Constitution rarely, if ever, explicitly commits final responsibility of the interpretation of a provision to a particular department. Instead, a political question must be inferred from the text and structure of the Constitution.\textsuperscript{90}

Analysis of the first criterion has varied in instances where the Court has applied the political question doctrine. In \textit{Gilligan v. Morgan}, which challenged the appropriateness of training and weaponry of the Ohio National Guard, the Court refused to assume the responsibility of another department's function of continuing surveillance over the National Guard based on the textual commitment of the issue to Congress.\textsuperscript{91} The Court did not need to analyze the textual commitment of the provision because the plaintiffs sought to have the Court take over the function of training the National Guard, which is a function for the political branches. In connection, the Court stated that the decision did not "hold nor imply that the conduct of the National Guard is always beyond judicial review or that there may not be accountability in a judicial forum for violations of law for specific unlawful conduct by military personnel."\textsuperscript{92} However, in \textit{Nixon}, the Court faced a quite different issue of whether the process used by the Senate

\textsuperscript{86} U.S. Const. art. I, § 5, cl. 1 ("Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members.").

\textsuperscript{87} Powell, 395 U.S. at 550. The qualifications include those set out in art. I, § 2, cl. 2; art. I, § 3, cl. 7; art. I, § 6, cl. 2; and § 3 of the Fourteenth Amendment—none of which deemed Powell ineligible. \textit{Id.} at 521.

\textsuperscript{88} \textit{Id.} at 519–50.

\textsuperscript{89} 462 U.S. 919, 940–41 (1983).

\textsuperscript{90} Nixon v. United States, 506 U.S. 224, 240 (1993) (White, J., concurring); see also Redish, supra note 5, at 1042–43 (noting that whether the court's review role is expressly referenced in the text of the constitutional provision is irrelevant because judicial review is never mentioned in the Constitution).

\textsuperscript{91} 413 U.S. 1, 11–12 (1973); see also U.S. Const. art. I, § 8, cl. 16 (giving Congress the power to "provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress").

\textsuperscript{92} \textit{Gilligan}, 413 U.S. at 11–12.
in impeachment trials complied with the Constitution.93 Thus, the Court was evaluating whether a legislative action abided by the Constitution. After an extensive review of the meaning of the words "sole" and "try," as well as the "historical and contemporary understanding of the impeachment provisions," Justice Rehnquist's decision turned on the fact that there was no textual limit on the word "try."94 The Senate procedures for trying Judge Nixon did not "transgress identifiable textual limits."95 It is worth noting that in the concurring opinion, Justice White argued that the case could have been determined on its merits because "try' presents no greater, and perhaps fewer, interpretive difficulties than some other constitutional standards."96 Although the Court has been clear that it will not take on the constitutional functions of another branch, as in Gilligan, the Court is amenable to reviewing the constitutional text to determine the scope of legislative or executive authority, as in Nixon.

Connected to the textual inquiry of the first factor is the second Baker criterion—the lack of judicially discoverable and manageable standards. Although the lack of principled standards can be linked to the prudential considerations in Coleman v. Miller,97 the Court has used this criterion to support the first Baker factor. For instance, the Court in Nixon held that the "lack of judicially manageable standards may strengthen the conclusion that there is a textually demonstrable commitment to a coordinate branch."98 In finding a lack of "identifiable textual limits" in the Impeachment Clause or in any other constitutional provision, the Court was supported in holding that there were no limits to the scope of the Senate's authority.99

Despite the fact that the Court has used the second criterion predominantly to prop up the first criterion, at times the Court has also used this factor in support of prudential considerations. For instance, the Court has simply argued that the lack of manageable standards makes it prudent to abdicate judicial review.100 Most recently, the Court has argued that the possibility of judicially discoverable

93. 506 U.S. 224.
94. Id. at 230–33, 238. The constitutional impeachment provision reads in part, "[t]he Senate shall have the sole Power to try all Impeachments." U.S. Const. art. I, § 3, cl. 6.
96. Id. at 247 (White, J., concurring) (articulating the general critique that the classical strand of the doctrine is really no different than a decision on the merits); see infra text accompanying notes 108–12.
97. 307 U.S. 433, 453–54 (1939) (holding that if Congress proposes ratification of an amendment to the Constitution and does not specify a date for ratification by the states, only Congress can determine whether ratification is timely); see supra text accompanying notes 44–45, 69.
98. 506 U.S. at 228–29.
99. Id. at 238.
100. See, e.g., Colegrove v. Green, 328 U.S. 549, 552–56 (1946).
standards cannot substitute for the actual articulation of these standards. In *Vieth v. Jubelirer*, the Court held that the Constitution provides no "judicially enforceable limit on the political considerations that the States and Congress may take into account when districting." Overturning its earlier decision in *Davis v. Bandemer*, the Court found that no workable standard had been articulated in the eighteen years since the decision and, therefore, the Court would not adjudicate political gerrymandering claims.

However, the use of this *Baker* criterion is rare and the Court has held elsewhere that "a judicial system capable of determining when punishment is 'cruel and unusual,' when bail is '[e]xcessive,' when searches are 'unreasonable,' and when congressional action is 'necessary and proper' for executing an enumerated power" is also able to make ordinary constitutional judgments. The Court has also used the second criterion to establish a prudential rationale for avoiding a decision on the merits. Yet, the Court is more apt to identify some meaning in the constitutional language at issue and to use the second criterion to show a textual commitment to another branch.

Although the decision in *Powell* exhausted significant space to the discussion of the *Baker* criteria, in subsequent cases the Court has (1) simply refuted the applicability of the political question doctrine, (2) affirmed the Court's authority to interpret the provision, and (3) decided the case on the merits of the issue without much discussion. For instance, in *United States v. Munoz-Flores*, the Court found all six criteria of the political question doctrine inapplicable and evaluated the case on its merits in order to determine whether the act in question was a "Bill for raising Revenue" within the meaning of the Origination Clause. The Court argued that the interpretation of statutes and legislative materials was familiar and central to the judiciary and its function. Similarly, in *Japan Whaling Ass'n v. American Cetacean Society*, the Court held that it had the power to interpret treaties and executive agreements—in fact, "interpreting congressional legislation is a recurring and accepted task for the federal

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102. *Id.* at 305.
103. 478 U.S. 109 (1986) (finding political gerrymandering claims justiciable but disagreeing on what the standard was for reviewing these claims).
104. *Vieth*, 541 U.S. at 306.
108. 495 U.S. 385 (addressing whether an act requiring federally convicted persons to pay a special assessment violated the Origination Clause).
109. *Id.* at 387–88; *see also* U.S. Dep't of Commerce v. Montana, 503 U.S. 442 (1992) (holding that interpreting the apportionment provisions of the Constitution was within the competency of the courts).
Furthermore, the Court found that its decision called for, "applying no more than the traditional rules of statutory construction, and then applying this analysis to the particular set of facts presented below." Considering that only three cases have been found to include a political question, it is clear that the Court does not find many provisions that are textually committed solely to another branch or devoid of some judicially determinable meaning.

As demonstrated, in the aftermath of Baker, the political question doctrine evolved into a substantive evaluation of the constitutional text in question. The first two criteria allowed the Court to evaluate the text of the relevant provision to determine what limits, if any, to the political branches' authority were available and, consequently, whether an act by a political actor was constitutional. This evaluation marked a significant difference in the use of the classical version of the doctrine. For instance, in decisions such as Martin v. Mott and Luther v. Borden, the Court's rationale in abdicating judicial review was simple: "the inquiry proposed to be made belonged to the political power and not to the judicial . . . it rested with the political power to decide." Therefore, whereas the doctrine was previously used as a threshold for determining whether to engage in judicial review prior to any interpretation of the Constitution, after Baker, the Court used the doctrine to "interpret the Constitution to say one thing rather than another." The justices engage in judicial review of the text of the Constitution—interpretation of the text—and, therefore, there is no need to invoke the political question doctrine because the justices are already determining the meaning of the text. In addition, the last four prudential criteria are virtually ignored, which places further emphasis on the first two criteria.

2. The Vitality of the Doctrine After Baker

There are three central reasons that, following Baker, a debate regarding the vitality of the political question doctrine arose. First, the Court has focused primarily on the first two Baker criteria, while largely ignoring the last four prudential considerations. Second, in the rare case where the Court did find a political question, the Court's rationale seemed to be a thinly veiled decision on the merits of the case. Finally, the Court was increasingly more confident in assert-
ing judicial authority in regard to interpretation of a variety of issues, to the detriment of the doctrine.119

The Court has not explicitly rejected the use of prudential considerations. In fact, the Court has noted prudential considerations in its decisions concerning political questions.120 However, these decisions have not hinged on Baker's prudential criteria. The Court is more likely to argue that "one of the Judiciary's characteristic roles is to interpret statutes, and we cannot shirk this responsibility merely because our decision may have significant political overtones."121 Similarly, the Court has held that a judicial determination that a law is unconstitutional cannot involve the "lack of respect" used in Baker, because, under this rationale, judicial review in general would be prohibited.122 Although prudential considerations may be taken into account at some point in the future, the doctrine has been effectively limited to the first two criteria.123

Central to the debate over the viability of the doctrine is the argument that many, if not all, political question cases rely on substantive legal conclusions; either (a) the Constitution gives a political branch discretion to act and that branch has not overstepped this discretion, or (b) there are no constitutional limits to the political branch's discretion.124 In either case, there is no need to invoke the political question doctrine when the courts are merely applying "neutral principles of judicial review."125 The courts are merely going through the motions of abdicating their authority to review a political actor's decision rather than actually deferring to the branch in question on procedural grounds.126 Conflating the distinction between substantive and procedural deference is confusing primarily because the courts' intentions are unclear.127 First, if the court has made a decision on the merits, it has also either condoned or rejected the decision of a political branch. Second, if the court has found the issue non-justiciable, then it "fore-

119. See Tushnet, supra note 62, at 1208.
123. Tushnet, supra note 62, at 1213.
125. See Redish, supra note 5, at 1042.
127. The decision in Nixon represents substantive deference; the Court could not associate any particular meaning with the word "try" so it deferred to the method the Senate had devised for impeachment proceedings. Nixon v. United States, 506 U.S. 224, 229–30 (1993). The decision in Luther represents procedural deference; the Court refused to review the constitutionality of Rhode Island's government, thereby avoiding any inquiry into the issue. Luther v. Borden, 48 U.S. 1, 46–47 (1849).
closes a range of potential litigation and signals once and for all that there is no judicial remedy available for any official misconduct within a certain area."

These issues are evident in Nixon, where the Court argued that "[t]he word try, both in 1787 and later, has considerably broader meanings than those to which petitioner would limit it," and, therefore, there was no "identifiable textual limit on the authority which is committed to the Senate." In effect, Nixon evaluated whether the Senate abused its discretion and, subsequently, "reject[ed] on the merits Judge Nixon's claim that he had not received a trial within the meaning of the Impeachment Clause," while maintaining that the political question doctrine was applicable and, thus, the Court was not evaluating the substance of the petitioner's claim.

Some scholars have argued that the only meaningful political question challenge would arise when a provision was interpreted as self-monitoring and, thus, not subject to judicial review at all. When faced with a political question challenge, a court would ask, "Who gets to decide what the right answer to a substantive constitutional question is?" Thus, the doctrine would only apply when the legislative or executive branch had complete and final authority to determine the constitutional meaning of the provision in question. In the alternative, or at the very least, a court would consider whether another branch could interpret the Constitution as well as the judiciary.

However, the contemporary Court has not been inclined to recognize limits to its authority in interpreting the Constitution. The Court is unlikely to find that a constitutional provision allocates complete interpretational authority to another branch. This condition is evidenced by the Court's reluctance to use the political question doctrine, even when it may be expedient, as well as the numerous cases where the Court has held that the issue is "only an ordinary question of constitutional interpretation of the sort courts routinely answer." Correspondingly, the Court has reviewed cases involving due process, equal protection, and free speech, indicating the Court's willingness to develop standards if there are none readily assessable in the constitutional language.

The doctrine's viability has been

129. 506 U.S. at 229.
130. Id. at 238.
131. Tushnet, supra note 62, at 1211.
133. Tushnet, supra note 62, at 1207.
134. Id. at 1207–08.
135. See Barkow, supra note 11, at 300–19; Nagel, supra note 71, at 659–64.
139. Redish, supra note 5, at 1046.
called into question not only because of the Court's self-described status as the "ultimate interpreter" of the Constitution but also because of its abdication of prudential concerns and use of the doctrine in cases where a decision on the merits has occurred. Thus, following Baker, the use and power of the political question doctrine has waned.

D. The Political Question Doctrine and the Nebraska Judiciary

Nebraska Coalition for Educational Equity & Adequacy v. Heine-man presented the first case in which the Nebraska Supreme Court explicitly accepted the political question doctrine. The court held that the doctrine had previously been "implicitly recognized" in State ex rel. Steinhe v. Lautenbaugh. However, the Baker criteria had not been adopted by the Nebraska Supreme Court at that time. Thus, the applicability of the political question doctrine in Coalition was an issue of first impression.

The Coalition plaintiffs—which included the forty-three school districts of the Nebraska Coalition for Educational Equity and Adequacy, two separate school districts, and four individual citizens—challenged the constitutionality of Nebraska's education funding system. The Coalition alleged that the funding system was inadequate and, as such, violated the religious freedom clause and the free instruction clause of the Nebraska constitution. The Coalition sought (1) a declaration that Nebraska's [c]onstitution requires "an education which provides the opportunity for each student to become an active and productive citizen in our democracy, to find meaningful employment, and to qualify for higher education; (2) a declaration that Nebraska's education funding system

140. Baker v. Carr, 369 U.S. 186, 211 (1962); see also Cooper v. Aaron, 358 U.S. 1, 18 (1958) (holding that the state legislature and governor were bound to obey the Supreme Court's interpretation of the Fourteenth Amendment as applied to racial segregation in schools because the "federal judiciary is supreme in the exposition of the law of the Constitution").
141. 273 Neb. 531, 731 N.W.2d 164 (2007).
142. 263 Neb. 652, 642 N.W.2d 132 (2002). Lautenbaugh addressed the issue of whether the election commissioner exceeded his authority and abused his statutory power. In finding the issue justiciable, the court stated that its determination was simply the proper interpretation of applicable statutes and, thus, was not a political question. Id. at 660, 642 N.W.2d at 139.
143. Coalition, 273 Neb. at 545, 731 N.W.2d at 176.
144. Id. at 535–36, 731 N.W.2d at 169–70.
145. NEB. CONST. art. I, § 4. The relevant language of the provision reads, "Religion, morality, and knowledge, however, being essential to good government, it shall be the duty of the Legislature to pass suitable laws . . . to encourage schools and the means of instruction." Id.
146. NEB. CONST. art. VII, § 1. The language of the provision reads, "The [l]egislature shall provide for the free instruction in the common schools of this state." Id.
is unconstitutional; and (3) an injunction enjoining state officials from implementing the system."\textsuperscript{147}

The Coalition's claims were not new. Since the early 1970s, educational funding has been the subject of increased litigation.\textsuperscript{148} The basis of the Coalition's suit fell in line with the third wave of school financing litigation, which has focused on the adequacy of the education provided to students by the state.\textsuperscript{149} Whereas the first two waves of litigation "sought to reduce spending disparities and focused on traditional input measures such as per-pupil and overall educational spending,"\textsuperscript{150} the third wave challenged the sufficiency of school funding by arguing for a minimal level of education based on the education clauses in the state constitution.\textsuperscript{151}

Contrary to the success this type of litigation enjoyed in other states, the district court and the Nebraska Supreme Court found the Coalition's claims to be a non-justiciable political question.\textsuperscript{152} The court stated that the primary issue was whether the court could determine the case on the merits "without violating the separation of powers clause,"\textsuperscript{153} which prohibits the court "from hearing a matter the determination of which the [c]onstitution entrusts to another coordinate department."\textsuperscript{154} Consequently, the court decided to evaluate this issue using the Baker criteria. The court held that the Coalition's claim met four of the Baker tests. There was (1) a textually demonstrable constitutional commitment of the issue to a coordinate department, (2) a lack of judicially discoverable and manageable standards for resolving the issue, (3) an impossibility of deciding the issue without making a policy determination clearly requiring non-judicial discretion, and (4) an impossibility of resolving the issue without

\textsuperscript{147} Coalition, 273 Neb. at 534, 731 N.W.2d at 169.
\textsuperscript{149} Id. at 1152–53.
\textsuperscript{150} Id. at 1153.
\textsuperscript{151} Id. at 1162–63. In some cases, the state supreme court has effectively invalidated the existing financing system for the state and required the respective legislature to reform the entire system. See, e.g., Rose v. Council for Better Educ., 790 S.W.2d 186 (Ky. 1989).
\textsuperscript{152} Coalition, 273 Neb. at 534, 731 N.W.2d at 164.
\textsuperscript{153} Id. at 541, 731 N.W.2d at 173; see also NEB. CONST. art. II, § 1 (describing the separation of powers under the Nebraska constitution).
\textsuperscript{154} Coalition, 273 Neb. at 545, 731 N.W.2d at 176 (quoting State ex rel. Spire v. Conway, 238 Neb. 766, 773, 472 N.W.2d 403, 408 (1991)). In Spire, the court insinuated that under article III, section 10 of the Nebraska constitution, the legislature has sole discretion in determining its members' qualifications. Although Spire did not reach the issue of whether the legislature made the correct determination, if the Nebraska Supreme Court adopted the rationale of Powell, the legislative determination would be justiciable if another provision of the constitution informs those qualifications.
disregarding the legislature's exclusive authority.\textsuperscript{155} In addition, the court advanced its own prudential consideration, finding that "a justiciable issue must be susceptible to immediate resolution."\textsuperscript{156}

The Nebraska Supreme Court's rationale in \textit{Coalition} provided a means to avoid the responsibility of deciding the controversial issue of whether the legislature was providing adequate funding for the state's school system. This may be a satisfactory result given the continuing public debate surrounding the issue of educational funding and the importance of the issue to the general public, which most likely will continue to prompt legislative action in the area. Additionally, once the court has found a constitutional right to education and standards to measure whether that right is violated, then the courts most likely would be responsible for monitoring compliance with those standards. Judicial restraint leaves the decision of particular educational standards to the legislature, who in turn, can try different methods to solve funding deficiencies.

Although this arrangement provides for a greater degree of flexibility in addressing the issue, the Nebraska Supreme Court's decision in \textit{Coalition} has effectively cut off the option of rehearing the issue to ensure the legislature meets its constitutional obligation to "encourage schools" and "provide for the free instruction in the common schools."\textsuperscript{157} This does not seem to be the optimal result practically or structurally, given the role of the judiciary in reviewing the actions of the other branches to ensure constitutional conformity. Moreover, following the precedent set by the U.S. Supreme Court, the court did not abstain from textual interpretation or determine that the final decision of the constitutionality of the issue was given to the legislature. Instead, the court found the issue non-justiciable based on an interpretation of the text of the relevant constitutional provisions, finding that the legislature has discretion to act in determining educational funding. The court could have simply found that the legislature was acting within its constitutional authority, thereby avoiding the political question doctrine and a decision that places school financing outside the court's purview.

### III. ANALYSIS

The Nebraska Supreme Court's decision in \textit{Coalition} is consistent with both the classical and prudential strands of the political question doctrine as set forth in \textit{Baker}. However, the court's decision conflates

\textsuperscript{155} \textit{Coalition}, 273 Neb. at 549-56, 731 N.W.2d at 178-83.
\textsuperscript{156} \textit{Id.} at 555, 731 N.W.2d at 182; see also \textit{Rath v. City of Sutton}, 267 Neb. 265, 673 N.W.2d 869 (2004) (explaining that a justiciable issue requires a present controversy that is subject to immediate resolution and capable of judicial enforcement).
\textsuperscript{157} See \textit{supra} notes 145-46.
the distinction between substantive and procedural deference and confirms that the doctrine, in its diminished state, does little more than veil a decision on the merits of the claim.

A. Application of the Baker Criteria—Classical Factors

The first two criteria of the Baker test are the textually demonstrable commitment of the issue to a coordinate branch and, in relation, the lack of judicially manageable standards. In evaluating the first criterion, the relevant text must be interpreted to determine "whether and to what extent the issue is textually committed," or, more succinctly, the "scope of authority conferred" upon the political branch. The second criterion, a lack of manageable standards, can "strengthen the conclusion that there is a textually demonstrable commitment to a coordinate branch."

In applying the first criterion, the court argued briefly that "[w]hat methods and what means should be adopted in order to furnish free instruction to the children of the state has been left by the constitution to the [l]egislature." In support of this proposition, the court referred back to State ex rel. Shineman v. Board of Education where the court addressed the issue of whether it had the power to determine the method the legislature should use when carrying out its constitutional duties. In that case, the court left the method of providing free instruction within the discretion of the legislature. Their decision stood for the proposition that the legislature had the responsibility to carry out the function articulated in article VII, section 1 of the Nebraska constitution. Indeed, the religious freedom clause and the free instruction clause imbue the legislature with the specific duties "to pass suitable laws . . . to encourage schools and the means of instruction" and to "provide for the free instruction." Although the constitutional language specifies that the legislature has the responsibility to carry out specific government functions, the issue in Coalition was whether the text leaves the final responsibility to interpret the

160. Id.
161. Coalition, 273 Neb. at 542, 731 N.W.2d at 173 (quoting Affholder v. State ex rel. McMullen, 51 Neb. 91, 93, 70 N.W. 544, 545 (1897)).
162. 152 Neb. 644, 42 N.W.2d 168 (1950).
163. Shineman, 152 Neb. at 647–48, 42 N.W.2d at 170.
164. Article 7, section 1 of the Nebraska constitution reads that the "[l]egislature shall provide for the free instruction in the common schools of this state." Neb. Const. art. VII, § 1. Article 1, section 4 reads that "[r]eligion, morality, and knowledge, however, being essential to good government, it shall be the duty of the [l]egislature to pass suitable laws . . . to encourage schools and the means of instruction." Neb. Const. art. I, § 4.
The court does not address this question, but instead focuses on who has the duty to carry out the provision. As previously discussed, the courts can still review the actions of a coordinate branch without taking over the functions of that branch. In fact, judicial review is exactly the duty and responsibility of the courts, which was largely ignored in Coalition.

Turning to the second criterion and following the rationale of the U.S. Supreme Court in Nixon, the court suggested that this factor may assist in establishing a textually demonstrable commitment. The court turned to the text of the free instruction clause and the religious freedom clause after finding that there were "no qualitative, constitutional standards . . . apart from the requirements that the education in public schools must be free and available to all children." The court argued that changes in the constitutional language from 1866 to 1875 effectively eliminated any qualitative measure of a "thorough and efficient system," and, furthermore, the citizens of Nebraska had rejected qualitative standards in 1996 in voting against a constitutional amendment that would have incorporated this type of standard. Similar to the rationale used in Nixon v. United States, the court used the absence of qualitative language to argue that the "paucity of standards" in the text of the provision removed any "restrictions or qualitative standards on the [l]egislature's duties regarding education." In addition, the court dismissed the use of the religious freedom clause to imbue a qualitative standard on the legislature's duty to provide free education. The court argued that the clause does not "impose an affirmative duty on the [l]egislature to encourage schools beyond the establishment of school districts." In so finding, the court found no textual limits on legislative action.

The court's arguments in regard to this element are questionable. First, it is unclear whether there are standards the court could have used to determine what the legislature's duty is in regard to education. Although the language of the relevant provisions—"free instruc-

165. See supra text accompanying note 84.
166. See, e.g., Gilligan v. Morgan, 413 U.S. 1 (1973); see also supra text accompanying notes 91–92 (outlining the facts and holding behind Gilligan).
169. Id. at 550, 731 N.W.2d at 179.
170. Id. at 550–52, 731 N.W.2d at 179–80.
171. Id. at 552, 731 N.W.2d at 180.
172. Id.
173. Id. at 552, 731 N.W.2d at 180. Clearly the court has previously interpreted the religious freedom clause in order to determine that there is a duty to establish school districts; thus, it would seem that the religious freedom clause is not beyond judicial review.
tion"174 and "suitable laws . . . to encourage schools and the means of instruction"175—do not provide an explicit definition, these terms are no more obtuse than "cruel and unusual"176 or "public use,"177 which are terms the court has been able to explicate. In addition, a significant majority of other state supreme courts who have faced the same issue have determined the issue justiciable and have reviewed the language of their constitutions to determine legislative compliance.178

Second, it is unclear why the court found it necessary to discuss recent popular initiatives in determining the constitutional meaning of the provisions. As the court has suggested elsewhere, "the interpretation of constitutional language is not a popularity contest."179 Lastly, the constitutional language did not need to have extensive qualitative explanation in order to review the situation of Nebraska schools and the education students are receiving or to determine whether the educational system is providing "knowledge . . . essential to good government."180 The court could have simply answered that the legislature’s funding system was meeting the constitutional requirements.

As discussed earlier, a decision that the Constitution places no limits on the discretion of a political branch is tantamount to a decision on the merits of the case.181 This is true because the court is "not abdicating its power to interpret and enforce a constitutional provision rather, it is simply holding that nothing in the Constitution directs the [legislature] as to how to make such determinations."182 The court is engaging in constitutional interpretation in order to find the issue exclusively within the legislature’s power. Therefore, it could be argued that the court in Coalition decided the substantive issue of whether the education funding system violated the constitution by deferring to the legislature’s determination of adequacy, but couched this decision within the political question doctrine which procedurally

182. Redish, supra note 5, at 1039.
places the final authority of the issue in the hands of the legislature.\textsuperscript{183} It may be that the courts will only find a political question when the other branches are within their constitutional bounds,\textsuperscript{184} but it is also true that the implications of using the political question doctrine go much further.

In order to maintain its right to review the legislature's actions in the future, the court could have reached the same result by engaging in ordinary constitutional interpretation on the merits. A decision on the merits would have commenced by evaluating whether the meaning of the free education provision was clear.\textsuperscript{185} If the meaning was unclear, the court could have looked elsewhere “to determine the intent of the framers of the phrase at issue.”\textsuperscript{186} As argued by the Coalition, the court could have evaluated the historical meaning of the language, legislative debates, or a variety of other methods for determining the meaning of the provision.\textsuperscript{187} Instead, judicial review was conducted by the court under the auspices of the political question doctrine. In addition, the court would not have been alone in deciding the issue on its merits. As noted above, many states have faced claims asserting that the education funding system of the state was inadequate and have found the issue justiciable.\textsuperscript{188} States with similar constitutional language concerning education have held that the concept of “education” infers a “sound basic education”\textsuperscript{189} or “the opportunity for each child to receive a minimally adequate education.”\textsuperscript{190} Thus, the court clearly could have decided the case on its merits by interpreting “education” in the free education clause to mean something as innocuous as a “sound basic education,” still managed to defer to the legislature, and maintained the right to review legislative actions in the future.

As discussed in section II.C.2.,\textsuperscript{191} when the courts conflate the distinction between substantive and procedural deference, the courts’ intentions become unclear. In \textit{Coalition}, the court held that the issue of educational adequacy is non-justiciable, and, therefore, has conceded

\begin{itemize}
\item \textsuperscript{184} See Henkin, \textit{supra} note 16, at 600–01.
\item \textsuperscript{185} Pig Pro Nonstock Coop. v. Moore, 253 Neb. 72, 81, 568 N.W.2d 217, 223 (1997).
\item \textsuperscript{186} \textit{State ex rel. Spire v. Conway}, 238 Neb. 766, 776, 472 N.W.2d 403, 409 (1991).
\item \textsuperscript{187} See Brief of Appellants, \textit{supra} note 179, at 43.
\item \textsuperscript{188} \textit{Id.} at 30–32. See \textit{supra} text accompanying note 179.
\item \textsuperscript{189} Campaign for Fiscal Equity, Inc. v. State, 655 N.E.2d 661, 665 (N.Y. 1995).
\item \textsuperscript{190} Abbeville County Sch. Dist. v. State, 515 S.E.2d 535, 539 (S.C. 1999); see also Tenn. Small Sch. Sys. v. McWherter, 851 S.W.2d 139 (Tenn. 1993) (defining education as generally preparing students intellectually for a mature life); Fair Sch. Fin. Council of Okla. v. State, 746 P.2d 1135 (Okla. 1987) (determining the meaning of an adequate education by standards set by the state board of education).
\item \textsuperscript{191} See \textit{supra} text accompanying notes 117–40.
\end{itemize}
that the free education clause is judicially unenforceable.\textsuperscript{192} As such, the court holds that the legislature has the exclusive authority to determine the scope of its actions. Not only does this distend the constitutional authority of the legislature in this area, but it also seems at odds with the role for the modern judiciary.

The court has maintained, and articulated elsewhere, that "the construction and interpretation of the [Nebraska] [c]onstitution is a judicial function."\textsuperscript{193} Although the legislature may "exercise reasonable discretion" in determining its method of carrying out a constitutional duty, the court maintains the right to evaluate "whether constitutional requirements have been applied."\textsuperscript{194} The court has also held that actions abusing the meaning of the constitution or evading the meaning of the constitution are void.\textsuperscript{195} Previously, the court has not flinched when invalidating a legislative act when the act goes beyond what is reasonable.\textsuperscript{196} The court has clearly articulated its right to review legislative acts to determine if these acts meet constitutional requirements. Consequently, it seems likely that the court was merely using the \textit{Baker} criteria to shield a direct decision on the merits of the case, effectively avoiding the responsibility of legitimizing the funding decisions of the legislature.

B. Application of the \textit{Baker} Criteria—Prudential Factors

The prudential factors used by the court in \textit{Coalition} include (a) the impossibility of deciding the issue without making an initial policy determination of a kind clearly for non-judicial discretion, (b) the impossibility of deciding an issue without showing a lack of respect for an another branch, and (c) the court's inability to immediately resolve school funding disputes. Although prudential factors provide the courts with inherently more flexible justification for refusing judicial review, it is pertinent to emphasize that only one case decided by the U.S. Supreme Court since \textit{Baker} has possibly hinged on prudential considerations.\textsuperscript{197} In addition, once the courts apply the classical factors of \textit{Baker} to decide a case on its merits, the use of prudential considerations has been thwarted. Thus, in \textit{Coalition}, the Nebraska Supreme Court's invocation of the \textit{Baker} prudential considerations is

\begin{itemize}
  \item \textsuperscript{193} See Pig Pro Nonstock Coop. v. Moore, 253 Neb. 72, 79, 568 N.W.2d 217, 222 (1997); Calabro v. City of Omaha, 247 Neb. 955, 972, 531 N.W.2d 541, 553 (1995).
  \item \textsuperscript{194} Rogers v. Morgan, 127 Neb. 456, 459-60, 256 N.W. 1, 2 (1934) (quoting State v. Moorhead, 99 Neb. 527, 557 N.W. 1067 (1916)).
  \item \textsuperscript{195} State ex rel. Stull Bros. v. Bartley, 41 Neb. 277, 59 N.W. 907 (1894).
  \item \textsuperscript{196} See, e.g., Neb. Tel. Co. v. State ex rel. Yeiser, 55 Neb. 627, 76 N.W. 171 (1898).
  \item \textsuperscript{197} See Vieth v. Jubelirer, 541 U.S. 267 (2004). Although the decision in \textit{Vieth} could possibly be attributed to prudential considerations, it is noteworthy that the Court spent eighteen years trying to come up with a standard before finding that the issue was a political question.
\end{itemize}
largely superfluous because (a) the court had already used the classical portion of the *Baker* criteria to decide the case on the merits, and (b) the use of the prudential considerations has largely been dismissed by the U.S. Supreme Court.198

Although the U.S. Supreme Court has avoided the use of prudential considerations, the justices have certainly not rejected these elements. Consequently, the Nebraska Supreme Court could have relied solely on prudential considerations in order to avoid a determination on the merits. In fact, given that the purpose of the doctrine is to avoid a decision on the merits, the prudential considerations may be a more probable method for achieving this end. As previously suggested, the use of the first two *Baker* criteria often results in a decision on the merits. Therefore, employing prudential considerations would avoid the difficulties associated with the first two *Baker* criteria as well as a decision on the merits. Choosing to use prudential considerations alone might well subject the court to criticism that its decisions are unprincipled or instrumental;199 however, the benefits associated with prudential considerations, such as maintaining the court's legitimacy or creating the opportunity for the court and the political branches to explore solutions to the issue,200 might well outweigh any criticism the court received.

For instance, although the court's use of the first prudential consideration is unconvincing, the remaining considerations present acceptable rationale for finding the issue non-justiciable. First, the court addressed whether it was possible to decide the issue without making a policy determination clearly requiring non-judicial discretion.201 Second, the court held that resolving the issue would disregard the legislature's exclusive authority in regard to fiscal policy decisions.202 Finally, the court found that its inability to immediately resolve the issue made a decision on the merits unwise.203

The court's argument in regard to the first prudential consideration is not convincing. Simple constitutional analysis would most likely have produced a standard that implied the legislature was act-

198. Although the Nebraska Supreme Court certainly is not required to use the same rationale or parameters as the U.S. Supreme Court given the fundamentally different role that state supreme courts play, the Nebraska Supreme Court chose to use the precedent set by *Baker* and its progeny, and, thus, the development of the doctrine in that arena is implicated.

199. See Wechsler, *supra* note 56, at 14 (arguing that the judicial process must be principled and not subject to political demands resulting from popular demands).


203. Id. at 555–56, 731 N.W.2d at 182–83.
ing within the limits set out by the relevant constitutional provisions in providing free education. The court did not need to determine "the proper means of financing schools" and was only asked to decide whether the legislature had met its duty to provide free instruction and to pass suitable laws to encourage schools. The court could have used numerous sources of evidence in conducting their review of the language of the provisions in question. If not the historical context surrounding the drafting of the provisions, then state statutes, regulations, teacher certification standards, teacher certification test results, principal ratings of teachers, class size specifications, library book ratios, and student proficiency standards could be used. Therefore, the court's reluctance to interpret the text of the constitution must be tied to its reluctance to decide "yes" or "no" in regard to school financing.

The last two considerations fall closely in line with the concerns articulated by Bickel. First, the court found that a determination of inadequate funding would in turn implicate prior funding decisions by the legislature. The court argued that it could not evaluate the issue without disregarding the legislature's authority in regard to fiscal issues. This is most likely true. However, a detailed analysis of the constitutional provisions at issue would hardly seem unusual or disrespectful for a court. Clearly, Bickel's influence can be seen as the court attempts to sidestep direct confrontation with the legislative branch. Correspondingly, the third and final prudential consideration used in Coalition was the inability of the court to resolve the school funding dispute, which seems to be a consideration of the court's own making. Referring to the "Stygian swamp" where many states have found themselves, the court emphasized the necessity of avoiding the continuous litigation that plagues many courts which have agreed

204. Id. at 541, 731 N.W.2d at 173.
205. See Campaign for Fiscal Equity, Inc. v. State, 801 N.E.2d 326 (N.Y. 2003); see also Reply Brief of Appellants, supra note 180, at 17-18 (arguing statutes and regulations can play an evidentiary role in determining whether or not an adequate education is being provided).
206. BICKEL, supra note 7, at 69–70, 130–32. Whereas much legislation is "evanescent, and meant to be," judicial decisions can have effects that carry into several generations. Id. at 130–31. Bickel argues that when the Court does not act, it is not abandoning principle but "engaging] the Court in a Socratic colloquy with the other institutions of government and with society as a whole concerning the necessity for this or that measure, for this or that compromise." Id. at 70–71.
207. Coalition, 273 Neb. at 554–55, 731 N.W.2d at 181–82.
208. Id.
210. The Stygian swamp is a reference to Greek mythology and the Stygios—a "wild and awful place" according to Plato—that feeds the River Styx, which surrounds Hades. PLATO, PHAEDO 183 (Reginald Hackforth trans., Cambridge University Press 1st ed. 1955).
to evaluate the adequacy of the state's educational system.\textsuperscript{211} Both of these considerations are prudent and would provide the court, before determining the issue of education funding on its face, with the opportunity to "elicit partial answers and reactions from the other institutions, and to try tentative answers itself."\textsuperscript{212} Therefore, the court's deference to the legislature may well have been wise given the current volatility of the issue within the political halls of Nebraska.

\textbf{IV. CONCLUSION}

There is a thin line between reaching a decision on the merits of a case when a branch has extensive discretion and abdicating review of a branch's decision because it is outside the courts' purview.\textsuperscript{213} This difficulty is evident in the Nebraska Supreme Court's decision in \textit{Coalition}.

As shown in \textit{Coalition}, the political question doctrine creates a circular dilemma in its application. A court first invokes the doctrine in order to avoid judicial review. However, in applying the first two criteria of \textit{Baker}, a court effectively engages in constitutional interpretation and makes a decision on the merits of the case. Any use of prudential considerations once the constitutional issue has been resolved is superfluous, as the purpose of invoking the doctrine has already been frustrated. Although the idea of the political question doctrine is still viable, the application of the \textit{Baker} criteria has largely reduced the power of the doctrine. The Nebraska Supreme Court would have been wiser to rely entirely on prudential considerations and avoid the circular logic inherent in the application of the first two \textit{Baker} criteria.

\textsuperscript{211} \textit{Coalition}, 273 Neb. at 555-57, 731 N.W.2d at 182-83.
\textsuperscript{212} Bickel, \textit{supra} note 7, at 240.
\textsuperscript{213} Gerhardt, \textit{supra} note 128, at 245.