***We the People: the Citizen & the Constitution***

2019-2020 High School Hearing Questions

Information, Tips, Analysis, & Resources from the Oregon high school We the People community

Unit Four / Q. 3

1. **“Of all times to abandon the Court’s duty to declare the law, this was not the one.   
   The practices challenged in these cases imperil our system of government. Part of the Court’s role in that system is to defend its foundations. None is more important than free and fair elections.”\* Do you agree with Justice Elena Kagan’s dissent on the Court’s role, or should the courts not get involved in political questions? Why or why not?**
   * Under what circumstances have the courts intervened in “political questions” in the past?

* Looking forward, what role, if any, should the courts play in preserving free, fair, and frequent elections in the United States?

\* Rucho v. Common Cause, 588 US \_ (2019)

**Collaboration Tips**

**4** different questions are in this overall question.

Dates/Timespan/Era of this question: **Nineteenth century to present**

Historical events/context that connects to this question:

* **Gerrymandering**
* **Civil Rights Era**
* **Baker v. Carr**
* **North Carolina Gerrymandering case**
* **Shelby County case**

Sections of the US Constitution that apply: **Article 2**

People/historical figures connected to the question: **Michael J. Klarman**

Source material for this question:

* **State Constitutions**
* **Federalist 78 & 71**
* ***The Framers Coup***

Sections of the US Constitution that apply: **Article 7**

People/historical figures connected to the question: **Justice Elena Kagan**

Source material for this question*:* ***Rucho v. Common Cause***

Possible Cases to reference:

* ***Baker v. Carr***
* ***Shelby County***
* ***Bush v. Gore***

**Comments from Justice Jack Landau**

*Justice Kagan's dissent could hardly have been more correct, in my view. Others may disagree. But the central premise of the majority's decision -- that there is no way to come up with a "limited and precise standard that is judicially manageable" -- is belied by the recent decision of a North Carolina three-judge court, which held that the state's redistricting violated the state constitutional free elections guarantee.*

<https://static1.squarespace.com/static/5beeefdbf407b4c074e45ec6/t/5d6ec8fe5d59b000015acea7/1567541511311/Common+Cause+v.+Lewis+-+9.3.19+-+Final+Judgment.pdf)> .

*The broader question of whether courts should decide "political questions" is trickier. First, there is the issue of the proper judicial role generally. Federal courts have developed a set of "justiciability" doctrines based on the "case" and "controversies" clause of Article III of the Constitution. Nothing in the words "case" or "controversies," however, suggests that courts cannot decide "political questions." The federal courts have invoked a historical aversion of courts to deciding such matters. But legal historians have criticized that justification as based on an inaccurate understanding of history that ignores the practice of British, colonial, and post-revolutionary courts routinely providing advice to executive and legislative bodies on a wide range of matters. For a critique of federal justiciability doctrine see the Oregon Supreme Court's decision in Couey v. Atkins (2015). Second, there is the question of what exactly constitutes a "political question." The leading US S Ct case is Baker v. Carr (1962), which defines a political question in terms of a number of considerations, in particular, a textually demonstrable constitutional commitment of the issue to a coordinate political department and a lack of judicially manageable standards for resolving the issue. The textual-commitment component is especially troublesome. Just because the Constitution delegates a particular issue to another branch doesn't mean that the courts don't have the obligation to say what the Constitution means when it does so. It is "emphatically the province and duty of the judicial department to say what the law is," right? Marbury v. Madison (1803). So, for example, even if the Constitution clearly delegates to the Senate the "sole power to try impeachments," why does it not remain the duty of the courts to say what the constitution means when it refers to the power to "try." Yet, the S Ct declined to address the issue as a political question in Nixon (no, not that Nixon) v. US (1983).*

*Similarly, Article IV has been read to delegate to Congress the responsibility of enforcing the requirement that states have a "republican" form of government. But does it follow that the courts cannot still determine what the Constitution means when it says "republican"? Third, there's the fact that the courts have, in fact, intervened in political questions. Colgrove v. Green (1946) determined that redistricting was a political question. But then, in Baker v. Carr, the court held otherwise. In Powell v. McCormack (1969), the Court intervened in the decision of the House to exclude a member. And, in Bush v. Gore (2001), the Court essentially decided a presidential election. As for lack of judicially manageable standards, the Court has trouble deciding what that means and why, for example, something as amorphous as due process analysis involves judicially manageable standards, but political gerrymandering does not. For a nice, short critique of the S Ct's political question doctrine, see "Questioning the Political Question Doctrine," published in the libertarian magazine Reason.* <https://reason.com/2019/06/30/questioning-the-political-questions-doctrine/>