PANEL II: TO GOVERN AND BE GOVERNED: *THE FEDERALIST*'S VISION OF REPRESENTATIVE DEMOCRACY

THE FEDERALIST VISION OF A REPRESENTATIVE DEMOCRACY

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A Federalist perspective generally draws upon "first principles,"[1] and we find these first principles in the presence or absence of specific language in the first document—the United States Constitution. Although we are continually confronted with aberrations in our representative democracy, as Federalists we distinguish between these first principles and mystical, undefined penumbras.[2] This renaissance of first principles, particularly judicial sensitivity to the separation of powers, is alive and well in the Sixth Circuit.[3] It is my belief that judges must be alert to their obligation to apply first principles, including the previously-forgotten concept of judicial self-restraint, when dealing with issues involving the relations between the people and their representatives.[4]

As an interesting and timely example, three-judge federal courts[5] across the republic are currently confronting the matter of apportionment of the states' congressional districts. Indeed, I recently heard one such case involving the state of Michigan.[6]

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1. THE FEDERALIST No. 15, at 108 (Alexander Hamilton)(Clinton Rossiter ed., 1961)(referring to those "first principles" that provide "the structure of the [Union]").

2. *See generally* THE FEDERALIST No. 78, at 470 (Alexander Hamilton)(Clinton Rossiter ed., 1961)("The benefits of the integrity and moderation of the judiciary have already been felt in more States than one; and though they may have displeased those whose sinister expectations they may have disappointed, they must have commanded the esteem and applause of all the virtuous and disinterested.").

3. *See, e.g.*, United States v. Driscoll, 970 F.2d 1472, 1487 (6th Cir. 1992); Michigan v. City of Allen Park, 954 F.2d 1201, 1210 (6th Cir. 1992).

4. *See* THE FEDERALIST No. 78, *supra* note 3, at 469 ("The courts must declare the sense of the law; and if they should be disposed to exercise WILL instead of JUDGMENT, the consequence would equally be the substitution of their pleasure to that of the legislative body.").

5. "A district court of three judges shall be convened when otherwise required by Act of Congress, or when an action is filed challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body." 28 U.S.C.A. § 2284(a)(West 1978 & West Supp. 1992).

6. *See* Good v. Austin, No. 91-CV-74754DT, 1992 WL 173862, at *5 (E.D. Mich. July

In that case, both the Republicans and the Democrats agreed that Michigan was required to reduce the size of its congressional delegation from eighteen to sixteen representatives.[7] They also agreed that, under section 2 of the Voting Rights Act,[8] two congressional districts in the state had to be left unaltered.[9] Thus, while the plans submitted by the Republicans and the Democrats were radically different, they simply did not touch two congressional districts. As a consequence, despite the fact that the size of the delegation had to be reduced to sixteen, the court's ultimate decision did not affect the representatives sitting in those two districts. This situation raises perplexing issues with regard to the operation of our representative democracy and the role in that process of judicial self-restraint. Indeed, as I prepared for this trial I found myself increasingly uncomfortable with the business of federal judges entering Justice Frankfurter's "political thicket."[10]

In terms of its application to representative democracy, constitutional philosophy steers rather than anchors our republic and the business of self-government. What is this vision of representative democracy that is argued in *The Federalist*? How has this vision of representative self-government survived as we approach the close of the Twentieth Century? The articles that follow address these questions from distinct, yet complementary, forward-looking perspectives.

28, 1992)(rejecting both Democrat- and Republican-proposed redistricting plans for partisan and incumbent biases).

7. *Id.* at *2.

8. 42 U.S.C.A. § 1973(b)(West 1981 & West Supp. 1992).

9. Good v. Austin, 1992 WL 173862, at *2.

10. *See, e.g.*, Colegrove v. Green, 328 U.S. 549, 556 (1946)(opinion of Frankfurter, J.)(affirming dismissal of complaint alleging that congressional districts created under Illinois law violated the Reapportionment Act of August 8, 1911, § 3 Stat. 13 (1911)(current version at 2 U.S.C.A. § 2a (West 1985 & West Supp. 1992)) and the United States Constitution). Justice Frankfurter wrote,

> Courts ought not to enter this political thicket. . . . The Constitution has many commands that are not enforceable by courts because they clearly fall outside the conditions and purposes that circumscribe judicial action. . . . The Constitution has left the performance of many duties in our governmental scheme to depend on the fidelity of the executive and legislative action and, ultimately, on the vigilance of the people in exercising their political rights.

Id. at 556; *see also* J. Peter Mulhern, *In Defense of the Political Question Doctrine*, 137 U. PA. L. REV. 97, 175 (1988)(concluding that "the political question doctrine is an integral part of [our constitutional] tradition; it is largely concerned with distinguishing cases in which courts will exercise their power of judicial review from those which they will not"). *But see* Davis v. Bandemer, 478 U.S. 109 (1986)(holding that questions of political gerrymandering are justiciable under the Equal Protection Clause).