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The Lost History of the Political Question Doctrine

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THE LOST HISTORY OF THE POLITICAL QUESTION DOCTRINE

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This Article challenges the conventional narrative about the political question doctrine. Scholars commonly assert that the doctrine, which instructs that certain constitutional questions are "committed" to Congress or to the executive branch, has been part of our constitutional system since the early nineteenth century. Furthermore, scholars argue that the doctrine is at odds with the current Supreme Court's view of itself as the "supreme expositor" of all constitutional questions. This Article calls into question both claims. The Article demonstrates, first, that the current political question doctrine does not have the historical pedigree that scholars attribute to it. In the nineteenth century, "political questions" were not *constitutional questions but instead were factual determinations made by the political branches that courts treated as conclusive in the course of deciding cases. Second, when the current doctrine was finally created in the mid-twentieth century, the Supreme Court used it to entrench, rather than to undermine, the Court's emerging supremacy over constitutional law. Under the current doctrine, the Court asserts for itself the power to decide which institution decides any constitutional question. With control over that first-order question, the Court can conclude not only that an issue is textually committed to a political branch but also that an issue is committed to the Court itself. This analysis turns on its head the assumption of scholars that the current doctrine is at odds with judicial supremacy. The modern political question doctrine is a species of—not a limitation on—judicial supremacy.*

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Introduction

The political question doctrine has long puzzled scholars of federal courts and constitutional law. Unlike other aspects of Article III jurisdiction (like standing, ripeness, and mootness), which define the circumstances under which the federal courts may decide legal issues, the political question doctrine instructs that the courts may not decide certain issues—most prominently, federal constitutional claims—at all.[1] Thus, even if a federal court is convinced that the legislative or executive branch violated the Constitution, the court lacks jurisdiction to issue such a declaration, because that constitutional question is "committed" to another branch.[2]

[1] Zivotofsky *ex rel.* Zivotofsky v. Clinton, 132 S. Ct. 1421, 1427 (2012) (stating that a court "lacks the authority to decide [a] dispute" involving a political question); DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 352 (2006) (expressing that standing, mootness, ripeness, and the political question doctrine "all originate in Article III's 'case' or 'controversy' language").

[2] Nixon v. United States, 506 U.S. 224, 228–29 (1993). A "political question" is thus analytically distinct from a situation where the court concludes that the political branches acted within the scope of their constitutional power. *See* Lawrence Gene Sager, *Fair*

Scholars have strongly disputed the nature, scope, and wisdom of this doctrine,[3] but they do seem to share two basic assumptions. First, the doctrine has been a feature of our legal system for over two hundred years.[4] Since *Marbury v. Madison*, scholars assert, the federal courts have treated some constitutional questions as outside the scope of judicial review.[5] Second, and relatedly, scholars claim that this longstanding doctrine has recently been on the decline.[6] During the past few decades, the Supreme Court has asserted itself as the

Measure: The Legal Status of Underenforced Constitutional Norms, 91 HARV. L. REV. 1212, 1224–26 & n.40 (1978) ("[A]ny invocation of the political question doctrine" presumes that "there is a constitutional norm which is applicable to the controversy at hand, but which cannot or should not be enforced by the federal judiciary."); Jonathan R. Siegel, *Political Questions and Political Remedies*, *in* THE POLITICAL QUESTION DOCTRINE AND THE SUPREME COURT OF THE UNITED STATES 243, 245 (Nada Mourtada-Sabbah & Bruce E. Cain eds., 2007) ("The essence of the doctrine is that it may bar judicial enforcement of actual legal constraints on government behavior.").

[3] Scholars have variously defended the doctrine, *see* Rachel E. Barkow, *More Supreme than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237, 335 (2002) (arguing that the political question doctrine is important in part because it prevents the Supreme Court from "being left alone to police the boundaries of its power"); J. Peter Mulhern, *In Defense of the Political Question Doctrine*, 137 U. PA. L. REV. 97, 101 (1988) (asserting that a better explanation of the doctrine, rather than its wholesale rejection, is necessary), sought the abolition of the doctrine, *see* Rebecca L. Brown, *When Political Questions Affect Individual Rights: The Other* Nixon v. United States, 1993 SUP. CT. REV. 125, 127 (1994) (arguing that the doctrine should be abandoned "at this point as a thorn in the side of separated powers, properly understood"); Martin H. Redish, *Judicial Review and the "Political Question,"* 79 NW. U. L. REV. 1031, 1033 (1985) (arguing for the repudiation of the doctrine); Louise Weinberg, *Political Questions and the Guarantee Clause*, 65 U. COLO. L. REV. 887, 889 (1994) (arguing that interpretation of constitutional law cannot be confided to a political branch exclusively), or even argued that there is no such doctrine, *see* Louis Henkin, *Is There a "Political Question" Doctrine?*, 85 YALE L.J. 597, 600–01 (1976) (arguing that many so-called "political question" cases simply uphold government action on the merits).

[4] Scholars often assert that *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), laid the foundation for the political question doctrine. *See* Barkow, *supra* note 3, at 239 (tracing the doctrine to *Marbury*); Kimberly Breedon, *Remedial Problems at the Intersection of the Political Question Doctrine, the Standing Doctrine, and the Doctrine of Equitable Discretion*, 34 OHIO N.U. L. REV. 523, 523–24, 527 (2008) ("The political question doctrine . . . is of longstanding stature in American jurisprudence, dating back to Chief Justice John Marshall's *Marbury v. Madison* decision in 1803."); Luis Fuentes-Rohwer, *Reconsidering the Law of Democracy: Of Political Questions, Prudence, and the Judicial Role*, 47 WM. & MARY L. REV. 1899, 1909 (2006) ("[T]he political question doctrine dates back to the Supreme Court's handling of William Marbury's lawsuit."); John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CALIF. L. REV. 167, 194 (1996) (similarly asserting that the doctrine dates back to *Marbury*); *see also* Aziz Z. Huq, *Removal as a Political Question*, 65 STAN. L. REV. 1, 20 (2013) (stating the doctrine was "[i]ntimated first by Chief Justice John Marshall in *Marbury v. Madison*"). Alternatively, some scholars trace the doctrine to *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849). *E.g.*, Redish, *supra* note 3, at 1036; *see also* sources cited *infra* note 85.

[5] *See* sources cited *supra* note 4.

[6] Barkow, *supra* note 3, at 240; Robert F. Nagel, *Political Law, Legalistic Politics: A Recent History of the Political Question Doctrine*, 56 U. CHI. L. REV. 643, 649–50 (1989).

"supreme" expositor of constitutional law (whose constitutional views are binding on all other federal and state officials) and has therefore been wary of a doctrine limiting the scope of judicial review. [7] Rachel Barkow nicely captured the prevailing sentiment, when she argued that "[t]he political question doctrine . . . cannot coexist"[8] with the current Court's conception of itself as "'the ultimate expositor of the constitutional text.'" [9]

I seek to challenge this conventional narrative. I argue that the current political question doctrine does not have the historical pedigree that scholars attribute to it. In fact, the current doctrine was not created until the mid-twentieth century, when it was employed by the Supreme Court to entrench, rather than to undermine, its emerging supremacy over constitutional law.

Although courts in the nineteenth century did apply a "political question doctrine," the doctrine that existed at that time was strikingly different from the current version. Under this early doctrine (which I refer to as the "traditional political question doctrine"), political questions were *factual* determinations made by the political branches that courts treated as conclusive in the course of resolving cases. Thus, courts did not dismiss as nonjusticiable an issue that presented a political question but rather *enforced and applied* the political branches' conclusion. In other words, the courts treated the political branches' determination as a (factual) rule of decision for the case. That was true, even if the courts believed that the political branches were in error. The Supreme Court, for example, treated as conclusive the executive's determination that a given country controlled a foreign territory, "whether the executive be right or wrong."[10] This traditional doctrine, moreover, was *not* a matter of Article III jurisdiction. Both federal and state courts were required to enforce and apply the determinations of the federal political branches on "political questions."[11]

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[7] *See* Barkow, *supra* note 3, at 240 ("[T]he demise of the political question doctrine is of recent vintage, and it correlates with the ascendancy of a novel theory of judicial supremacy."); *see also* Jesse H. Choper, *The Political Question Doctrine: Suggested Criteria*, 54 DUKE L.J. 1457, 1459 (2005) (arguing the doctrine is "in serious decline, if not fully expired" because it is "clearly at odds with the [Court's] notion of judicial supremacy").

[8] Barkow, *supra* note 3, at 300.

[9] *Id.* at 241 (quoting United States v. Morrison, 529 U.S. 598, 616 n.7 (2000)).

[10] Williams v. Suffolk Ins. Co., 38 U.S. (13 Pet.) 415, 420 (1839).

[11] No scholar seems to have recognized that this traditional doctrine was the heart of the early political question doctrine. Indeed, only a few modern scholars seem to have noticed this strand of the doctrine. *See* Caleb Nelson, *Adjudication in the Political Branches*, 107 COLUM. L. REV. 559, 592–93 (2007) (discussing cases that show "an important branch of [the political question] doctrine operated to identify factual questions on which courts would accept the political branches' determinations as binding"); *see also*

Aside from dicta in one case,[12] however, there is little evidence that this judicial subservience extended to constitutional claims. That is, the courts did not treat the political branches' constitutional judgments as "rules of decision" for a case. Nor did courts dismiss constitutional claims as nonjusticiable. Instead, courts regularly adjudicated constitutional questions on the merits, including those that are today considered "political questions," such as the validity of constitutional amendments and (through 1911) the Guarantee Clause.[13]

The Supreme Court continued to apply the traditional doctrine throughout the first half of the twentieth century. And although the Court held for the first time in *Pacific States Telephone & Telegraph Co. v. Oregon* that a Guarantee Clause claim was a nonjusticiable political question,[14] the Court did not thereby create a new political question doctrine extending beyond the Guarantee Clause. In fact, only a plurality of the Court suggested in two cases that other constitutional claims might be nonjusticiable. [15] Accordingly, through the mid-twentieth century, the *only* political question doctrine that had been adopted by the Court as a whole was the traditional doctrine.

Somewhat remarkably, however, and despite the lack of change in the case law, much of the legal community gradually came to see the "political question doctrine" as a device that would prohibit federal courts from ruling on certain constitutional issues. Although there may be multiple explanations for this shift, I suggest that one important influence was the academic discourse about the doctrine. From the 1930s through the 1950s, in both casebooks and articles, legal scholars increasingly ignored the traditional doctrine and instead focused on *Pacific States* and the plurality decisions, arguing that *the* "political question doctrine" was an Article III device defining the scope of judicial review.[16] It is surprising that academics, and particularly casebook authors, would highlight a doctrine that had not been adopted by the Supreme Court. But this phenomenon was likely tied

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John Harrison, *The Relation Between Limitations on and Requirements of Article III Adjudication*, 95 CALIF. L. REV. 1367, 1372–74 (2007) (recognizing that the Court accepted some determinations by the political branches as "binding," although describing the political branches' findings as determinations of "legal questions"); *infra* notes 32–34 and accompanying text (noting other scholarship that has mentioned some early cases).

12 In *Luther*, the Court suggested in dicta that the judiciary was required to enforce Congress's determination of Guarantee Clause issues. 48 U.S. (7 How.) 1, 42 (1849). I discuss *Luther* at length below. *See infra* Part I.B.

13 *See infra* Part I.C.

14 223 U.S. 118, 133 (1912); *see also infra* Part II.A (discussing Pac. States Tel. & Tel. Co. v. Oregon, 223 U.S. 118 (1912)).

15 *See infra* Part II.B (discussing Coleman v. Miller, 307 U.S. 433 (1939), and Colegrove v. Green, 328 U.S. 549 (1946)).

16 *See infra* Part III.

to a jurisprudential movement known as "legal process theory." In the post-*Lochner* era, legal scholars were engaged in a profound debate over the legitimacy of judicial review. Legal process scholars argued that judicial review could be both constrained and legitimated through procedure; jurisdictional rules, like standing and ripeness, would determine when judges were authorized to make constitutional pronouncements.[17] A "political question doctrine" that emanated from Article III and prevented federal courts from ruling on certain constitutional questions fit nicely into this legal process vision. Accordingly, legal process theorists had good reason to promote this image of the "political question doctrine"—even if such a doctrine had not been accepted by the Supreme Court.

Legal process theory had a profound impact on the field of federal courts. Process theorists like Henry Hart and Herbert Wechsler, influenced by their hero Felix Frankfurter, "defin[ed] the pedagogic canon" of the field for generations.[18] The influence of process theory thus helps explain why, by the mid-twentieth century, much of the legal community assumed that there was a "political question doctrine" that could define—and constrain—the federal courts' judicial review power.

The Supreme Court, however, never adopted the political question doctrine envisioned by legal process theorists. That may be in large part because the legal process emphasis on a restrained judiciary was in serious tension with the Supreme Court's view of itself in the mid-twentieth century as "supreme in the exposition of . . . the Constitution."[19] Instead, I argue that the Court in *Baker v. Carr* articulated a new political question doctrine (the "modern political question doctrine") that could serve, not as a doctrine of judicial restraint (or subservience), but as a source of judicial power.[20] First, in a part of the opinion that has often been overlooked by scholars, *Baker* signaled the demise of the traditional political question doctrine. The *Baker* Court declared that it would no longer enforce the

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[17] *See infra* Part III.C.

[18] Akhil Reed Amar, *Law Story*, 102 HARV. L. REV. 688, 690 (1989) (reviewing PAUL M. BATOR ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM (3d ed. 1988)); *see infra* Part III.C.

[19] Cooper v. Aaron, 358 U.S. 1, 18 (1958). In *Cooper*, the Court asserted its "supremacy" vis-à-vis state and local governments. Following *Baker v. Carr*, 369 U.S. 186 (1962), the Court used its political question cases to assert its supremacy vis-à-vis the other branches of the federal government. *See infra* Part IV.A.

[20] Notably, my focus here is on the political question doctrine as crafted and applied by the Supreme Court in *Baker* and subsequent cases. There is an interesting question whether the doctrine has been applied differently by the lower federal courts. Such an inquiry is beyond the scope of this Article, although I hope to pursue it in future work.

political branches' factual determinations, whether they "be right or wrong."[21] Instead, the Court would independently decide both the legal and the factual issues arising in any case or controversy.[22] Second, the Court took control of (what existed of) the constitutional side of the doctrine: "Deciding whether a matter has in any measure been committed by the Constitution to another branch . . . is a responsibility of this Court *as ultimate interpreter of the Constitution*."[23] The Court thereby claimed the power to decide whether, and the extent to which, any other branch may be involved in constitutional decisionmaking.

This analysis has important implications for scholarship in federal courts and constitutional law. First, this historical account demonstrates that the modern political question doctrine cannot be justified on the basis of a long historical pedigree; that doctrine, I argue, did not exist until the Supreme Court's 1962 decision in *Baker v. Carr*. Moreover, this analysis turns on its head the assumption of most scholars that the modern doctrine is at odds with judicial supremacy.[24] Under the modern doctrine, the Court asserts for itself the power to decide who decides any constitutional question.[25] With control over that first-order question, the Court can conclude not only that an issue is textually committed to the President or to a chamber of Congress but also that an issue is committed to the Court itself. In fact, that is how the Court since *Baker* has most often used its political question cases—to claim that various constitutional issues are committed to the

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21 Williams v. Suffolk Ins. Co., 38 U.S. (13 Pet.) 415, 420 (1839).

22 *See infra* Part IV.A.

23 *Baker*, 369 U.S. at 211 (emphasis added).

24 *E.g.*, Barkow, *supra* note 3, at 242; *see also* David Orentlicher, *Conflicts of Interest and the Constitution*, 59 WASH. & LEE L. REV. 713, 746 (2002) ("[T]he political question doctrine creates a real tension with the principle of judicial supremacy."). Indeed, scholars who favor judicial supremacy tend to strongly oppose the political question doctrine. *E.g.*, ERWIN CHEMERINSKY, INTERPRETING THE CONSTITUTION 96–97, 98–101 (1987). Conversely, those who doubt that the Supreme Court should have the final word on all constitutional questions tend to defend the doctrine or argue for its expansion. *E.g.*, MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 9, 107–08 (1999); Mulhern, *supra* note 3, at 99–100; *see also* LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 209–10 (2004) (noting with approval that the doctrine ensures that some matters are "wholly beyond judicial scrutiny"); Jide Nzelibe, *The Uniqueness of Foreign Affairs*, 89 IOWA L. REV. 941, 979–80 (2004) (doubting that arguments in favor of judicial supremacy, and opposing the political question doctrine, should apply to foreign affairs cases).

25 *See Baker*, 369 U.S. at 211 ("Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution."); *infra* Part IV.A.

Court, and not to a political branch.[26] Scholars may disagree over whether the Supreme Court *should* have such a power to allocate interpretive authority over constitutional questions—a view that likely depends on one's attitude toward judicial supremacy.[27] My goal here is to demonstrate, contrary to the assumption of most scholars, that the modern political question doctrine is a species of—not a limitation on—judicial supremacy.

I develop this historical account of the political question doctrine as follows. Part I describes the traditional doctrine of the nineteenth and early twentieth centuries, recounting how courts treated as conclusive the political branches' determination of certain factual issues but showed no such subservience as to constitutional questions. Part II explains that the Supreme Court continued to apply this traditional doctrine through the mid-twentieth century, but that a new type of "political question" case also emerged. Part III documents how academics began to treat the fledging group of constitutional cases as *the* political question doctrine. Part IV examines how the Court in *Baker v. Carr* and subsequent cases transformed the political question doctrine into a source of judicial power.

I
Rediscovering the Traditional Political Question Doctrine

The modern political question doctrine serves, in theory, to identify constitutional issues that are "committed" to another branch of government and thus outside the scope of judicial review.[28] Although scholars today often assume that this doctrine has deep historical roots, the modern doctrine differs significantly from the doctrine applied by courts in the nineteenth and early twentieth centuries—

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[26] *See infra* Part IV.A.

[27] *See infra* Part IV.C. Jurists, scholars, political actors, and members of the general public often assume that the Supreme Court should be in charge of constitutional decisionmaking. *See* Barry Friedman, The Will of the People 14 (2009) (arguing that the "American people have decided to cede" this power "to the Justices"); Keith E. Whittington, Political Foundations of Judicial Supremacy 5 (2007) ("Through much of American history, presidents have found it in their interest to defer to the Court . . . . The strategic calculations of political leaders lay the political foundations for judicial supremacy."); Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 Harv. L. Rev. 1359, 1385 (1997) (advocating the Court's role "as the authoritative settler of constitutional meaning"). But a growing number of scholars advocate departmentalism—the notion that each branch has an independent role in defining constitutional meaning. *E.g.*, Gary Lawson & Christopher D. Moore, *The Executive Power of Constitutional Interpretation*, 81 Iowa L. Rev. 1267, 1270, 1279, 1303 (1996); *see* sources cited *infra* notes 325–26 and accompanying text.

[28] Nixon v. United States, 506 U.S. 224, 228–29 (1993).

what I refer to as the "traditional political question doctrine."[29] Under the traditional doctrine, political questions were not constitutional questions but instead were factual determinations made by the political branches that courts treated as conclusive in the course of deciding a case or controversy.[30]

Although a few modern scholars have noticed (some of) these early cases, they have not understood the scope and nature of this traditional political question doctrine.[31] Most notably, building on the modern assumption that "political questions" are "constitutional questions," Louis Henkin suggested that, if the Court in its early cases did not refrain from adjudicating constitutional issues, there must

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[29] Some readers may be interested in my methodology in uncovering the history of the political question doctrine: In order to ensure that my research would be as exhaustive as possible, I asked a research assistant to compile a database with *every* Supreme Court case that used the word "political question" (or used those words in close proximity) from 1789 until the present day. The research assistant added cases that were later described as "political question" cases, even if those cases did not come up in the initial search. With the help of other research assistants, I then read through the cases. I also read—chronologically—scholarship that used the term "political question" from around the 1880s through the 1960s, so that I could get a sense of the different ways in which commentators had used the term over time. That review led me to conclude, as I describe in Part III, that there was a change in the understanding of the concept of "political question" in the early to mid-twentieth century. To confirm this point, I read through late nineteenth and early twentieth century treatises that discuss the term "political question." With the help of research assistants, I also examined the briefs and transcripts underlying a number of the precedents discussed in this Article, including *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849), *United States v. Holliday*, 70 U.S. (3 Wall.) 407 (1866), *Minor v. Happersett*, 88 U.S. (21 Wall.) 162 (1875), *Coyle v. Smith*, 221 U.S. 559 (1911), *Pacific States Telephone & Telegraph Co. v. Oregon*, 223 U.S. 118 (1912), *Coleman v. Miller*, 307 U.S. 433 (1939), *Colegrove v. Green*, 328 U.S. 549 (1946), and *Baker v. Carr*, 369 U.S. 186 (1962). It would be impossible in the space of a law review article to describe every one of my findings or to articulate all the nuance in the history. But I lay out the most important finding: There was a traditional political question doctrine. The cases that I highlight in Part I.A are, in my view, illustrative of that doctrine.

[30] Commentators also used the term "political question" to refer to the right of states to assert their sovereign "political rights" in court—an issue that arose during Reconstruction. *See* Georgia v. Stanton, 73 U.S. (6 Wall.) 50, 76–77 (1868) (noting that Georgia's challenge to the Reconstruction Acts "call[ed] for the judgment of the court upon political questions, and, upon rights, not of persons or property, but of a political character"); 2 JOHN RANDOLPH TUCKER, THE CONSTITUTION OF THE UNITED STATES: A CRITICAL DISCUSSION OF ITS GENESIS, DEVELOPMENT, AND INTERPRETATION § 385, at 816–18 (Henry St. George Tucker ed., 1899) (describing, in addition to the traditional cases discussed in this Article, *Georgia v. Stanton* and *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475 (1867), as political question cases). But scholars today correctly understand these cases as part of modern standing doctrine. Harrison, *supra* note 11, at 1373 n.10; *see* Henry P. Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363, 1367–68, 1382 & nn.28–29 (1973) (pointing out that "[n]o doubts . . . were raised" about the justiciability of a constitutional challenge to the Reconstruction Acts "when personal rights were at stake" in *Ex parte McCardle*, 74 U.S. (7 Wall.) 506 (1869)). I therefore do not focus on such cases in this project.

[31] For an explanation of how I uncovered the history discussed here, see *supra* note 29.

have been *no* political question doctrine, even during this early period.[32] But that is a misunderstanding of the history.[33] There was indeed a doctrine—one that applied broadly in both civil and criminal cases and in both federal and state court. One of the central goals of this Article is to familiarize modern readers with this early doctrine. This background is crucial to understanding how far from its roots the current doctrine has evolved.[34]

A. Political Questions as Rules of Decision

Throughout the nineteenth and early twentieth centuries, both federal and state courts viewed certain issues as "political questions," including which government controlled a territory;[35] the date on which a war began or ended;[36] whether the United States continued to have a treaty with a foreign country;[37] and whether a certain group of

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[32] *See* Henkin, *supra* note 3, at 600–01, 608–13 (doubting that there has ever been a "doctrine requiring abstention from judicial review of 'political questions,'" at least outside the Guarantee Clause context, and focusing on cases involving constitutional claims, but also citing a few nineteenth-century cases involving foreign relations). I discuss below Professor Henkin's additional assertion that there is also no "political question doctrine" today. *See infra* notes 314–15 and accompanying text. More recently, Gwynne Skinner has similarly argued that "the Supreme Court has never applied the 'political question doctrine' as a true justiciability doctrine"—although Professor Skinner goes further than Professor Henkin (and this Article) in suggesting that even the Court's post-1912 Guarantee Clause cases did not treat that issue as nonjusticiable. *See* Gwynne Skinner, *Misunderstood, Misconstrued, and Now Clearly Dead: The "Political Question Doctrine" as a Justiciability Doctrine*, 29 J.L. & POL. 427, 427–28, 434–39, 441 (2014); *see also id.* at 428 n.6 (noting agreement with Henkin). But neither Professor Henkin nor Professor Skinner seems to recognize that there was a different doctrine in the nineteenth century—or that this doctrine applied in both civil and criminal cases, and in both federal and state court. *See also supra* note 11 (noting other scholarship that has discussed some of the relevant early cases, without recognizing the nature or breadth of the early doctrine).

[33] Professor Henkin also assumed (inaccurately) that the early cases involved no "extra-ordinary deference" to the political branches. Henkin, *supra* note 3, at 612; *see infra* note 77 and accompanying text (discussing the subservience of the courts as to factual determinations that were deemed political questions).

[34] For a discussion of how the current doctrine differs from the traditional doctrine, see Part IV.B.

[35] *See* Jones v. United States, 137 U.S. 202, 212 (1890) ("Who is the sovereign, *de jure* or *de facto*, of a territory, is not a judicial, but a political, question, the determination of which by the legislative and executive departments . . . conclusively binds the judges."); 2 TUCKER, *supra* note 30, § 385, at 816 ("[Judiciary powers] accept the determination of the political departments . . . as conclusive [on w]hat is the *de facto* government of another country.").

[36] *See* HENRY CAMPBELL BLACK, HANDBOOK OF AMERICAN CONSTITUTIONAL LAW § 56, at 101 (3d ed. 1910) ("[T]he judicial tribunals must follow the political departments [as to the existence of a state of war] and accept their determination as conclusive.").

[37] Terlinden v. Ames, 184 U.S. 270, 285, 288 (1902); 2 WESTEL WOODBURY WILLOUGHBY, THE CONSTITUTIONAL LAW OF THE UNITED STATES § 582, at 1007 (1910). Courts also treated as a "political question" whether a foreign diplomat had the power to

Native Americans constituted a "tribe."[38] Although jurists and scholars in that era often described these issues as "questions of fact,"[39] most such political questions would likely now be considered mixed questions of fact and law.[40] (For ease of exposition, I generally refer to these determinations as factual decisions, in keeping with the nineteenth-century usage.[41])

My concern here is not so much with *which* subject matters fell into the category of "political questions" but rather with *how* these political questions impacted a judicial decision. Jurists during this early period did not dismiss as nonjusticiable an issue that presented a political question. Instead, the courts enforced and applied the political branches' determination in the course of deciding a case or controversy. In other words, the courts treated the political branches' determination as a factual rule of decision for the case. Both case law and scholarship, including late-nineteenth and early twentieth-century treatises, confirm that *this* doctrine was the heart of the "political question doctrine" during this early period.[42]

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negotiate or terminate a treaty on behalf of his government. *E.g.*, Doe v. Braden, 57 U.S. (16 How.) 635, 657 (1854); 2 WILLOUGHBY, *supra*, at 1007.

[38] *See In re* Kan. Indians, 72 U.S. (5 Wall.) 737, 751, 755–57 (1867) (treating as conclusive Congress's determination that the Shawnee Indians were a tribe and concluding as a matter of law that the State of Kansas could not tax the Shawnee); United States v. Holliday, 70 U.S. (3 Wall.) 407, 419 (1866) ("[I]t is the rule of this court to follow the action of the executive and other political departments . . . . If by them those Indians are recognized as a tribe, this court must do the same.").

[39] *E.g.*, Williams v. Suffolk Ins. Co., 38 U.S. (13 Pet.) 415, 420 (1839) (declaring that "when the executive branch of the government assume[s] . . . a fact in regard to the sovereignty of any island or country, it is conclusive on the judicial department"); 2 WILLOUGHBY, *supra* note 37, § 577, at 999 (stating that the judiciary would treat as binding legislative or executive determinations that a "certain set of facts . . . , a given status, exists").

[40] Some of these questions depended on the political branches' determinations of international or foreign law. That is true, for example, of executive decisions as to whether the United States was still bound by a treaty and whether a foreign diplomat could (under the law of his home country) negotiate a treaty. *See supra* note 37.

[41] My analysis here does not turn on the distinction between factual and mixed questions; as I show below, no matter how one draws that line, the traditional doctrine did not encompass constitutional questions (that is, the determination whether a statute or other governmental action complied with the Constitution). This distinction would, however, be important for any scholarship evaluating the early judiciary's willingness to treat as conclusive the political branches' determination of (what we would today view as) mixed questions or even pure questions of international or foreign law. *See supra* notes 37, 40.

[42] *See* sources cited *supra* notes 35–38; *see also* 2 TUCKER, *supra* note 30, § 385, at 816 (observing that the judiciary must "accept the determination of the political departments of the government as conclusive" on political questions); Note, *Determination of Status of Foreign Territory*, 16 HARV. L. REV. 134, 134 (1901) (noting a court must "follow the ruling of the political department" on political questions). As noted, the only other

A few examples will help illustrate how courts applied the traditional doctrine. *Williams v. Suffolk Insurance Co.* involved a dispute over an insurance contract. The master of a vessel that was confiscated by the Buenos Ayres government sought the insurance proceeds,[43] but the insurance company refused to pay out on the policy, arguing that the master was himself responsible for the loss of the ship.[44] The Buenos Ayres government had warned the master that it would confiscate the vessel if he attempted to dock at the Falkland Islands in South America—a territory that Buenos Ayres claimed to control.[45] The master, however, denied that Buenos Ayres controlled the territory and contended that he was therefore justified in ignoring the foreign government's warning.[46]

The Supreme Court held that the question as to which government controlled the Falkland Islands was a political question, such that "the action of the American government on this subject is binding and conclusive on this Court."[47] Noting that the executive had "denied the jurisdiction which [Buenos Ayres] assumed to exercise over the Falkland islands,"[48] the Supreme Court declared that this "fact must be taken and acted on by this Court as thus asserted and maintained," "whether the executive be right or wrong."[49] In *Williams*, the executive's determination "materially affect[ed]" the central legal question in the dispute: whether the master of the vessel had acted appropriately.[50] The Court found that the master "violated no regulation which he was bound to respect" and, accordingly, directed the insurance company to cover the cost of the lost vessel.[51]

Kennett v. Chambers was an action to enforce a contract arising out of Texas's war for independence against Mexico.[52] In order to raise money for the war effort, General T. Jefferson Chambers of the Texan army contracted to sell some land located in Texas.[53] According

common use of the term "political question" was to refer to the assertion of "sovereign rights" in court—a matter now considered part of standing doctrine. *See supra* note 30.

43 38 U.S. (13 Pet.) 415, 418–19 (1839).

44 *Id.* at 419–20.

45 *Id.*

46 *Id.*

47 *Id.*; *see also* Jones v. United States, 137 U.S. 202, 212 (1890) ("Who is the sovereign, *de jure* or *de facto*, of a territory is not a judicial, but a political question . . . .").

48 *Williams*, 38 U.S. (13 Pet.) at 420.

49 *Id.* ("[I]t is not material to inquire, nor is it the province of the Court to determine, whether the executive be right or wrong.").

50 *Id.* at 421 ("The decision of the first point materially affects the second, which turns upon the conduct of the master.").

51 *Id.*

52 55 U.S. (14 How.) 38, 45–46 (1852).

53 *Id.*

to the complaint, although the plaintiffs paid $12,500 for the property—money that the general used to purchase supplies for the Texan army—General Chambers refused to convey the property to them.[54]

Writing for the Court in *Kennett*, Chief Justice Taney explained that this contract would be illegal and unenforceable, if it were a contract to support a "rebellion" against a government with which the United States had diplomatic ties (as the United States did with Mexico).[55] A crucial issue, therefore, was whether at the time the contract was signed Texas was independent or still part of Mexico (and, thus, engaging in a "rebellion"). The Court stated that Texas's status was a political question, such that until the executive "recognized [Texas] as an independent state, the judicial tribunals of the country were bound to consider the old order of things as having continued, and to regard Texas as a part of the Mexican territory."[56] In this case, although Texas had declared its independence before the contract was signed (and considerable evidence suggested that Texas *was* in fact independent),[57] the political branches did not recognize Texas as independent until several months later.[58] Accordingly, the contract in *Kennett* was unenforceable; General Chambers could keep his land.[59]

The traditional political question doctrine was not limited to civil disputes like *Williams* and *Kennett* but also applied in criminal prosecutions. In *United States v. Holliday*,[60] defendant Lorton Holliday was charged with violating a statute that prohibited the sale of "any spirituous liquor or wine to any Indian under the charge of any . . . Indian agent appointed by the United States."[61] Holliday had sold liquor to a

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[54] *Id.*

[55] *See id.* at 49–50 (discussing evidence that the contract was made with the understanding that the payments would allow for General T. Jefferson Chambers to gather supplies for his military force, which was not sanctioned by the United States, and finding that if this was the purpose of the contract, the contract was "not only void, but the parties who advanced the money were liable to be punished in a criminal prosecution").

[56] *Id.* at 51; *see also id.* at 50–51 ("[T]he question whether Texas had or had not at that time become an independent state, was a question for that department of our government exclusively which is charged with our foreign relations.").

[57] *See id.* at 47–48 (noting that the President had stated in one message that "'[i]t is true, with regard to Texas, the civil authority of Mexico has been expelled, its invading army defeated, . . . and all present power to control the newly organized Government of Texas annihilated'" although the executive's official position was still that Texas was part of Mexico).

[58] *Id.* at 46–47.

[59] *Id.* at 52 ("We therefore hold this contract to be illegal and void . . . .").

[60] 70 U.S. (3 Wall.) 407 (1866).

[61] Act of February 13, 1862, An Act to Amend an Act Entitled 'An Act to Regulate Trade and Intercourse with the Indian Tribes, and to Preserve Peace on the Frontiers,' Approved June Thirteenth, Eighteen Hundred and Thirty-Four, ch. 24, 12 Stat. 338, 339 (repealed 1934); *see* Transcript of Record at 1–2, United States v. Holliday, 70 U.S. (3 Wall.) 407 (1866) (No. 119) (setting out the alleged facts and charge in the indictment).

man named Otibsko, who was said to be a member of the Chippewa.[62] Notably, Otibsko would be "[an] Indian under the charge of any . . . Indian agent" within the meaning of the statute only if the Chippewa constituted a tribe.[63]

The Court held that it was bound by the political branches' determination that the group was in fact a tribe: "[I]t is the rule of this court to follow the action of the executive and other political departments of the government . . . . If by them those Indians are recognized as a tribe, this court must do the same."[64] The Court then went on to independently determine the remaining issues in the case, rejecting Holliday's contention that Otibsko was no longer affiliated with the tribe[65] and holding that the federal statute at issue was a proper exercise of Congress's authority under the Indian Commerce Clause.[66] The Court thus upheld Holliday's conviction.[67]

The traditional political question doctrine applied not only in various federal cases but also in state court.[68] A lawsuit in New York state court, *Russian Socialist Federated Soviet Republic v. Cibrario*,[69] offers an illustration. The Bolshevik government of Russia brought suit against a movie company, seeking damages for breach of a contract to provide moving picture machines and other supplies.[70] Although the Bolsheviks had clearly controlled Russia since late 1917, the United States government did not yet recognize the regime as the

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[62] *See* United States v. Holliday, 70 U.S. (3 Wall.) 407, 418 (1866) (setting out the evidence supporting the claim that Otibsko was a member of the tribe); Transcript of Record at 1–2, *supra* note 61 (providing the name of the Indian and his tribe).

[63] The government's brief indicates that the Department of the Interior appointed "agents" only to work with recognized tribes. Accordingly, unless the Chippewa were a recognized tribe, the statute would not apply. Brief of the United States at 25, 31–32, United States v. Holliday, 70 U.S. (3 Wall.) 407 (1866) (No. 119). Likewise, Otibsko had to in fact be a member of the tribe. *See infra* note 65 and accompanying text.

[64] *Holliday*, 70 U.S. (3 Wall.) at 419.

[65] *Id.* at 410, 420.

[66] *Id.* at 417. Holliday argued that Congress lacked power under the Indian Commerce Clause to regulate the sale of liquor outside Indian territory, particularly when (as in his case) the sale took place wholly within one state. The Court rejected this claim. *See id.* at 418 ("[I]f commerce . . . is carried on with an Indian tribe, or with a member of such tribe, it is subject to be regulated by Congress . . . .").

[67] *Id.* at 420.

[68] In fact, state courts applied their own traditional political question doctrine, treating as conclusive the determination of state officials on certain "political questions." *See, e.g.*, State v. Wagner, 61 Me. 178, 184 (1873) (declaring, in a case where the defendant had allegedly committed a crime on Smutty Nose Island, that it would treat as conclusive the state political branches' determination that the island was part of Maine).

[69] 235 N.Y. 255 (1923).

[70] *See* E.D.D., *International Recognition and the National Courts*, 21 MICH. L. REV. 531, 531 (1923) (recounting the facts of the case).

leader of the country.[71] The state court found that it was bound by the political branches' determination: "Who is the sovereign of a territory is a political question. In any case where that question is in dispute the courts are bound by the decision reached by those departments."[72] The court held, as a matter of law, that such an unrecognized government lacked standing to sue in a New York state court.[73]

The above cases illustrate several important features of the traditional political question doctrine. First, although courts did not themselves adjudicate political questions, neither did they dismiss as nonjusticiable an issue that turned on a political question. Instead, the courts enforced and applied the political branches' determinations in the course of resolving the underlying case or controversy. [74] Moreover, I want to underscore the depth of the courts' deference—indeed, subservience—to the political branches on these political questions. The federal and state courts treated the political branches' conclusions as factual rules of decision, even if it appeared that the political branches got the facts *wrong*. Thus, in *Kennett v. Chambers*, it made no difference that Texas did in fact appear to be independent of Mexico at the time the contract was signed.[75] Nor was the state court in *Cibrario* moved by "the patent and notorious fact that the Soviet

[71] In February 1917, the Russian Emperor abdicated his throne, and a provisional government took control of the country. This control was short-lived, however, and by October 1917, the Bolshevik government controlled the nation, which it renamed the Soviet Union. ANTHONY D'AGOSTINO, THE RUSSIAN REVOLUTION, 1917–1945, at 40 (2011). The United States government did not recognize the Soviet government until 1933. *See* United States v. Pink, 315 U.S. 203, 211 (1942) (noting the recognition).

[72] *Cibrario*, 235 N.Y. at 262–63.

[73] *Id.* at 257, 260 (noting that "[i]f recognized," a foreign government "undoubtedly . . . may" be a plaintiff in a New York state court but finding "no precedent" for the proposition that "a power not recognized by the United States may seek relief in our courts").

[74] Accordingly, the Court's only goal was to discern—and then apply—the political branches' determinations on these "political questions." Although that was often clear, there were cases where the Court struggled to figure out what the political branches had concluded (particularly if there appeared to be disagreement between Congress and the executive). *See, e.g.*, Pearcy v. Stranahan, 205 U.S. 257, 265–70, 272 (1907) (noting, in a tax case that turned on whether the Isle of Pines (an island off the coast of Cuba) belonged to Cuba or the United States, that the executive and some members of Congress disagreed on this issue, although concluding that the weight of the evidence suggested that the "United States" believed Cuba had at least de facto control, which was sufficient to render the individual liable for the importation tax); *see also* Benjamin H. Williams, *The Isle of Pines Treaty*, 3 FOREIGN AFF. 689, 690–91 (1925) (noting that the issue of control over the Isle of Pines was politically charged because a number of Americans had moved to the island during the American occupation of Cuba from 1898 to 1902 and advocated American control of the island).

[75] *See* Kennett v. Chambers, 55 U.S. (14 How.) 38, 47–48 (1852) (noting that the President had himself stated that Mexican control had been "annihilated" within Texas, but that the executive nevertheless viewed Texas as part of Mexico).

Republic [was] the government of Russia."[76] In each case, the courts followed the executive's determination, "whether the executive be right or wrong."[77]

Second, courts treated as conclusive *only* the political branches' determination of the political question—and then went on to resolve the remaining factual and legal issues in the case. Thus, in *Holliday*, although the Court applied the political branches' decision as to the Chippewa's tribal status, the Court independently examined the other issues in the case, including Holliday's constitutional claim that Congress lacked power under the Indian Commerce Clause to regulate the sale of liquor outside Indian territory.[78]

Third, the traditional doctrine was *not* a matter of Article III jurisdiction; the doctrine, after all, applied in both state and federal court.[79] Indeed, it does not appear that the doctrine was a strict rule (jurisdictional or otherwise). Jurists and scholars often suggested that if the political branches made no determination on a given "political question," the courts would have to decide that factual issue in order to resolve the case.[80] Furthermore, some nineteenth-century cases indicated that Congress could, by statute, delegate the determination of certain political questions to the judiciary—and thereby convert a "political question" into a "judicial question."[81] The traditional polit-

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[76] Oliver P. Field, *The Doctrine of Political Questions in the Federal Courts*, 8 MINN. L. REV. 485, 501–02 (1924) (noting that federal courts during this era also treated as conclusive the executive's determination, "[i]n spite of the patent and notorious fact that the Soviet Republic is the government of Russia today").

[77] Williams v. Suffolk Ins. Co., 38 U.S. (13 Pet.) 415, 420 (1839). Accordingly, Professor Henkin was incorrect in asserting that the Court's early cases involved *no* "extra-ordinary deference to the President." Henkin, *supra* note 3, at 611–12. Although the Court did not "abst[ain] from judicial review" of constitutional questions, the Court *did* apply what most commentators today would likely view as "extra-ordinary deference," when it declared itself bound by the political branches' factual determinations, whether they "be right or wrong."

[78] *See supra* note 66 and accompanying text.

[79] *See* U.S. CONST. art. III; Int'l Primate Prot. League v. Adm'rs of Tulane Educ. Fund, 500 U.S. 72, 78 n.4 (1991) ("[T]he requirements of Article III plainly [do] not apply [in state court]."); ASARCO Inc. v. Kadish, 490 U.S. 605, 617 (1989) (making a similar point). Likewise, other non-Article III courts, like territorial courts, treated as conclusive the political branches' determinations of "political questions." *See* Watts v. United States, 1 Wash. Terr. 288, 295–96, 299 (1870) (treating as conclusive, in a criminal case, the political branches' determination that San Juan Island was part of the United States).

[80] *See In re* Cooper, 143 U.S. 472, 503 (1892) (suggesting in dicta that, if Congress and the executive fail to decide which country controls a given territory, the court must do so); QUINCY WRIGHT, THE CONTROL OF AMERICAN FOREIGN RELATIONS § 107, at 172–73 (1922) ("[I]f the controversy involves 'a political question' the courts hold that they must follow the decision of the political organs . . . . Sometimes, however, no definite decision has been given by those organs. In such cases, the courts [have given] a decision thereon.").

[81] *See, e.g.*, United States v. Arredondo, 31 U.S. (6 Pet.) 691, 734–36 (1832) (declaring that Congress by statute had "disclaimed [the boundary dispute at issue] as a political

ical question doctrine, accordingly, seemed to be viewed as a background default rule: To the extent that the political branches decided a given political question, the courts were bound by that determination.

Finally, as *Holliday* illustrates, *none* of these early cases treated constitutional questions as political questions. Constitutional considerations may have informed whether a particular factual issue was deemed a political question. For example, courts likely assumed that the executive and legislature had superior constitutional authority over (and greater expertise with respect to) foreign affairs and relations with Indian tribes and, for that reason, followed the political branches' determination of matters like de facto control over a foreign territory and the tribal status of a group of Native Americans. [82] But aside from dicta in *Luther v. Borden* (discussed below),[83] there is little indication that either the federal or the state courts viewed themselves as bound by the political branches' determinations of constitutional questions. On the contrary, there is considerable evidence that the early judiciary assumed that it could independently determine all constitutional questions that arose in a case or controversy.[84]

B. Understanding Luther v. Borden

The description of the traditional political question doctrine provided above sheds light on *Luther v. Borden*, a case that is often associated with the modern doctrine. Many commentators describe *Luther* as holding that questions under the Guarantee Clause of Article IV, which provides that the "United States shall guarantee to every state

question for the legislative department to decide, and enjoined it on us as purely judicial"); *see also* Field, *supra* note 76, at 499 ("Congress can divest a political question of its character by providing that it be settled by the courts.").

[82] *See, e.g.*, Doe v. Braden, 57 U.S. (16 How.) 635, 657 (1854) (stating that courts must treat as conclusive the executive's decision that a foreign diplomat had the power to negotiate a treaty because otherwise "it would be impossible for the executive . . . to conduct our foreign relations . . . and fulfil the duties which the Constitution has imposed upon it"); Kennett v. Chambers, 55 U.S. (14 How.) 38, 50 (1852) ("[I]f we undertook to [determine Texas's status] . . . , we should take upon ourselves the exercise of political authority, for which a judicial tribunal is wholly unfit, and which the Constitution has conferred exclusively upon another department."); BLACK, *supra* note 36, § 56, at 100 (offering as one reason behind the doctrine that "courts ought not to usurp the functions of the political branches . . . nor intrude upon their jurisdiction"); *see also* Note, *supra* note 42, at 134–35 ("[T]he judiciary is bound by the decision of the executive department in political questions" because "[c]ontrary decisions would be a source of embarrassment, and might involve the state in international complications.").

[83] *See infra* Part I.B.

[84] *See infra* Parts I.C, I.D; *cf.* 2 WILLOUGHBY, *supra* note 37, § 577, at 999 (stating that the same considerations that supported treating certain factual questions as "political questions" did not permit the executive or legislature "to violate constitutional provisions").

. . . a republican form of government," are outside the scope of judicial review.[85] But a closer look reveals that the Court in *Luther* issued no such holding; in fact, *Luther* was, in most respects, a traditional political question case.

The case arose out of the Dorr Rebellion in Rhode Island. A group of citizens led by Thomas Dorr objected to the existing state constitution, which significantly restricted the right to vote,[86] and sought in 1841 to form an alternative government.[87] (Although Dorr's supporters did not ultimately gain control over Rhode Island,[88] the Dorr Rebellion did lead to considerable reform.[89]) During this rebellion, Luther Borden, a representative of the existing "charter government," broke into Martin Luther's house to arrest him for unlawfully supporting the Dorr regime.[90] Luther subsequently sued Borden for trespass, and Borden defended himself on the ground that he had acted on behalf of the charter government, which had imposed martial law during the crisis.[91] Luther responded that, at the time of the trespass, the Dorr group was the government of Rhode Island.[92] Accordingly, one of the central questions in the case was which "government" was the true government of the state.

In the opinion for the Court, Chief Justice Taney announced that this question—which government controlled Rhode Island—was a political question, such that the judiciary would accept as binding the

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[85] U.S. CONST. art. IV, § 4; Barkow, *supra* note 3, at 255 (asserting that, in *Luther*, "the Court . . . conclude[d] that the interpretation of the Guarantee Clause rests with Congress"); Zachary M. Vaughan, Note, *The Reach of the Writ:* Boumediene v. Bush *and the Political Question Doctrine*, 99 GEO. L.J. 869, 872 (2011) ("The *Luther* Court's declaration that the Guarantee Clause is a nonjusticiable political question has been consistently followed.").

[86] WILLIAM M. WIECEK, THE GUARANTEE CLAUSE OF THE U.S. CONSTITUTION 86–87 (1972) (noting that "[t]he royal charter" from 1663 "had been retained as the state constitution" and generally restricted suffrage to real property owners); *see* GEORGE M. DENNISON, THE DORR WAR: REPUBLICANISM ON TRIAL, 1831–1861, at 27 (1976).

[87] *See* Luther v. Borden, 48 U.S. (7 How.) 1, 35–36 (1849) (discussing how individuals who were "dissatisfied with the charter government" sought to create a new constitution); WIECEK, *supra* note 86, at 89–92, 94–95 (discussing these events).

[88] *See* WIECEK, *supra* note 86, at 95 (noting that the newly formed Dorr government met for two days and then adjourned).

[89] *See id.* at 99 (noting that Rhode Island adopted a new constitution that greatly expanded suffrage and thus "Dorr and his sympathizers . . . lost the battle but won the war").

[90] *Luther*, 48 U.S. (7 How.) at 37; *see also supra* note 86 (noting that Rhode Island at this time used its royal charter as its state constitution).

[91] *Luther*, 48 U.S. (7 How.) at 34.

[92] *Id.* at 34–35.

determination of the political branches.[93] In light of the precedents discussed above, this conclusion was unsurprising.[94] The Court declared that Congress had the primary authority for determining which government was established in a state—a determination Congress made when it admitted senators and representatives from that state.[95] The Court then stated the following (a passage that would be the focus of subsequent commentary):

> Under [the Guarantee Clause] it rests with Congress to decide what government is the established one in a State. For as the United States guarantee to each State a republican government, Congress must necessarily decide what government is established in the State before it can determine whether it is republican or not. And when the senators and representatives of a State are admitted into the councils of the Union, the authority of the government under which they are appointed, as well as its republican character, is recognized by the proper constitutional authority. And its decision is binding on every other department of the government, and could not be questioned in a judicial tribunal.[96]

In this case, "Congress was not called upon to decide the controversy," because the Dorr government did not last long enough to select members of Congress—and thereby give Congress two slates of

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[93] *Id.* at 47 ("[W]hether [the people of a state] have . . . establish[ed] a new [government], is a question to be settled by the political power. And when that power has decided, the courts are bound to take notice of its decision, and to follow it.").

[94] *See supra* Part I.A. It is far more surprising that the Chief Justice at one point suggested that the determination as to which government controlled a state was a question of state law, such that the Court was bound by the Rhode Island courts' recognition of the charter government. *Luther*, 48 U.S. (7 How.) at 40. Indeed, some commentators have treated *Luther* as a case in which federal courts deferred to state courts on a state law issue. *See* David P. Currie, *The Constitution in the Supreme Court: Civil War and Reconstruction, 1865–1873*, 51 U. CHI. L. REV. 131, 166–67 (1984). Although that is a plausible reading, much of the opinion treats the decision as one for the political branches. Moreover, it would be odd to leave this determination to the state courts; a court *must* assume the legitimacy of the constitution that creates it—as the Court in *Luther* seemed to recognize. *See* Walter F. Dodd, *Judicially Non-Enforcible Provisions of Constitutions*, 80 U. PA. L. REV. 54, 90 (1931) ("Once a government is in operation, a court, constituting part of the organization thereunder, could hardly declare that government ineffective."); *see also Luther*, 48 U.S. (7 How.) at 39–40 ("[T]he question [which government exists in a State] . . . has not heretofore been recognized as a judicial one in any of the State courts. . . . Indeed, we do not see how the question could be tried and judicially decided in a State court. . . . [I]f a State court . . . should come to the conclusion that the government under which it acted had been put aside and displaced by an opposing government, it would cease to be a court, and be incapable of pronouncing a judicial decision upon the question it undertook to try."). In any event, if *Luther* was a "state law" case, then *every* statement about the political branches was clearly dicta, including the one that I focus on here: the notion that Congress controls the interpretation of the Guarantee Clause.

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

[96] *Id.*

representatives from which to choose.[97] Absent a congressional determination, the Court looked to the actions of the executive branch, which had statutory authority to put down insurrections within states.[98] Although President John Tyler did not send in the militia to support the charter government, he had indicated his willingness to do so, if necessary.[99] Accordingly, the executive had, in effect, recognized the charter government as *the* government of Rhode Island.[100] This determination, the Court declared, was as "authoritative" as the executive's recognition of the government of a foreign country.[101]

The Court then went on to decide the major legal issue in the case: whether the charter government was justified in declaring martial law during the Dorr Rebellion. The Court upheld the use of martial law, reasoning that "unquestionably, a State may use its military power to put down an armed insurrection."[102] Interestingly, in this part of the opinion, the Court expressed a view on the meaning of the Guarantee Clause. Chief Justice Taney declared that "[u]nquestionably a military government, established as the permanent government of the State, would not be a republican government, and it would be the duty of Congress to overthrow it."[103] In this case, however, there was no such problem, because the declaration of martial law "was intended merely for the crisis," not to establish a permanent military regime.[104]

Luther v. Borden was, in many respects, a traditional political question case. The Court treated as conclusive the political branches' factual determination that the charter government controlled Rhode Island, and then went on to resolve the legal issue in the dispute. The case has, however, been incorporated into the modern political question doctrine because of the Court's statement that Congress has the power to determine not only "what government is the established one in a State" but also "whether it is republican" in form.[105] As some

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97 *See id.* ("[A]s no senators or representatives were elected under the authority of the [Dorr] government . . . Congress was not called upon to decide the controversy.").

98 *Id.* at 42–43.

99 *Id.* at 44; *see also* DENNISON, *supra* note 86, at 72, 121 (during the crisis, President John Tyler made clear that he "would support the charter government at all costs").

100 *Luther*, 48 U.S. (7 How.) at 44.

101 *Id.* ("In the case of foreign nations, the government acknowledged by the President is always recognized in the courts of justice.").

102 *Id.* at 46. Justice Woodbury dissented only on this point. *See id.* at 51, 70 (Woodbury, J., dissenting) (disputing "only . . . the points in issue concerning martial law").

103 *Id.* at 45 (majority opinion).

104 *Id.*

105 *Id.* at 42.

scholars have recognized, this language was dicta.[106] That is true not only because (as the Court stated) "Congress was not called upon to decide the controversy"[107] but also because the plaintiff in *Luther* did not challenge the charter government as "unrepublican"; he claimed only that the charter government had been superseded by the Dorr regime.[108]

But I also want to emphasize another point that has often gone unnoticed by modern scholars. Although *Luther* has been cited for the proposition that Guarantee Clause claims are nonjusticiable (as the term is used in the modern political question doctrine), that is *not* what Chief Justice Taney's opinion declared. Instead, Chief Justice Taney was, albeit only in dicta, extending the traditional political question doctrine to an area of constitutional law. That is, in adjudicating cases and controversies, the Court would have to treat as "binding" Congress's determination as to whether a state government was "republican."[109]

It is not clear why Chief Justice Taney included this dicta about the Guarantee Clause—dicta that is hard to reconcile with the Chief Justice's own willingness to interpret the Clause later on in the *Luther* opinion. It is possible that Chief Justice Taney (later, the author of *Dred Scott v. Sandford*) was thinking ahead to future disputes over slavery.[110] During the mid-nineteenth century, a number of abolition-

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[106] *See* Arthur E. Bonfield, *The Guarantee Clause of Article IV, Section 4: A Study in Constitutional Desuetude*, 46 MINN. L. REV. 513, 535 (1962) (noting this "unfortunate dicta"); Fritz W. Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 YALE L.J. 517, 589–91 (1966) (describing the Court's declaration as "dicta").

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

[108] The plaintiff could have made a reasonable claim that the charter government violated the Guarantee Clause, given the suffrage restrictions in the charter constitution. *See supra* note 86 and accompanying text. But my review of the record indicates that the plaintiff did not raise such a claim. *See, e.g.*, Transcript of Record at 11–18, Luther v. Borden, 48 U.S. (7 How.) 1 (1849) (No. 115) (containing the plaintiff's offer of proof, which focused on the fact that the charter government had been superseded and stating, in its only use of the word "republican," that the new Dorr government *was* republican). Nor does the Court's opinion indicate that the plaintiff asserted such a claim. *See also* Currie, *supra* note 94, at 166 (similarly observing that "[t]he plaintiff had not relied on the guarantee clause" in *Luther*).

[109] *See supra* note 96 and accompanying text.

[110] Chief Justice Taney later authored the Court's opinion in *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857). For discussions of how the Guarantee Clause factored into the debate over slavery, see WIECEK, *supra* note 86, at 133–65; Bonfield, *supra* note 106, at 530–32. Notably, Chief Justice Taney did not mention slavery in his *Luther* opinion, leading historian William Wiecek to conclude that he "entirely missed" the implications of that case for the slavery debate. WIECEK, *supra* note 86, at 133 (asserting that "Taney was usually sensitive to the implications of cases before him regarding slavery . . . . Yet in the *Luther* case, Taney entirely missed any such implications"). But I see no reason to assume that Chief Justice Taney overlooked those implications.

ists argued that every slave state lacked a "republican" form of government.[111] By declaring itself bound by Congress's determination as to the republican nature of a state government, the Court in *Luther* ensured that it would have to reject any such Guarantee Clause challenge to slavery.[112] Congress had, after all, since the Founding accepted representatives and senators from slave states.[113]

In any event, this passage in *Luther* was apparently not viewed for many years as declaring that all Guarantee Clause issues were "political questions." As discussed below, the Court in the late nineteenth and early twentieth centuries (through 1911) adjudicated a number of Guarantee Clause challenges on the merits. The dicta in *Luther* would, however, become important when it was picked up—and transformed—by the Court in 1912.

C. Constitutional Questions Were Not Treated as Political Questions

Throughout the nineteenth and much of the twentieth century, federal courts adjudicated constitutional questions on the merits, including issues that are today considered quintessential "political questions," such as the validity of constitutional amendments under Article V and the meaning of the Guarantee Clause of Article IV.[114]

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[111] *See* WIECEK, *supra* note 86, at 136, 145 (noting that "antislavery thinkers" argued that "slavery was incompatible with republican government"); Bonfield, *supra* note 106, at 531 (making a similar point).

[112] Such an approach would have been consistent with proslavery arguments of that era. In response to claims that slavery was at odds with republican government, Southerners pointed out that Congress had often admitted slave states into the Union "with the explicit declaration that they were 'republican in form.'" WIECEK, *supra* note 86, at 146.

[113] The Court, however, was never asked to resolve the question whether slavery was "unrepublican." Bonfield, *supra* note 106, at 537.

[114] Likewise, it does not appear that the Court refrained from adjudicating constitutional questions that arose in the realm of foreign policy or war powers. *See* JOHN HART ELY, WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH 55 & 176 n.46 (1993) ("[I]n the nineteenth century the hesitation [about adjudicating cases involving foreign affairs and national security] was not even expressed by commentators . . . ."). There is a difficult question whether the "plenary power" doctrine created by the Supreme Court in the late-nineteenth century for immigration cases was an early version of the modern doctrine of nonjusticiable constitutional questions, or instead a doctrine of extreme deference to the political branches. *See* Cornelia T. L. Pillard & T. Alexander Aleinikoff, *Skeptical Scrutiny of Plenary Power: Judicial and Executive Branch Decision Making in* Miller v. Albright, 1998 SUP. CT. REV. 1, 32, 37–38 (describing the "plenary power doctrine" as "a Court-crafted rule of extreme judicial deference to congressional and executive exercises of the immigration power" and noting the "analogy" between the plenary power doctrine and the modern political question doctrine, but stating that "[a] conclusion that immigration cases involve nonjusticiable political questions is not consistent with applying even a low level of scrutiny" and doubting that early immigration cases applied something akin to the modern political question doctrine); *see also* Adam B. Cox, *Citizenship, Standing, and Immigration*

The available evidence thus indicates that jurists and scholars during this era did not view constitutional questions as "political questions."

Admittedly, I cannot prove that the nineteenth-century judiciary would under no circumstances have treated as conclusive a constitutional determination of another branch. It is possible, for example, that (if faced with the question) the Supreme Court would have enforced a congressional determination that an "invasion" or "rebellion" required the suspension of habeas corpus.[115] Nevertheless, I have identified no case in which the Court held that it was bound by the constitutional determination of a political branch. Nor did the Court dismiss certain constitutional claims as nonjusticiable. Instead, the Court independently adjudicated constitutional questions in the course of resolving cases and controversies—precisely the approach that (as discussed below) was called for in *Marbury v. Madison*.[116]

1. Constitutional Amendments

Article V provides that the Constitution may be amended only with the support of two-thirds of the House of Representatives and the Senate and three-fourths of the states (voting through state legislatures or conventions).[117] Many jurists and scholars today consider the validity of a constitutional amendment to be a nonjusticiable political question, such that Congress has final—and, apparently, exclusive—authority to determine whether a measure complies with Article V.[118] Indeed, some commentators have argued that it would

Law, 92 CALIF. L. REV. 373, 383–84 & n.42 (2004) (stating that "[u]nderstood as a doctrine of judicial deference, the plenary power [doctrine] is a close cousin of the political question doctrine" but also identifying "an important distinction . . . . At least as a matter of contemporary plenary power jurisprudence, . . . limited review of immigration law is at least formally available," although noting that "early plenary power cases do hint at the more categorical denial of review that typically accompanies the judicial determination that a controversy presents a nonjusticiable political question"). A full exploration of the nature of the plenary power doctrine is beyond the scope of this Article. At most, I believe, the early plenary power cases may be a limited exception to my general finding—that the Supreme Court during this era did not treat constitutional questions as nonjusticiable.

115 *See* U.S. CONST. art. I, § 9 ("The Privilege of the Writ of *Habeas Corpus* shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."). For a powerful argument that such a constitutional question should not be deemed a political question (even under modern law), see Amanda L. Tyler, *Is Suspension a Political Question?*, 59 STAN. L. REV. 333, 335 (2006) (observing that "there is no settled authority" on whether suspension is a political question).

116 5 U.S. (1 Cranch) 137 (1803); *see infra* Part I.D.

117 U.S. CONST. art. V.

118 Even scholars who argue that the amendment process should *not* be a political question agree that *Coleman v. Miller* (discussed below in Part II.B), has been construed to render Article V claims nonjusticiable. *See* Walter Dellinger, *The Legitimacy of Constitutional Change: Rethinking the Amendment Process*, 97 HARV. L. REV. 386, 402 (1983) (noting that "[t]he assumption since *Coleman* has been" that Congress will decide

be unwise to permit judicial review of the amendment process, because that is the only mechanism by which Congress can "overrule" what it views as an erroneous Supreme Court constitutional decision.[119]

That was not, however, the assumption of the early Court.[120] For example, in *Hollingsworth v. Virginia*, the Supreme Court considered, and rejected, an argument that the Eleventh Amendment was invalid because it had never been presented to the President for his signature.[121] Notably, the Eleventh Amendment was enacted to overrule the Supreme Court's own decision in *Chisholm v. Georgia*, which held that a state could be subjected to suit in the federal courts, absent its

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"any question concerning the validity of ratifications"); Michael Stokes Paulsen, *A General Theory of Article V: The Constitutional Lessons of the Twenty-Seventh Amendment*, 103 YALE L.J. 677, 718 (1993) ("*Coleman* . . . has come to be regarded as standing for the proposition that legal issues presented by the amendment process . . . are political questions . . . committed to Congress . . . .").

[119] *See* Orentlicher, *supra* note 24, at 749–50 (arguing that "courts should find a political question when their involvement would entail a serious institutional conflict of interest for the judiciary," such as in the areas of impeachment and constitutional amendment); Scharpf, *supra* note 106, at 588–89 (arguing that the judiciary should treat the amendment process as a political question in order to ensure a democratic check on judicial review); *see also* Erwin Chemerinsky, *Cases Under the Guarantee Clause Should Be Justiciable*, 65 U. COLO. L. REV. 849, 851, 853–54 (1994) (reiterating his view that there should perhaps be no political question doctrine but arguing that to the extent there is such a doctrine it should apply to the amendment process, given that "[c]onstitutional amendments are the only way for the political process to directly overturn a Supreme Court decision interpreting the Constitution").

[120] The early Court assumed that it could rule on the amendment process, like other constitutional questions. *See infra* notes 121–26 and accompanying text. I have, however, found a contrary view in dicta from one case. Notably, this decision did *not* suggest that the amendment process was nonjusticiable in the sense of the modern political question doctrine, but instead suggested that the traditional political question doctrine might apply. *See* White v. Hart, 80 U.S. (13 Wall.) 646, 649 (1872) (stating in dicta that Georgia could not "deny the validity of her ratification of the [Reconstruction] amendments. The action of Congress upon the subject cannot be inquired into. The case is clearly one in which the judicial is bound to follow the action of the political department of the government, and is concluded by it").

[121] 3 U.S. (3 Dall.) 378, 381–82 & n.(a) (1798) (holding that the President's veto power "applies only to the ordinary cases of legislation: He has nothing to do with the proposition, or adoption, of amendments to the Constitution"); *see* U.S. CONST. amend. XI ("The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another state, or by Citizens or Subjects of any Foreign State.").

consent.[122] But there is no indication that the Supreme Court hesitated in adjudicating *Hollingsworth* on the merits.[123]

Likewise, in the early twentieth century,[124] the Court addressed on the merits a series of substantive and procedural challenges to the Eighteenth and Nineteenth Amendments (involving prohibition and women's suffrage, respectively).[125] For example, in *Leser v. Garnett*, the Court held that the Nineteenth Amendment did not result in "so great an addition to the electorate" as to be outside the scope of Congress's power under Article V.[126] The Court clearly did not assume that Congress alone could determine the validity of constitutional amendments.

2. The Guarantee Clause

Article IV provides that "[t]he United States shall guarantee to every state in this union a republican form of government."[127] For over a century, jurists and scholars have described the Guarantee Clause as a nonjusticiable political question, such that Congress has exclusive control over the meaning of that Clause.[128] But as some modern commentators have recognized, that was not the assumption in the nineteenth and early twentieth centuries.[129]

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[122] 2 U.S. (2 Dall.) 419, 479 (1793); *see* James E. Pfander, *History and State Suability: An "Explanatory" Account of the Eleventh Amendment*, 83 CORNELL L. REV. 1269, 1271 (1998) ("[T]he Eleventh Amendment overturned the 'state suability' determination in *Chisholm*.").

[123] *See supra* note 121 and accompanying text; *see also* Robert J. Pushaw, Jr., *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 CORNELL L. REV. 393, 449 (1996) ("[*Hollingsworth*] nowhere intimated that the amendment process raised political issues outside the judiciary's competence.").

[124] *See* Dellinger, *supra* note 118, at 403 (noting that, after *Hollingsworth* in 1798, "[i]t was not until the 1920's that the Court was again called upon" to rule on the validity of amendments).

[125] *See* U.S. CONST. amends. XVIII, XIX. For substantive challenges, see National Prohibition Cases, 253 U.S. 350, 386 (1920) (upholding the Eighteenth Amendment); *infra* note 126 and accompanying text. For procedural challenges, see United States v. Sprague, 282 U.S. 716, 731–32 (1931) (rejecting an argument that the Eighteenth Amendment could only be approved by a state convention); Dillon v. Gloss, 256 U.S. 368, 375–76 (1921) (upholding Congress's seven-year time limit for ratifying the Eighteenth Amendment); Hawke v. Smith, 253 U.S. 221, 224–25, 227, 231 (1920) (holding that Ohio could not require ratification by a voter referendum).

[126] 258 U.S. 130, 135–37 (1922) (noting that the change required by the Nineteenth Amendment was no greater than that demanded by the Fifteenth Amendment).

[127] U.S. CONST. art. IV, § 4.

[128] *See* Brown, *supra* note 3, at 150 ("Every law student knows that a claim under the so-called Guarantee Clause is a political question . . . .").

[129] *See* New York v. United States, 505 U.S. 144, 184 (1992) ("In a group of cases decided before the holding of *Luther* was elevated into a general rule of nonjusticiability, the Court addressed the merits of claims founded on the Guarantee Clause . . . ."); Robert J. Pushaw, Jr., *Judicial Review and the Political Question Doctrine: Reviving the Federalist*

In *Minor v. Happersett*, for example, the Court held on the merits that the denial of women's suffrage did not violate the Guarantee Clause, emphasizing that only one of the original thirteen states (and no state admitted since) had granted women the right to vote.[130] The Court found that this history provided "unmistakable evidence" that women's suffrage was not a prerequisite of "republican" government under the Constitution.[131] The Court later adjudicated other Guarantee Clause challenges to state government action, without any suggestion that this constitutional issue might be a political question.[132]

Coyle v. Smith is especially illuminating. The State of Oklahoma sought by statute to move its state capital from Guthrie to Oklahoma City.[133] William H. Coyle, whose business interests would be adversely affected by the move, challenged the state law on the ground that it conflicted with the 1906 federal statute admitting Oklahoma into the Union, which prohibited Oklahoma from moving its capital until at least 1913.[134] The central issue in the case was whether Congress had the power to impose such a condition on a state.[135]

Relying on *Luther v. Borden*, the plaintiff claimed that once Congress determined, exercising its powers under the Admissions and Guarantee Clauses, that "the temporary location of the capital should be at Guthrie . . . the determination of congress must of necessity be

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"Rebuttable Presumption" Analysis, 80 N.C. L. REV. 1165, 1194–95 (2002) ("The [*Luther*] Court did not hold that all complaints under the Guarantee Clause raised political questions."). One precedent is ambiguous on this score. *See* Taylor v. Beckham, 178 U.S. 548, 578–81 (1900) (rejecting constitutional challenge to Kentucky election contest either on the merits or as nonjusticiable). *Compare, e.g.*, Weinberg, *supra* note 3, at 920 & n.126 (citing *Taylor* as a case decided on the merits), *with* Scharpf, *supra* note 106, at 591 & n.255 (describing *Taylor* as a political question case).

130 *See* 88 U.S. (21 Wall.) 162, 165, 175–78 (1875) (rejecting a challenge to provisions of the Missouri constitution and laws that limited suffrage to "[e]very male citizen"). According to the Court, New Jersey was the only state at the Founding that granted women the right to vote, and the state dispensed with that right in 1807. *Id.* at 175–78.

131 *See id.* (concluding that this history provided "unmistakable evidence of what was republican in form, within the meaning of that term as employed in the Constitution").

132 *See, e.g.*, Att'y Gen. of Mich. v. Lowrey, 199 U.S. 233, 237–38, 239 (1905) (rejecting a claim that the creation of a school district violated either the Contracts Clause or the Guarantee Clause); Forsyth v. Hammond, 166 U.S. 506, 515–16, 519 (1897) (rejecting a claim that a state violates the Guarantee Clause by delegating to the state judiciary the power to decide questions of annexation by a city).

133 Coyle v. Smith, 221 U.S. 559, 562–63 (1911).

134 *Id.* at 563 (noting that the plaintiff was the "owner of large property interests in Guthrie").

135 *Id.* at 565 (stating that the issue was "whether the provision of the [admissions] act was a valid limitation . . . , which overrides any subsequent state legislation repugnant thereto").

binding upon the courts."[136] "[T]he courts may not question the constitutionality [of the federal law] but can only accept and give effect to that which congress has created."[137] The plaintiff thereby sought, in the spirit of the dicta in *Luther*, to extend the traditional political question doctrine to a constitutional question. He urged the Court to "give effect" not only to Congress's judgment that the state capital should be at Guthrie but also to Congress's (implicit) determination that it had the power to impose such a condition.

The Supreme Court did not, however, even entertain the argument that it was required to "give effect" to Congress's judgment on a constitutional question. Although the Court mentioned Coyle's "political question" argument in describing the background of the case,[138] the Court did not address the claim. Instead, the Court went directly to the merits, holding that Congress could not restrict Oklahoma's authority to determine the location of its capital.[139] The Court emphasized that Congress must admit states "upon an equal footing" with existing states[140] and declared that the Guarantee Clause did not empower Congress "to impose restrictions upon a new State which deprive it of equality with other members of the Union . . . ."[141]

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136 Brief and Argument for Plaintiff in Error at 14–15, 53–54, Coyle v. Smith, 221 U.S. 559 (1911) (No. 941).

137 *Id.* at 14–15; *see also id.* at 18 ("[T]he courts may not question the constitutionality or power of congress but can only accept and give effect to that which congress has created.").

138 *See Coyle*, 221 U.S. at 565–66 (noting Coyle's claim that "the power of Congress to admit new states, and to determine whether or not its fundamental law is republican in form, are political powers, and as such, uncontrollable by the courts").

139 *Id.* at 573–74, 579–80.

140 *Id.* at 565–68, 573, 579–80 (internal quotation marks omitted).

141 *Id.* at 567–68. Scholars have also suggested that the legislative process presents a "political question," such that Congress has final authority to determine whether it complied with the Article I procedures for enacting legislation. *See* U.S. CONST. art. I, § 7 (describing procedures for enacting legislation); Brown, *supra* note 3, at 151 ("Traditionally, the integrity of the means of reaching legislative decisions had been considered off limits to judicial review for reasons focal to the political-question doctrine."); Choper, *supra* note 7, at 1505–06 ("Legislative enactments alleged as violating constitutionally required procedures have been generally held to be political questions."). The Supreme Court has, in general, clearly not treated the legislative process as a political question. For example, the Court has long adjudicated on the merits the constitutional requirement that appropriations laws commence in the House of Representatives, *see* U.S. CONST. art. I, § 7, cl. 1 (describing constitutionally required procedures for appropriations legislation); Millard v. Roberts, 202 U.S. 429, 435–37 (1906) (deciding the constitutionality of a revenue measure originating in the Senate); Twin City Bank v. Nebeker, 167 U.S. 196, 202–03 (1897) (deciding the constitutionality of a provision of a revenue bill that originated in the Senate); *see also* United States v. Munoz-Flores, 495 U.S. 385, 389–400 (1990) (rejecting a claim that the Origination Clause presented a political question), and the scope of the President's pocket veto power. *See* U.S. CONST. art. I, § 7, cl. 2 (describing the veto powers); The Pocket Veto Case, 279 U.S. 655, 675, 682–83 (1929) (interpreting the pocket veto provisions).

D. The Traditional Doctrine and Judicial Review

Under the traditional political question doctrine, courts treated as conclusive certain factual determinations made by the political branches. However, aside from dicta in *Luther v. Borden*, the Supreme Court showed little interest in extending this traditional doctrine to constitutional questions. That should be unsurprising. Applying the traditional doctrine to a constitutional claim—that is, treating the political branches' determination of a constitutional question as a "rule of decision" for a case—would have been in serious tension with nineteenth-century conceptions of judicial review.

In making the case for judicial review in *Marbury*, Chief Justice Marshall considered in part whether the Court had to enforce a statute, even if the Court found it unconstitutional.[142] The issue, stated another way, was whether the Court had to accept as conclusive

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Nevertheless, commentators have pointed to *Field v. Clark*, which held that the "enrolled act" certified by Congress and the executive is "unimpeachable" evidence of the statute passed by Congress. 143 U.S. 649, 672–73 (1892). Scholars have suggested that *Field* declared aspects of the Article I legislative process to be outside the scope of judicial review. An examination of *Field* reveals, however, that the Court was instead simply creating a rule of evidence. In the late nineteenth century, both federal and state courts were struggling with the question whether the enrolled act or the journals of the legislative chambers were superior evidence of "the law" enacted by the legislature. *See* Recent Case, *Impeachment of Statutes*, 7 HARV. L. REV. 183, 186 (1893) ("*Held*, the fact that a bill has been signed by . . . the general assembly, approved by the governor, and duly deposited . . . shows . . . that it has become a law, and it is not competent to impeach the same by the journals . . . or other evidence."). Neither approach was ideal; legislators could falsify either the enrolled act or the journals. *See* 2 JOHN HENRY WIGMORE, A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 1350, at 1634, 1654 (1st ed. 1904) ("[T]here is equal or greater danger of error and fraud in the journals . . . ."). For that reason, a number of commentators, including Dean Wigmore in his 1904 *Treatise on Evidence*, argued that courts should adopt the more efficient approach of looking only at the enrolled act. *Id.* at 1654–55; *see* Dodd, *supra* note 94, at 67–68 ("A definite and more easily applicable rule is established if the enrolled bill be treated as conclusive.").

This debate reached the Supreme Court in *Field*. The plaintiffs in *Field* challenged a tariff law in part on the ground that it omitted a provision that had been approved by both chambers of Congress. 143 U.S. at 662–66, 668–69. Although the Court did not doubt that Congress must comply with the procedures for enacting legislation, this "general principle . . . [did] not determine the precise question before the court; for it remain[ed] to inquire as to the *nature of the evidence* upon which a court may act" in determining "whether a bill . . . was or was not passed by congress." *Id.* at 669–70 (emphasis added). The Court rejected the challengers' claim that the "journal [of each House is] the best . . . evidence . . . as to whether a bill was, in fact, passed" and held that it would instead treat the enrolled act as "complete and unimpeachable" evidence of "the law" enacted by Congress. *Id.* at 670–71, 672–73. The Court later confirmed that *Field* created a rule of evidence, for the Court invited Congress to modify its evidentiary rule by "declaring under what circumstances, or by what kind of evidence, an enrolled act of congress" may be impeached and "shown not to be" the "true law" passed by Congress. Harwood v. Wentworth, 162 U.S. 547, 560 (1896); *Twin City Bank*, 167 U.S. at 201–02.

142 5 U.S. (1 Cranch) 137, 176–77 (1803).

Congress's (apparent) determination that its statute was valid: "If an act of the legislature, repugnant to the constitution, is void, does it, notwithstanding its invalidity, bind the courts, and oblige them to give it effect?"[143]

The Chief Justice declared that such a proposition was "an absurdity too gross to be insisted on."[144] He explained: "It is emphatically the province and duty of the judicial department to say what the law is . . . . So if a law be in opposition to the constitution . . . the court must determine which of these conflicting [legal] rules governs the case. This is of the very essence of judicial duty."[145] Decades later, the Court reaffirmed that Congress could not require it to enforce what the Court viewed as an unconstitutional law. The Court would not treat the political branches' determination of a constitutional question as a "rule of decision" for a case.[146]

The Court's declaration that it is the "province and duty of the judicial department to say what the law is" has been understood by some modern jurists and scholars as support for judicial supremacy.[147] But, as other commentators have pointed out, the Court in *Marbury* did not clearly assert that its constitutional rulings were "supreme"

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143 *Id.* at 177.

144 *Id.*

145 *Id.* at 177–78.

146 *See* United States v. Klein, 80 U.S. (13 Wall.) 128, 145–48 (1872) (refusing to give effect to a statute that imposed a "rule of decision" that the Court viewed as an unconstitutional infringement on the President's pardon power). *Klein* involved a statute passed by Congress in 1870 to prevent former Confederates, who had received a presidential pardon, from recovering property that was taken by the federal government during the Civil War. *See* 16 Stat. 230, 235 (1870) (providing that "no pardon or amnesty granted by the President . . . shall be admissible in evidence on the part of any claimant in the court of claims as evidence in support of any claim against the United States"). Although the Court's reasoning is rather opaque, it appears that the Court struck down the statute in large part because it required the courts to enforce an unconstitutional law. *See Klein*, 80 U.S. (13 Wall.) at 145–48 (finding that the statute prescribed a rule that infringed "the constitutional power of the Executive"); *see also* Martin H. Redish & Christopher R. Pudelski, *Legislative Deception, Separation of Powers, and the Democratic Process: Harnessing the Political Theory of* United States v. Klein, 100 Nw. U. L. REV. 437, 444 (2006); Tyler, *supra* note 115, at 393–99 (asserting that both *Klein* and *Marbury* require courts to independently resolve constitutional questions).

147 *See, e.g.*, Cooper v. Aaron, 358 U.S. 1, 18 (1958) (asserting that *Marbury* "declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution"); *see also* Thomas Donnelly, Note, *Popular Constitutionalism, Civic Education, and the Stories We Tell Our Children*, 118 YALE L.J. 948, 960 (2009) ("The foundation of judicial supremacy is often traced back to Chief Justice John Marshall's bold declaration in *Marbury v. Madison* that '[i]t is emphatically the province and duty of the judicial department to say what the law is.'" (quoting 5 U.S. (1 Cranch) 137, 177 (1803))); Joshua I. Schwartz, *Nonacquiescence,* Crowell v. Benson*, and Administrative Adjudication*, 77 GEO. L.J. 1815, 1825 (1989) (noting invocations of *Marbury*'s "classic assertion of judicial supremacy in the interpretation of the law").

and binding on government actors in all contexts; such claims of judicial supremacy would not become commonplace until the latter half of the twentieth century.[148] Instead, these commentators argue, the *Marbury* Court indicated that it would decide constitutional questions only to resolve a given case or controversy.[149]

Whatever the resolution of that debate, the important point for present purposes is that the Court in *Marbury* and subsequent cases firmly declared its independence in resolving any constitutional question that came before it.[150] This independence with respect to constitutional questions contrasts sharply with the courts' subservience under the traditional political question doctrine, where the judiciary enforced the political branches' factual determinations, whether they "be right or wrong."[151] As Chief Justice Marshall declared in *Marbury*, the judiciary would not likewise enforce what it viewed as an unconstitutional statute. The courts would not "close their eyes on the constitution, and see only the law [enacted by Congress]."[152]

The historical account provided in this Article also sheds light on another aspect of *Marbury*. Scholars have often described *Marbury* as the source of the modern political question doctrine, stating that "*Marbury* itself contains the seeds for the view that the authority to answer some constitutional questions rests entirely with the political branches," because "[i]n *Marbury*, Chief Justice Marshall acknowl-

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[148] *See infra* notes 261–62, 305 and accompanying text.

[149] *See* David E. Engdahl, *John Marshall's "Jeffersonian" Concept of Judicial Review*, 42 DUKE L.J. 279, 326 (1992) (arguing that Marshall's point in *Marbury* was "that the judiciary's determination of constitutional questions is limited both in opportunity and in authoritative impact to a particular 'case'"). Under this view, the Court's power to make constitutional pronouncements is simply a byproduct of its "dispute resolution" function. For an illuminating discussion of the Court's "law declaration" and "dispute resolution" functions (and how both can be traced to *Marbury*), see Henry Paul Monaghan, *On Avoiding Avoidance, Agenda Control, and Related Matters*, 112 COLUM. L. REV. 665, 666–75 (2012). Notably, even some advocates of judicial supremacy have recognized that *Marbury* is "ambiguous" on the question whether the judiciary must be the ultimate interpreter of the Constitution. *See, e.g.*, Erwin Chemerinsky, *Who Should Be the Authoritative Interpreter of the Constitution? Why There Should Not Be a Political Question Doctrine*, *in* THE POLITICAL QUESTION DOCTRINE AND THE SUPREME COURT OF THE UNITED STATES, *supra* note 2, at 181, 185 (noting that *Marbury* can be interpreted as not resolving the question of whether there is an authoritative interpreter of the Constitution).

[150] Notably, I use the term "independent" to underscore that the judiciary was not bound to treat as *conclusive* the political branches' constitutional determinations. I do not mean to suggest that the courts owed no deference to other branches. *See* Henry P. Monaghan, Marbury *and the Administrative State*, 83 COLUM. L. REV. 1, 12–13, 34 (1983) (arguing that the Court retains "independent" judgment, but that its decisions often reflect the input of other units of government).

[151] Williams v. Suffolk Ins. Co., 38 U.S. (13 Pet.) 415, 420 (1839).

[152] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 178 (1803).

edged the existence of certain questions that are wholly outside the purview of the courts—'[q]uestions, in their nature political.'"[153]

It would be surprising if Chief Justice Marshall in *Marbury* had anticipated the modern political question doctrine—pursuant to which courts treat certain constitutional claims as nonjusticiable because they are "textually committed" to another branch. As discussed, there is simply no evidence that such a doctrine existed in the nineteenth century; on the contrary, courts during that era regularly adjudicated constitutional questions that came before them in a case or controversy, including issues that are today considered "political questions."

In context, however, it is clear that Chief Justice Marshall was *not* declaring that certain constitutional questions were outside the scope of judicial review. *Marbury* arose out of Secretary of State James Madison's refusal to deliver a commission to William Marbury, who had been appointed by outgoing President John Adams to serve as a justice of the peace in Washington, D.C.[154] Marbury sued for a writ of mandamus directing Madison to deliver the commission.[155] Chief Justice Marshall announced that the Court could issue the writ only if Madison's duty was "ministerial" rather than "discretionary."[156] It was in this context—before the Chief Justice even mentioned judicial review—that he made the comment about "questions, in their nature political":

> The province of the court is, solely, to decide on the rights of individuals, not to enquire how the executive, or executive officers, perform duties in which they have a discretion. Questions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court.[157]

Thus, if Madison had discretion to either deliver or refuse to deliver the commission, there would be nothing for the Court to "mandate" via a writ of mandamus.[158] The decision to deliver the commission would be a question, in its nature political, submitted to the executive. In that event, Madison's conduct would be, on the merits, within the bounds of his lawful discretion.[159] The Court in

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153 Barkow, *supra* note 3, at 239; *see also supra* note 4 (collecting sources).

154 *See Marbury*, 5 U.S. (1 Cranch) at 153–54.

155 *See id.* (discussing the background of the case).

156 *See id.* at 169–71 (explaining that the Court's "duty of giving judgment" is limited to, inter alia, the officer's acts "directed by law," as distinguished from acts left to "executive discretion").

157 *Id.* at 170.

158 *See id.* at 169 ("[T]o render the mandamus a proper remedy, the officer to whom it is to be directed, must be one to whom, on legal principles, such writ may be directed . . . .").

159 The modern-day equivalent would likely be the administrative law principle that courts may not review actions that are "committed to agency discretion by law." 5 U.S.C.

Marbury, however, found that Madison did have a ministerial duty to deliver the commission.[160]

Marbury did not lay the foundation for a political question doctrine precluding review of constitutional claims. In the nineteenth and early twentieth centuries, there was only one political question doctrine: the traditional doctrine that required federal and state courts to treat as conclusive certain factual determinations of the political branches. This doctrine neither arose from Article III, nor was a hard-and-fast jurisdictional rule; courts assumed, for example, that Congress could transform some political questions into judicial questions by assigning those issues to the judiciary. It remains to be seen how this traditional doctrine was eventually overtaken by the modern doctrine of today.

II
The (Lack of) Clear Change in Supreme Court Doctrine

Throughout the first half of the twentieth century, the Supreme Court continued to apply the traditional political question doctrine, treating as conclusive the political branches' determinations on certain factual issues.[161] In *Oetjen v. Central Leather Co.*, for example, the defendant's title to a piece of property depended on whether the property had been confiscated by the "government" of Mexico or ille-

§ 701(a)(2) (2012); *see* Interstate Commerce Comm'n v. Bhd. of Locomotive Eng'rs, 482 U.S. 270, 282 (1987) (noting that judicial review is unavailable "to the extent that . . . agency action is committed to agency discretion by law" (quoting 5 U.S.C. § 701(a)(2) (2012))).

[160] *Marbury*, 5 U.S. (1 Cranch) at 158.

[161] *See, e.g.*, Vermilya-Brown Co. v. Connell, 335 U.S. 377, 380–81, 390 (1948) (applying the executive's determination that Great Britain controlled Bermuda, and holding that the Fair Labor Standards Act still applied to American workers at a military base there); Clark v. Allen, 331 U.S. 503, 514 (1947) (applying the political branches' determination that a treaty continued to exist with post-World War II occupied Germany in resolving a dispute over a will); Cordova v. Grant, 248 U.S. 413, 419 (1919) (treating as conclusive the political branches' assertion of "authority over [a] territory" around the Rio Grande and "follow[ing] its lead" in resolving a trespass action); Charlton v. Kelly, 229 U.S. 447, 457–69, 476 (1913) (treating as conclusive the political branches' determination that they continued to have an extradition treaty with Italy, despite that country's alleged breaches of the treaty, and rejecting a habeas petitioner's other challenges to his extradition to Italy). The formal doctrine does not appear to have changed during this period, although there was a noticeable change in the rhetoric of some decisions in which the Court indicated less willingness simply to abide by political branch decisions, whether they were right or wrong. *See, e.g.*, United States v. Sandoval, 231 U.S. 28, 46–47 (1913) (stating that, although "it is the rule of this court to follow" the political branches on the tribal status of a group of Indians, Congress could not "arbitrarily call[ ] [a group] an Indian tribe" (quoting United States v. Holliday, 70 U.S. (3 Wall.) 407, 419 (1866))).

gally taken by a rogue military regime.[162] The Court declared, in accordance with its precedents, that the question as to which regime controlled Mexico was a political question, "the determination of which by the legislative and executive departments . . . conclusively binds the judges."[163]

The Supreme Court did, however, depart from its precedents in 1912, holding for the first time that it lacked jurisdiction to decide a Guarantee Clause claim, because that constitutional issue was a "political question." But, importantly, the Court did not thereby create a new doctrine of nonjusticiable political questions extending beyond the Guarantee Clause. Only a plurality of the Court in 1939 and 1947 sought to extend that concept to other constitutional claims.

Accordingly, through the first half of the twentieth century, the *only* "political question doctrine" accepted and applied by the Court as a whole was the traditional doctrine. I nevertheless describe the 1912 and plurality decisions in some detail here, because (as discussed in Part III) scholars would later emphasize those decisions in offering a different conception of the "political question doctrine."

A. Pacific States*: A New Paradigm*

One year after *Coyle*, [164] the Supreme Court took a sharp turn on Guarantee Clause claims in *Pacific States Telephone & Telegraph Co. v. Oregon*. Pacific States asserted that an Oregon tax on corporations violated the Guarantee Clause, because the law was adopted by a popular initiative, rather than by the state legislature.[165] The company argued that "the vital element in a republican form of government . . . is *representation*. Legislation by the people directly is the very opposite."[166]

In its Supreme Court briefs, Oregon invoked *Luther v. Borden* and (erroneously characterizing its dicta as a holding) contended that

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[162] 246 U.S. 297, 299 (1918). The case arose in the midst of the Mexican Revolution of 1910, during which two military officials—General Huerta and General Carranza—battled for power. *Id.* at 299–300. The Carranza forces had confiscated the property at issue and sold it to a company that, in turn, sold it to the defendant. *Id.* at 299–301.

[163] *Id.* at 302 (quoting Jones v. United States, 137 U.S. 202, 212 (1890)). By the time the case reached the Supreme Court, the political branches recognized the Carranza regime as the government of Mexico. *Id.* The Court found that, under international law principles, the conduct of such a recognized government could not "be successfully questioned in the courts of another" nation. *Id.* at 302–04. Accordingly, the defendant could keep the property. *Id.* at 304.

[164] 221 U.S. 559, 565–68, 573–74, 579–80 (1911) (holding that Congress could not restrict a state's authority to move its capital); *see supra* Part I.C.2.

[165] *See* Brief for Plaintiff in Error at 103, 75–115, Pac. States Tel. & Tel. Co. v. Oregon, 223 U.S. 118 (1912) (No. 822).

[166] *Id.* at 103.

"the determination of political questions," such as the "fact of the very existence of a republican form of government, rests with the Congress and with the Executive."[167] Oregon pointed out that "since the adoption of [its] initiative and referendum" in 1902, Congress had repeatedly accepted the state's senators and representatives, "something which could not have taken place under [*Luther v. Borden*] if Congress had failed to recognize the republican character of the constitution of the State."[168] Accordingly, "the very question . . . raised by" Pacific States had been "finally and absolutely determined so far as the judiciary is concerned."[169]

Pacific States strongly disputed that the political branches' determination of the "republican" nature of Oregon's government was "binding upon this court."[170] Pacific States declared: "[J]ust as this court [in *Coyle*] declined to be bound by" Congress's determination that its admissions law "conformed to the Federal Constitution . . . so here we invoke the court's jurisdiction to review the validity of provisions" of the Oregon Constitution, even if the political branches "have, by implication, accepted [Oregon's initiative] as conforming to the Federal Constitution."[171]

The parties' arguments thus seemed, much like *Coyle*, to present the Court with two basic options. The Court could either independently decide the constitutional claim or treat as conclusive the political branches' determination that the initiative complied with the Guarantee Clause. But the Court did neither. Instead, the *Pacific States* Court held that "the enforcement of [the Guarantee Clause], because of its political character, is exclusively committed to

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[167] Supplemental Brief for Defendant in Error at 57–58, Pac. States Tel. & Tel. Co. v. Oregon, 223 U.S. 118 (1912) (No. 36); *see also* Brief of Defendant in Error at 5–6, Pac. States Tel. & Tel. Co. v. Oregon, 223 U.S. 118 (1912) (No. 822) ("The power to determine whether a State has a republican form of government is vested in Congress. . . . [It] is a political rather than a judicial question.").

[168] Supplemental Brief for Defendant in Error, *supra* note 167, at 60–61.

[169] *See id.* at 57–58 (arguing that Pacific States' "appeal lies to Congress or to the Executive"). Interestingly, although Oregon quoted the language from *Luther*, urging the courts to treat the political branches' determination as conclusive, Oregon asked the Court to dismiss the appeal for lack of jurisdiction. *Id.* at 63. Oregon may have asked for this disposition in part because it claimed that the Court lacked jurisdiction for other reasons—that Pacific States lacked standing (or a cause of action) under the Guarantee Clause, and that a state's determination on how to allocate "legislative powers" did not raise a federal question. *See id.* at 53–57. In any event, Oregon's "political question" argument appeared to be—and was apparently understood by Pacific States as—an argument that the Court must treat as conclusive the determination of the political branches. Accordingly, Oregon should have urged the Court to reject Pacific States' claim on the merits.

[170] Reply Brief for Plaintiff in Error at 21–28, Pac. States Tel. & Tel. Co. v. Oregon, 223 U.S. 118 (1912) (No. 822).

[171] *Id.* at 26.

Congress."[172] Indeed, without citation to cases like *Coyle* or *Minor v. Happersett*, the Court asserted that this principle had "never been doubted or questioned since" *Luther v. Borden*. [173] Accordingly, the Court dismissed Pacific States' constitutional claim "for want of jurisdiction." [174]

Some early twentieth-century commentators noticed that *Pacific States* was a departure from the traditional political question doctrine.[175] One observer stated in 1912:

> The case is significant in that the court declined jurisdiction. The mere fact that a political question was involved will not explain this ruling. A political question is a question of fact which may arise in any kind of case and has no bearing on the jurisdiction of the court. The rule is merely that, instead of examining such a question on its merits or submitting it to a jury, the court will, if possible, find out how the political departments of government have decided it, and will then follow that decision. . . . Many cases involving political questions have been decided by the Supreme Court.[176]

Writing in 1925, Melvin Fuller Weston also found "a little difficulty . . . in reconciling" *Pacific States* with other "political question" cases, where the courts "accept[ed] . . . the decision of the other branches of government" as controlling on a particular issue.[177]

It is not clear why the Court in *Pacific States* departed from prior law. The Court's analysis is baffling. Much of the opinion suggests that the case required it to rule on the validity of the entire Oregon government and "every . . . statute passed in Oregon since the adoption of the initiative and referendum."[178] Such assertions were clearly over-

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172 223 U.S. 118, 133, 136–37 (1912).

173 *Id.* at 148–49.

174 *Id.* at 151; *see also id.* ("As the issues presented . . . are, and have long . . . been, definitely determined to be political and governmental, and embraced within the scope of the powers conferred upon Congress, and not therefore within the reach of judicial power, it follows that the case presented is not within our jurisdiction . . . .").

175 *See infra* notes 176–77 and accompanying text (discussing the shift in *Pacific States*); *see also* EDWIN COUNTRYMAN, THE SUPREME COURT OF THE UNITED STATES: WITH A REVIEW OF CERTAIN DECISIONS RELATING TO ITS APPELLATE POWER UNDER THE CONSTITUTION 253–55 (Matthew Bender & Co. eds., 1913) (arguing that the Court's ruling was not compelled by precedent).

176 Note, *Initiative and Referendum*, 25 HARV. L. REV. 644, 644 (1912).

177 Melville Fuller Weston, *Political Questions*, 38 HARV. L. REV. 296, 327 (1925). Weston, however, sought to explain the case as one where the plaintiff improperly asserted a broad structural claim—an analysis that we might today describe as an assertion that the plaintiff lacked standing or a cause of action under the Guarantee Clause. *See id.* at 322–26 (noting that the plaintiff claimed a "constitutional right . . . not to person or property . . . but to political existence and integrity").

178 *Pac. States*, 223 U.S. at 141 (stating that the plaintiff's "propositions . . . proceed alone upon the theory that the adoption of the initiative and referendum destroyed all government republican in form in Oregon"); *see also id.* at 150–51 ("[T]he assault which

stated.[179] After all, as Pacific States itself emphasized, the Court was "not asked to declare [Oregon] not to be a State" but "merely [to] . . . pronounce" that a single provision of the state constitution "violates one or more provisions of the Federal Constitution."[180]

Walter Pratt has suggested that the Court in *Pacific States* was concerned about a potential political backlash against a decision invalidating the initiative, which was a key part of the progressive agenda in the early twentieth century.[181] By 1912, many progressives were highly critical of what they perceived as a probusiness federal judiciary; a decision invalidating a state initiative imposing a tax on corporations could have added fuel to that fire.[182]

Whatever the explanation for the decision, the Court in *Pacific States* did not purport to create a new doctrine of nonjusticiable constitutional questions. On the contrary, the Court claimed—however erroneously—to be applying principles that had "never been doubted or questioned since" *Luther v. Borden*.[183] The impact of the 1912 decision, if any, would thus be determined by subsequent developments.

B. The Splintered Opinions in Coleman *and* Colegrove

For two decades after *Pacific States*, the Court reaffirmed (without analysis) that "questions arising under [the Guarantee Clause] are political, not judicial, in character . . . ."[184] But the Court

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the contention here advanced makes is not on the tax as a tax, but on the State as a State.").

[179] Scholars both at the time of *Pacific States* and more recently have noted that the Court's assertions were far-fetched. *See* COUNTRYMAN, *supra* note 175, at 259–61 (describing the Court's characterization of the case as "unreal" and "illusory"); Richard L. Hasen, *Leaving the Empty Vessel of "Republicanism" Unfilled: An Argument for the Continued Nonjusticiability of Guarantee Clause Cases*, *in* THE POLITICAL QUESTION DOCTRINE AND THE SUPREME COURT OF THE UNITED STATES, *supra* note 2, at 75, 81 (arguing that the Court's "'parade of horribles'" argument was "surely makeweight").

[180] Reply Brief for Plaintiff in Error, *supra* note 170, at 25.

[181] *See* WALTER F. PRATT, JR., THE SUPREME COURT UNDER EDWARD DOUGLASS WHITE, 1910–1921, at 69–71 (1999) (discussing the Court's decision); Nathaniel A. Persily, *The Peculiar Geography of Direct Democracy: Why the Initiative, Referendum, and Recall Developed in the American West*, 2 MICH. L. & POL'Y REV. 11, 13 (1997) (observing that the initiative, referendum, and recall were "emblematic" progressive reforms).

[182] *See* PRATT, *supra* note 181, at 70–71 (asserting that *Pacific States* "could not have come at a more opportune time to blunt the attacks on the courts"). For a discussion of the court-curbing efforts by progressives and populists during this era, see Tara Leigh Grove, *The Structural Safeguards of Federal Jurisdiction*, 124 HARV. L. REV. 869, 890–99 (2011).

[183] *Pac. States*, 223 U.S. at 148–49.

[184] Ohio *ex rel.* Bryant v. Akron Metro. Park Dist., 281 U.S. 74, 79–80 (1930); *see* Mountain Timber Co. v. Washington, 243 U.S. 219, 234–35 (1917); O'Neill v. Leamer, 239 U.S. 244, 248 (1915) ("The attempt to invoke § 4 of article 4 of the Federal Constitution is obviously futile . . . ." (citing *Pac. States*, 223 U.S. 118)). However, in one case, the Court seemed to reject the Guarantee Clause claim on the merits—before noting that it was

did not go on to declare other constitutional claims to be nonjusticiable political questions. The Court, for example, through 1931 continued to adjudicate on the merits challenges to constitutional amendments.[185]

Then, in a deeply divided opinion in *Coleman v. Miller*, the Justices for the first time declined to rule on the validity of an amendment—a proposal on child labor.[186] A group of Kansas legislators brought the suit, alleging that the amendment had not been properly ratified by their state.[187] Writing for a three-Justice plurality, Chief Justice Hughes asserted that the case presented nonjusticiable political questions that Congress had the "ultimate authority" to decide.[188]

Four other Justices, however, advocated a very different approach. Writing for that group,[189] Justice Black argued for the extension of the traditional political question doctrine to this area of constitutional law. Relying on cases like *Williams v. Suffolk Insurance*

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nonjusticiable. *See* Highland Farms Dairy, Inc. v. Agnew, 300 U.S. 608, 612 (1937) (stating that the unlawful delegation of state legislative power was "not a denial of a republican form of government" and that "[e]ven if it were, the enforcement of that guarantee . . . is for Congress, not the courts").

185 *See supra* Part I.C.1 (discussing the adjudication).

186 The Child Labor Amendment was proposed in 1924 to overrule Supreme Court decisions holding that Congress lacked the power to prohibit child labor in the states. *See* Coleman v. Miller, 307 U.S. 433, 435 & n.1 (1939) (noting the date of proposal); DAVID E. KYVIG, EXPLICIT AND AUTHENTIC ACTS: AMENDING THE U.S. CONSTITUTION, 1776–1995, at 257, 307–09, 469 (1996) (discussing the amendment); *see also* Bailey v. Drexel Furniture Co., 259 U.S. 20, 36–38, 44 (1922) (holding that Congress could not use its taxing power to regulate child labor); Hammer v. Dagenhart, 247 U.S. 251, 272–73 (1918) (holding that Congress could not use its commerce power to regulate child labor). The amendment was rendered unnecessary in 1941 when the Court upheld Congress's power to regulate labor conditions. *See* United States v. Darby, 312 U.S. 100, 115–17 (1941) (upholding congressional regulation of labor conditions); KYVIG, *supra*, at 313 (observing that, after *Darby*, "any remaining feeling of need for the still-unratified [child labor] amendment evaporated").

187 *See Coleman*, 307 U.S. at 436–37 (discussing the suit).

188 *See id.* at 450–51 (concluding that Congress had "ultimate authority" to determine "the efficacy of ratifications" and "whether . . . [an] amendment had lost its vitality through lapse of time . . . ."). Admittedly, the "political question" analysis in Chief Justice Hughes's plurality opinion is somewhat ambiguous. Most notably, the plurality "affirmed" the state court's decision rejecting the state legislators' lawsuit, rather than dismissing the case for lack of jurisdiction (as one might expect from a finding of "nonjusticiability"). *Id.* at 456. So it is plausible to say that even the plurality did not seek to extend the approach of *Pacific States*—a position that would further strengthen my contention that there was *no* doctrine of "nonjusticiable" political questions outside the context of the Guarantee Clause. Much of the plurality's opinion, however, sounds like an effort to extend *Pacific States*. So for present purposes, I assume that was the goal of Chief Justice Hughes's opinion. I seek here to show that, even if one makes this assumption, there was still no majority support in *Coleman* for expanding the *Pacific States* approach beyond the Guarantee Clause.

189 Justice Black believed the legislators lacked standing but still discussed justiciability because a majority of the Court found standing. *Id.* at 456–57 (Black, J., concurring).

Co., Justice Black insisted that Congress's determination that an amendment "conforms to the commands of the Constitution" "'conclusively binds the judges, as well as all other officers, citizens, and subjects of . . . government.'"[190] Moreover, Justice Black emphasized (along the lines of the traditional doctrine) that both federal and state courts were bound by Congress's determination of this "political question." For that reason, he chastised the Kansas Supreme Court for "assum[ing] jurisdiction" to review the amendment process.[191] "Neither State nor Federal courts can review that power."[192]

It is not clear why seven Justices declined to decide *Coleman* on the merits, particularly given that the Court had ruled on similar challenges as recently as 1931. But whatever the reason for the Justices' votes,[193] the fractured opinions in *Coleman* provided little insight into how a "political question doctrine" might apply, if at all, to constitutional questions. Although three Justices indicated (along the lines of *Pacific States*) that the validity of a constitutional amendment was a nonjusticiable political question, four other Justices insisted (in tension with the principles of *Marbury*) that the Court was bound to treat Congress's constitutional determination as a "rule of decision" in

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190 *Id.* at 457–58 ("[D]ecision of a 'political question' by the 'political department' to which the Constitution has committed it 'conclusively binds the judges'" (quoting Jones v. United States, 137 U.S. 202, 212 (1890))); *see id.* at 457 & n.3 ("'[I]t is not material to inquire, nor is it the province of the court to determine, whether the executive ('political department') be right or wrong. It is enough to know that in the exercise of his constitutional functions, he has decided the question.'" (quoting Williams v. Suffolk Ins. Co., 38 U.S. (13 Pet.) 415, 420 (1839))).

191 *Id.* at 458.

192 *Id.* at 459.

193 One possible explanation is that the Justices in *Coleman* were concerned about potential challenges to the Fourteenth Amendment. Chief Justice Hughes's plurality alluded to the "special circumstances" under which that amendment was added to the Constitution. *Id.* at 449–50. During Reconstruction, Congress instructed the southern states that they could not rejoin the Union, unless they ratified the amendment. *See* Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 1109 (1995). Scholars have thus debated whether the Fourteenth Amendment was adopted in accordance with Article V. *Compare, e.g.*, 2 BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS 15–17, 21–23 (1998) (contending that the Fourteenth Amendment can be justified only if the text of the Constitution may be altered outside the Article V process), *with* John Harrison, *The Lawfulness of the Reconstruction Amendments*, 68 U. CHI. L. REV. 375, 378 (2001) (arguing that the amendment was valid under Article V). In *Coleman*, a majority of the Court made clear that it would not entertain any such challenge. *See supra* notes 186–92 and accompanying text (discussing the ruling). I am grateful to Walter Dellinger for making me aware of the possible connection between *Coleman* and the Fourteenth Amendment.

future cases. And the remaining two Justices in *Coleman* urged the Court to decide the case on the merits.[194]

The Court's next excursion into this terrain, *Colegrove v. Green*, offered little clarity. *Colegrove* involved a challenge to an Illinois statute governing the apportionment of congressional districts.[195] The plaintiffs alleged that the districts were severely malapportioned in violation of, among other things, the Equal Protection Clause of the Fourteenth Amendment.[196]

Writing for a three-Justice plurality, Justice Frankfurter found that the plaintiffs' claim was a nonjusticiable political question, because the Constitution "conferred upon Congress exclusive authority to secure fair representation by the States."[197] But Justice Frankfurter's effort to extend the approach of *Pacific States* commanded only two other votes. Justice Rutledge concurred separately on the ground that, in his view, the Court should decline to exercise its discretionary power to issue equitable relief.[198] (That four-Justice vote was sufficient to reject the plaintiffs' challenge, because the case was heard by a seven-member Court.[199]) Justice Black (joined by Justices Douglas and Murphy) dissented, arguing that the case did not present a nonjusticiable political question and that malapportionment denied voters the equal protection of the laws.[200] The divided opinions

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194 Justices Butler and McReynolds asserted that the amendment was invalid because it was not ratified within a reasonable time. *Coleman*, 307 U.S. at 470–74 (Butler, J., dissenting).

195 *See* Colegrove v. Green, 328 U.S. 549, 550–51 (1946) (describing the claim).

196 *See id.* (describing the claim); *see* Anthony Lewis, *Legislative Apportionment and the Federal Courts*, 71 HARV. L. REV. 1057, 1058 (1958) (discussing the claim).

197 *Colegrove*, 328 U.S. at 554–55 (plurality opinion) (writing that the Constitution "precludes judicial correction" of the alleged "evil[ ]" of malapportionment); *see also id.* at 554 (emphasizing that Article I empowers Congress to "make or alter" state regulations of the "Times, Places and Manner" of congressional elections); U.S. CONST. art. I, § 4, cl. 1. Justice Frankfurter's plurality opinion also suggested that the plaintiffs lacked standing, because they asserted an injury to Illinois as a polity rather than a personal injury, and that the Court lacked the power to order the equitable remedy sought by the plaintiffs. *Id.* at 552.

198 *See Colegrove*, 328 U.S. at 565–66 (Rutledge, J., concurring) (arguing that the Court should not exercise its jurisdiction).

199 *See* Petition for Rehearing at 2, Colegrove v. Green, 328 U.S. 549, 550–51 (1946) (No. 804) ("It is most unfortunate . . . that the case necessarily had to be decided by seven Justices . . . ."); *see also* HUNTER R. CLARK, JUSTICE BRENNAN: THE GREAT CONCILIATOR 173 (1995) (noting that Justice Jackson "did not participate in the case" because he was "in Europe serving as chief prosecutor at the Nuremberg tribunal" and "[t]here was no ninth vote because Chief Justice Harlan Stone, recently deceased, had not yet been replaced").

200 *See Colegrove*, 328 U.S. at 569–73 (Black, J., dissenting) (arguing that the issue was justiciable and that the Court should have ruled in favor of the plaintiffs).

in *Coleman* and *Colegrove* did not create a new "political question doctrine" extending beyond the Guarantee Clause.[201]

III
The Academic Debate: Changing Understandings of the "Political Question Doctrine"

From the early nineteenth through the mid-twentieth century, the Supreme Court applied the traditional political question doctrine, treating as conclusive the political branches' determinations on certain factual issues in the course of deciding cases. Although the Court beginning in 1912 also found Guarantee Clause claims to be nonjusticiable political questions, only a plurality of the Court sought to extend that concept to other constitutional issues. Yet, by the mid-twentieth century, much of the legal community considered *Pacific States* and the plurality decisions in *Coleman* and *Colegrove* to be the core of the "political question doctrine." This shift in thinking is quite puzzling. But I suggest here that this shift can be traced to significant changes in the academic discourse about the doctrine.

A. The Shifting Focus to Pacific States *and Its Progeny*

In the first few decades of the twentieth century, a number of scholars struggled to make sense of the various "political question" cases. Like scholars today, some of these early commentators sought to explain why courts designated some issues as "political questions" as opposed to "judicial questions."[202] But this early scholarship also differed significantly from subsequent commentary on the political question doctrine. First, these early scholars focused on traditional

[201] Following *Colegrove*, the Supreme Court declined to intervene in a series of reapportionment cases. But none of these decisions clearly turned on a finding of nonjusticiability. In some cases, the Court's opinion indicated that it would not provide the equitable relief sought (as suggested by Justice Rutledge's concurrence in *Colegrove*). *See* South v. Peters, 339 U.S. 276, 277 (1950) (denying equitable relief). In the other cases, the Court denied the appeal for want of a substantial federal question, *see* Remmey v. Smith, 342 U.S. 916, 916 (1952), or without providing any reason, *see* Kidd v. McCanless, 352 U.S. 920, 920 (1956); Cook v. Fortson, 329 U.S. 675, 675 (1946).

[202] *Compare, e.g.*, Weston, *supra* note 177, at 300–01, 331–33 (arguing that "the line between 'judicial' . . . on the one hand, and 'political' on the other, is wholly a matter of the delegation of authority under organic law"), *with* Maurice Finkelstein, *Judicial Self-Limitation*, 37 Harv. L. Rev. 338, 339, 344 (1924) (asserting that courts designated certain issues as "political questions" for prudential reasons), *and* Field, *supra* note 76, at 485, 486–510, 511–13 (asserting that the designation of a matter as a "political question" rested on several factors, such as "the separation of powers" and "a lack of legal principles to apply"); *see also supra* note 82 and accompanying text (explaining that under the traditional doctrine, constitutional considerations likely informed the designation of "political questions").

political question cases, characterizing the "doctrine of political questions" as one that generally required the courts to treat "[t]he expressed view of the political department" as "a rule of decision for the court."[203] Although scholars sought, at times with some frustration,[204] to incorporate the Guarantee Clause cases into their analyses,[205] the political question doctrine was *not* seen primarily as a mechanism for determining which constitutional claims would be subject to judicial review.[206] Second, these early scholars did not treat the political question doctrine as a matter of Article III jurisdiction; instead, these commentators recognized that both federal and state courts were required to apply the political branches' decisions on "political questions."[207]

By the early 1930s, however (surprisingly, even before *Coleman* in 1939), there were signs of a shift in the scholarly definition of a

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[203] Field, *supra* note 76, at 485; *see also* CHARLES K. BURDICK, THE LAW OF THE AMERICAN CONSTITUTION § 51, at 128–29 (1922) (noting that the courts are controlled by and "will . . . follow without question the decision of the political departments" on various "political questions"); CHARLES GORDON POST, JR., THE SUPREME COURT AND POLITICAL QUESTIONS 11, 15 (1936) (stating that when the court is faced with a "political question," "it will disclaim all authority over the question and accept the decision of the political departments" and thus "depend upon the political departments . . . to inform [the court], by act or word, of the proper decision to apply in the particular case"); WRIGHT, *supra* note 80, at 172–73 ("[I]f the controversy involves 'a political question' the courts hold that they must follow the decision of the political organs . . . ."). Scholars also continued to discuss, as "political question" cases, decisions involving the power of states to assert their "political rights" in court, which we now describe as a matter of standing. *See supra* note 30; *see also* BURDICK, *supra*, § 51, at 131–32 (describing the Court's refusal, for lack of jurisdiction, to entertain Georgia's application for an injunction against enforcement of the Reconstruction Acts).

[204] *See supra* note 177 and accompanying text (discussing Professor Weston's comment in 1925 that he had "a little difficulty" reconciling *Pacific States* with some other political question cases).

[205] *See* BURDICK, *supra* note 203, § 51, at 129–30 (describing the political question doctrine as one in which "the courts will adopt the conclusions reached . . . by the political departments" and noting that *Luther* was such a case, and asserting that "[a]cting upon the same principle, the Supreme Court [in *Pacific States*] has refused to consider the question whether a State has or has not a republican form of government"); POST, *supra* note 203, at 13–16, 19–20 (describing *Luther*, both as a case where the Court applied the political branches' determination as to the "*de jure* government of Rhode Island" and, like *Pacific States*, as about the Court's "competence concerning" the Guarantee Clause (footnote omitted)).

[206] The exception may be Maurice Finkelstein. He argued that the courts should steer clear of certain (principally constitutional) issues, such as those entailed in the due process cases of the *Lochner* era. Finkelstein, *supra* note 202, at 361–63.

[207] *See, e.g.*, BLACK, *supra* note 36, § 56, at 100 (explaining that "if the [political] question has been settled by the action of the political departments of the government, the judiciary will accept and follow their conclusions without question"); Weston, *supra* note 177, at 315–16 (noting the "fairly well settled" principle that "questions involving international relations" are considered political questions).

"political question."[208] A few scholars began to describe "political questions" as constitutional issues that were outside the scope of judicial review[209] and to define the "political question doctrine" as an Article III jurisdictional device. [210] The shift continued over the next few decades. During this period, although scholars at times mentioned that nonconstitutional issues—like the recognition of foreign governments or the status of Indian tribes—were "political questions," there was little discussion of *how* these traditional political questions impacted a judicial decision. That is, scholars often overlooked the fact that courts would treat the political branches' determinations of these issues as binding rules of decision in adjudicating cases.[211] Scholars instead tended to describe *all* "political questions" as issues that were simply "non-justiciable."[212]

By the mid-twentieth century, the shift was largely complete.[213] The paradigmatic "political question" cases were those in which the

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[208] The findings here are based on my chronological review of books and dozens of articles on "political questions" from around the 1880s through the 1960s.

[209] *See*, *e.g.*, E.F. Albertsworth, *Constitutional Duties and Inadequate Enforcement Machinery*, 17 A.B.A. J. 153, 153 (1931) (criticizing "judicial non-review of so-called 'political' questions" (internal quotation marks omitted)).

[210] The first such reference that I identified was a 1927 student note. *See* Note, *What Constitutes a Case or Controversy Within the Meaning of Article III of the Constitution*, 41 HARV. L. REV. 232, 232–33 (1927) ("Collusive suits, moot cases, advisory functions and political questions are all without the scope of the judicial power." (footnotes omitted)). Subsequent commentators increasingly treated the "political question doctrine" as a matter of Article III jurisdiction. *See, e.g.*, John J. Cauley, Note, *Political Questions as Distinguished from Judicial Questions*, 24 NOTRE DAME LAW. 231, 231 (1949) ("Recognizing that certain matters are beyond the effective or permitted scope of the judicial function, the Supreme Court has frequently refused to act in cases involving a 'political question' . . . .").

[211] *See* John P. Frank, *Political Questions*, *in* SUPREME COURT AND SUPREME LAW 36, 36–43 (Edmond Cahn ed., 1954) (focusing on the nonjusticiability of political questions); Note, *Judicial Attitude Toward Political Question Doctrine: The Gerrymander and Civil Rights*, 1960 WASH. U. L.Q. 292, 293 (asserting that "non-justiciable . . . political questions" include "such questions as: (1) recognition of foreign governments; (2) commencement and termination of war; (3) jurisdiction over territory; [and] (4) status of Indian tribes" and that "[o]nce there has been a determination that a case is substantially concerned with a political question, the case will be dismissed and the decision of the department of government involved will stand undisturbed" (footnotes omitted)).

[212] Frank, *supra* note 211, at 36; *see also id.* at 36–43 (noting that courts had treated, as political questions, not only Guarantee Clause and constitutional amendments issues, but also questions like recognition of foreign governments, the beginning or end of war, status of Indian tribes, and the enforcement of treaties, but failing to explain that in the latter set of cases, the courts had treated the decision of the political department as a rule of decision for the court); *see also* Louis L. Jaffe, *Standing to Secure Judicial Review: Public Actions*, 74 HARV. L. REV. 1265, 1302 (1961) (characterizing "the category of 'political question'" as "a doctrine of judicial abstention").

[213] I identified only a few mid-twentieth-century articles that continued to discuss the traditional doctrine. *See, e.g.*, Edwin D. Dickinson, *The Law of Nations as National Law: "Political Questions,"* 104 U. PA. L. REV. 451, 451 (1956) (explaining that in foreign affairs

Supreme Court dismissed constitutional claims for lack of jurisdiction.[214] According to scholars of this era, such nonjusticiable constitutional questions included not only the Guarantee Clause but also constitutional amendments and reapportionment (despite the division in *Coleman* and *Colegrove*).[215] In short, scholars viewed the political question doctrine much like commentators today—as a "limitation, quite vague in outline, on the exercise by the courts of [the] function" of judicial review.[216]

B. The "Political Question Doctrine" in Law School Texts

One sign of (and likely contributor to) the shift in the understanding of the political question doctrine was the coverage of the doctrine in federal courts casebooks.[217] In the first edition of his well-known casebook, published in 1931, then-Professor Felix Frankfurter (working with Wilber G. Katz) included a short portion on "political

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cases, under "the so-called doctrine of 'political questions,'" once the political branches have made a decision "the courts are limited to ascertainment and conformity").

[214] *See* CHARLES L. BLACK, JR., THE PEOPLE AND THE COURT 28 (1960) ("There is another limitation, quite vague in outline, on the exercise by the courts of [judicial review]. It is said that the courts may not decide 'political' questions."); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 7 (1959) ("[T]he courts themselves regard some questions as 'political,' meaning thereby that they are not to be resolved judicially, although they involve constitutional interpretation and arise in the course of litigation.").

[215] *See* LEARNED HAND, THE BILL OF RIGHTS 15–16 (1958) (discussing as examples of political questions state gerrymandering, the validity of federal constitutional amendments, and "whether an amendment to a state constitution has made it no longer 'Republican'"); Willard Hurst, *Review and the Distribution of National Powers*, *in* SUPREME COURT AND SUPREME LAW 140, 147–49 (Edmond Cahn ed., 1954) (describing the political question doctrine as a limit on judicial review and characterizing *Luther* as a case in which the Court declared that "the question whether a state possesses a republican form of government . . . is a matter for Congress to decide"); Wechsler, *supra* note 214, at 7–9 (providing, as examples of "political questions," constitutional issues arising out of impeachment, the seating or expulsion of a senator or representative under Article I, the Guarantee Clause, and state gerrymanders). Some scholars also treated *Field v. Clark*, a case about legislative procedures, as a "political question" case. *E.g.*, Hurst, *supra*, 148 & n.25; *see also supra* note 141 (explaining that *Field* created a rule of evidence and did not declare aspects of the legislative process to be outside the scope of judicial review).

[216] BLACK, *supra* note 214, at 28; *see also* Hurst, *supra* note 215, at 144 (describing "the vaguely defined area known as 'political questions'" as "one of the earliest, and . . . most persistent, aspects of judicial review"); Jaffe, *supra* note 212, at 1300 (stating that "the doctrine of 'political questions'" created a "vague[ ]" set of exceptions to judicial review).

[217] *See infra* notes 218–24 and accompanying text. The first three federal courts casebooks did not mention any doctrine of "political questions." *See* HAROLD R. MEDINA, CASES ON FEDERAL JURISDICTION AND PROCEDURE (1926); GEORGE W. RIGHTMIRE, CASES AND READINGS ON THE JURISDICTION AND PROCEDURE OF THE FEDERAL COURTS (1917); CARL C. WHEATON, CASES ON FEDERAL PROCEDURE (1921); *see generally* Mary Brigid McManamon, *Felix Frankfurter: The Architect of "Our Federalism,"* 27 GA. L. REV. 697, 758–60 (1993) (identifying the Medina, Rightmire, and Wheaton casebooks as the first three texts for then-emerging courses on federal jurisdiction).

questions" in the chapter entitled "Constitutional Limits of the Judicial Power—'Case or Controversy.'"[218] Frankfurter used, as the only principal case, *Pacific States*.[219] Although Frankfurter's 1931 casebook cited a few articles that discuss traditional political question cases,[220] the casebook did not directly mention the traditional side of the doctrine.

Subsequent casebooks followed suit—emphasizing *Pacific States* and other constitutional cases, with little or no mention of the traditional doctrine.[221] The first edition of Armisted Dobie's federal courts casebook, released in 1935, offers an illustration. In a section entitled "Further Limitations on Jurisdiction of Federal Courts: Political Questions," Dobie used *Pacific States* as the first principal case.[222] The second (and only other) principal "political question" case was *Nixon v. Herndon*, in which the Supreme Court struck down on equal protection grounds a Texas state law that prevented African Americans

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[218] FELIX FRANKFURTER & WILBER G. KATZ, CASES AND OTHER AUTHORITIES ON FEDERAL JURISDICTION AND PROCEDURE ix, 118–25, 763 (1931).

[219] *See* FRANKFURTER & KATZ, *supra* note 218, at 118–25 & 125 n.1.

[220] *Id.* at 125 n.1 (citing Field, *supra* note 76, and Weston, *supra* note 177).

[221] Several of the early casebooks focused on *Pacific States* or other constitutional cases. *See* ARMISTEAD M. DOBIE & MASON LADD, CASES AND MATERIALS ON FEDERAL JURISDICTION AND PROCEDURE xii, 122–26 (1940) (containing a subsection for "Political Questions" under "Further Limitations on Jurisdiction of Federal Courts," and presenting as principal cases *Pacific States* and *Nixon v. Herndon*, 273 U.S. 536 (1927), where the Court adjudicated on the merits a constitutional challenge to racial discrimination in primary voting); ARMISTEAD M. DOBIE, CASES ON FEDERAL JURISDICTION AND PROCEDURE vii, 71–74 (1935) (same); RAY FORRESTER, DOBIE AND LADD'S CASES AND MATERIALS ON FEDERAL JURISDICTION AND PROCEDURE xiii, 83–88 (2d ed. 1950) (containing a subsection for "Political Questions" under "Further Limitations on Jurisdiction of Federal Courts," and presenting as principal cases *Coleman* and *Colegrove*). Other casebooks highlighted cases about the power of states to assert their "political rights" in court (cases that are now described as standing cases), but also pointed readers to *Pacific States* and other constitutional cases as the only other "political question" cases. *See* CHARLES T. MCCORMICK & JAMES H. CHADBOURN, CASES AND MATERIALS ON FEDERAL COURTS 14–15, 17 n.7 (2d ed. 1950) (directing readers in the index to a discussion about political questions in *Massachusetts v. Mellon*, 262 U.S. 447 (1923), and mentioning *Pacific States* in a footnote); CHARLES T. MCCORMICK & JAMES H. CHADBOURN, CASES AND MATERIALS ON FEDERAL COURTS 12–13, 15 n.5, 876 (1946) (same); *see also supra* note 30 (noting that these "political rights" cases are now viewed as standing decisions). Interestingly, Professor Frankfurter took the latter approach in the second edition of his treatise. *See* FELIX FRANKFURTER & HARRY SHULMAN, CASES AND OTHER AUTHORITIES ON FEDERAL JURISDICTION AND PROCEDURE 30–33 & n.1 (rev. ed. 1937) (using *Georgia v. Stanton* as the principal "political question" case, and discussing *Pacific States* and *Luther v. Borden*). The casebooks all gave short shrift to (or made no mention of) the traditional political question doctrine. Notably, *no* casebook suggested to readers how "political questions" functioned in the traditional cases until the first edition of HENRY M. HART, JR. & HERBERT WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM (1953). And, as discussed below, Hart and Wechsler still emphasized the decisions involving constitutional claims. *See infra* notes 225–30 and accompanying text.

[222] DOBIE, *supra* note 221, at vii, 71–73.

from voting in primary elections.[223] The juxtaposition of these two decisions is striking. In *Pacific States*, the Court held that Guarantee Clause claims were committed to Congress, while the Court resolved the equal protection challenge in *Nixon v. Herndon*. Accordingly, as presented by Dobie in 1935 (notably, even before *Coleman*), the political question doctrine was very much what we perceive today: a doctrine that determines which constitutional questions may be resolved by the judiciary, and which are reserved to the political branches.

The Dobie casebook did mention traditional political question cases in a footnote, observing that "the executive, not the judicial, department must pass on" matters such as "which foreign government has jurisdiction over certain territory,"[224] but nowhere explained the very different way in which these traditional political questions operated in federal court decisions. Thus, the casebook did not alert readers to the fact that the courts enforced and applied the executive's decision as to which country controlled a territory, rather than (as in *Pacific States*) dismissing as nonjusticiable an issue that involved a "political question."

The first edition of Henry Hart and Herbert Wechsler's *The Federal Courts and the Federal System*, published in 1953, offered a similar, albeit somewhat more complete, picture. Much like the casebook's predecessors, Hart and Wechsler presented the political question doctrine as a jurisdictional issue arising under Article III, placing the section on "Political Questions" in a chapter entitled "The Nature of the Federal Judicial Function: Cases and Controversies."[225] Hart and Wechsler also focused on constitutional claims. Thus, the principal case for the section was *Colegrove*, and the first examples of political question cases were *Pacific States* and *Luther v. Borden*.[226] (The casebook inaccurately described the latter as a case about the meaning of the Guarantee Clause, rather than solely as a dispute over

[223] 273 U.S. 536, 541 (1927); DOBIE, *supra* note 221, at 73–74. The state officials in *Nixon v. Herndon* urged that the Supreme Court lacked jurisdiction over suits involving state primaries. *See* Brief for Texas at 5–6, Nixon v. Herndon, 273 U.S. 536 (1927) (No. 117). But the Court dismissed that objection as "little more than a play upon words." Nixon v. Herndon, 273 U.S. at 540 ("That private damage may be caused by . . . political action and may be recovered for in a suit at law hardly has been doubted for over two hundred years . . . .").

[224] DOBIE, *supra* note 221, at 74 n.74.

[225] HART & WECHSLER, *supra* note 221, at xviii–xx.

[226] *Id.* at 192–93 (discussing *Pacific States* and *Luther*).

which government controlled Rhode Island.[227]) *Coleman* was another leading example of a "political question" case.[228]

Hart and Wechsler did also mention—in the text, not simply in the footnotes—that the concept of "political questions" might encompass issues like the "[d]uration of a state of war" and "[r]ecognition of foreign governments," and in discussing *Oetjen* indicated that courts would treat as "conclusive[ ]" the political branches' decision as to which government controlled a given territory.[229] Accordingly, the casebook at least pointed readers toward the traditional doctrine.

The bulk of Hart and Wechsler, however, presented the political question doctrine much like the casebook's predecessors—primarily as a mechanism for declaring certain constitutional questions outside the scope of judicial review. Indeed, Hart and Wechsler closed the section on political questions with the following: "If you were revising the Constitution of the United States, or framing an ideal constitution . . . , to what extent would you employ the courts to settle" basic questions of "asserted governmental authority?"[230] In other words, the first edition of Hart and Wechsler invited readers to consider the extent to which a legal system should employ judicial review.

Notably, these casebook selections not only reflected but also likely contributed to the change in the understanding of the "political question doctrine." Frankfurter's decision to highlight *Pacific States* in 1931 likely had a major impact on the subsequent scholarly literature and casebook coverage of the political question doctrine. As Professor and (later) Justice, Frankfurter was mentor and friend to many of the leading federal courts scholars of the mid-twentieth century, including Henry Hart and Herbert Wechsler. [231] Indeed, Professors Hart and Wechsler dedicated the first edition of their casebook to

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[227] According to the casebook, the plaintiff argued that "the charter government was invalid because in violation" of the Guarantee Clause. *Id.* at 192–93 (describing the claim that "the rebel government . . . was in control" as a secondary argument). *But see supra* note 108 and accompanying text (noting the plaintiffs in *Luther* did not make a Guarantee Clause claim).

[228] HART & WECHSLER, *supra* note 221, at 193–94. Hart and Wechsler also highlighted *Field v. Clark*, a case that had come to be seen as declaring certain aspects of the legislative process outside the scope of judicial review. *See supra* notes 141, 215. As I explain above, *Field* was an evidentiary decision. *See supra* note 141.

[229] HART & WECHSLER, *supra* note 221, § 6, at 194–95 (internal quotation marks omitted).

[230] *Id.* at 209.

[231] *See* Amar, *supra* note 18, at 689 n.7, 699 n.52, 703 n.71; McManamon, *supra* note 217, at 768–69 (noting that Hart and Wechsler were "student and collaborator" and "friend" of Frankfurter, respectively, and that their book was "clearly a descendant of Frankfurter's casebook").

Frankfurter.[232] That 1953 edition, in turn, soon became the "definitive text on the subject of federal jurisdiction," which "defin[ed] the pedagogic canon" of the field of federal courts for generations.[233] The influence of Frankfurter, Hart, and Wechsler, thus helps explain the dramatic shift in the understanding of the political question doctrine: The "definitive texts" of federal courts instructed the legal community that *the* "political question doctrine" was an Article III jurisdictional device that served primarily to identify which constitutional questions could be adjudicated by the federal courts.

C. Explaining the Shift in Scholarly Understanding

There remains the puzzle of why scholars, and particularly casebook authors, would emphasize a "doctrine" that had not clearly been adopted by the Supreme Court—or, at least, why no one seemed to question the coverage of "political questions" in casebooks. Although it may be impossible to fully explain this phenomenon, I suggest that broader political and jurisprudential forces likely influenced the scholarly emphasis on a "political question doctrine" that could define the scope of judicial review.[234]

In the early twentieth century, progressives were deeply critical of what they viewed as a probusiness Supreme Court, which struck down on constitutional grounds federal and state regulations designed to protect workers.[235] The Court's constitutional decisions during this "*Lochner* era" were closely associated with a way of thinking about law—that law was a science, and that legal principles could be "found" to answer any question.[236] Around the same time, and partly

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[232] HART & WECHSLER, *supra* note 221, at ix (showing that the first edition was dedicated "to Felix Frankfurter, who first opened our minds to these problems").

[233] Amar, *supra* note 18, at 689–90 (quoting Philip B. Kurland, Book Review, 67 HARV. L. REV. 906, 907 (1954)).

[234] I offer here only a brief account of the jurisprudential changes of this era. *Cf.* MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870–1960, at 169 (1992) ("[D]efining Legal Realism with precision is not . . . easy"); Amar, *supra* note 18, at 691 (stating that the legal process school "resists a simple one-line encapsulation").

[235] *See* WILLIAM G. ROSS, A MUTED FURY: POPULISTS, PROGRESSIVES, AND LABOR UNIONS CONFRONT THE COURTS, 1890–1937, at 1, 179 (1994) (observing that from 1890 to 1937, "populists, progressives, and labor leaders subjected both state and federal courts to vigorous and persistent criticism" and that "[p]rogressive proposals [during the 1920s] more often involved only the Supreme Court"); *see also* Tara Leigh Grove, *The Exceptions Clause as a Structural Safeguard*, 113 COLUM. L. REV. 929, 959–62 (2013) (discussing challenges to the Court's constitutional decisions during this era).

[236] *See* GARY MINDA, POSTMODERN LEGAL MOVEMENTS: LAW AND JURISPRUDENCE AT CENTURY'S END 24 (1995) ("The conceptualism of this era was . . . associated with the substantive due process tradition of constitutional law . . . ."). Indeed, in his dissent in *Lochner v. New York*, Justice Holmes attacked both the political assumptions and the conceptual approach of the majority opinion. *See* 198 U.S. 45, 75–76 (1905) (Holmes, J.,

in reaction to the Court's probusiness decisions,[237] a group of scholars known as "legal realists" urged a different understanding of law and legal institutions. Legal realists insisted that law was not "found" but "made"; much like political actors, judges had considerable discretion in choosing how to rule in each case. [238] Accordingly, legal realists called into question any attempt to "create a sharp distinction between law and politics and to portray law as neutral, natural, and apolitical." [239]

This new way of thinking about law had important implications for debates over judicial review. If the job of a judge was much like that of a legislator—with judges making choices, rather than identifying legal principles—judicial review became much more difficult to justify.[240] At a minimum, the legal realist critique seemed to counsel in favor of judicial restraint; but it could call into question the very existence of a judicial power to strike down legislation.

This intellectual dilemma provided the impetus for another school of academic thought: legal process theory.[241] In keeping with the insights of legal realism, legal process scholars acknowledged that judges had discretion when they made decisions, including in constitutional cases.[242] But legal process scholars insisted that judicial discre-

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dissenting) (stating that "[t]his case is decided upon an economic theory which a large part of the country does not entertain" and that "[g]eneral propositions do not decide concrete cases").

[237] *See* MINDA, *supra* note 236, at 24–26 ("Some of the leading legal decisions responsible for generating the American legal realist movement were the Supreme Court's economic due process decisions. The most notorious was *Lochner v. New York.*"); *see also* LAURA KALMAN, THE STRANGE CAREER OF LEGAL LIBERALISM 17 (1996) ("Legal realism proved the jurisprudential analogue of reform liberalism . . . .").

[238] *See* KALMAN, *supra* note 237, at 15–16 ("[T]he realists saw that for each legal rule that led to one result, at least one more rule pointed to another result.").

[239] HORWITZ, *supra* note 234, at 170.

[240] *See* Michael Wells, *Behind the Parity Debate: The Decline of the Legal Process Tradition in the Law of Federal Courts*, 71 B.U. L. REV. 609, 618 & n.37 (1991) (observing that, under the legal realist view, "judicial action resembles legislative decree . . . . [T]he fear arises that they may decide cases according to their personal preferences without the constraint imposed by accountability to the electorate" and that "[t]he problem is most acute in the constitutional context, where legislatures cannot override judicial decisions"); *see also* Daniel B. Rodriguez, *The Substance of the New Legal Process*, 77 CALIF. L. REV. 919, 941 (1989) (reviewing WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY (1988)) ("[L]egal realism challenged the very nature and scope of judicial power.").

[241] *See* HORWITZ, *supra* note 234, at 254–55 ("The legal process school sought to absorb and temper the insights of Legal Realism after the triumph of the New Deal."); Barry Friedman, *Neutral Principles: A Retrospective*, 50 VAND. L. REV. 503, 516–18 (1997) (recounting how legal process theorists sought to respond to legal realists).

[242] *See* HORWITZ, *supra* note 234, at 254 (describing the legal process school's "recognition that doctrinal formalism was incapable of eliminating discretion in the law");

tion could be properly confined through procedure.[243] Reasoned decisionmaking, along with jurisdictional doctrines emanating from Article III—like standing, ripeness, and mootness—would define the proper range of judicial authority, and, within that range, federal judges could legitimately make constitutional determinations.[244]

The legal process school had a profound impact on the field of federal courts. Henry Hart and Herbert Wechsler—following in the footsteps of their hero Felix Frankfurter—were among the leading legal process thinkers,[245] and the Hart and Wechsler casebook was both heavily influenced by, and contributed to the influence of, this school of thought.[246] Indeed, the legal process framework was "accepted for nearly forty years by scholars and judges as a starting point of analysis of federal courts issues."[247]

A "political question doctrine" that would define and limit the scope of judicial review fit nicely with the legal process image of a judicial function confined by procedure. The legal process movement thus helps explain why academics in the early to mid-twentieth century increasingly emphasized *Pacific States* and the plurality decisions in *Coleman* and *Colegrove*.[248]

MINDA, *supra* note 236, at 35, 37 (stating that legal process theorists "accepted the realists' claim that judges engage in policy-making when they decide legal cases").

243 *See* KALMAN, *supra* note 237, at 30–31, 41–42 (observing that "[p]rocess theorists were . . . obsessed with procedural issues [and] with limiting the role of the federal courts," particularly in the exercise of judicial review); MINDA, *supra* note 236, at 34–35 (tracing legal process theory back to Hart and Sacks's belief that "respect for procedure and principled decision making might lead judges to outcomes that conform to institutional and democratic norms").

244 *See* NEIL DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE 236, 238 (1995) (noting that, for legal process theorists, "[p]ost-realist jurisprudence must depart from the truism that judges make law and begin instead with the question of how they make law" and that process theorists emphasized the importance of "reasoned elaboration"); MINDA, *supra* note 236, at 35, 37 (noting that legal process theorists hoped self-restraint and reasoned decisionmaking would constrain discretion); Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 YALE L.J. 153, 241–44 (2002) (discussing how legal process theorists advocated reasoned decisionmaking as a way to constrain the judiciary); *infra* notes 256–58 and accompanying text (noting Alexander Bickel's reliance on jurisdictional doctrines to limit judicial review).

245 *See* Friedman, *supra* note 244, at 229–31 (describing Felix Frankfurter and Learned Hand as "heroes of the Legal Process school" whose teachings were extremely influential).

246 *See* Amar, *supra* note 18, at 690–91 (noting that the Hart and Wechsler casebook helped to "defin[e] what has come to be one of the most important schools of legal thought in late twentieth-century America, typically described as 'the legal process school'"); Wells, *supra* note 240, at 623–24 ("The Legal Process theory of adjudication serves as an essential premise for the [casebook's] conception of federal courts law . . . .").

247 Wells, *supra* note 240, at 623–24.

248 Although it is hard to pin down precisely when the legal process school began, Neil Duxbury has suggested that "process jurisprudence" dates back at least to the 1930s. DUXBURY, *supra* note 244, at 234–35.

Over time, this "doctrine" became such an important part of the legal discourse that jurists and scholars incorporated it into their theories of judicial review. Thus, both Justice Frankfurter and Judge Learned Hand (another leading figure in the legal process movement),[249] pointed to the doctrine in arguing for judicial restraint. Writing in 1955, Justice Frankfurter insisted that the political question doctrine refuted any claim that "courts of justice 'must of necessity determine'" every constitutional question that came before them.[250] Three years later, Judge Hand likewise urged that, since "the Supreme Court has steadfastly refused to decide constitutional issues that it deems to involve 'political questions'—a term it has never tried to define," it was clear that the Court need not invalidate government action "whenever [it] sees, or thinks that it sees, an invasion of the Constitution."[251] "It is always a preliminary question how importunately the occasion demands an answer."[252]

Responding to Judge Hand, Herbert Wechsler denied that the Supreme Court had broad discretion to refuse to answer a constitutional question.[253] But, notably, Wechsler agreed that the political question doctrine was an important limit on the Court's judicial review power; he simply insisted that such a limit, like the exercise of judicial review itself, had to be based on "neutral principles."[254] In Wechsler's view, "all the [political question] doctrine can defensibly imply is that the courts are called upon to judge" whether "the Constitution has committed the determination of the issue to another agency of government than the courts."[255]

The political question doctrine was central to the theory of Supreme Court decisionmaking presented by Alexander Bickel, another prominent legal process scholar.[256] Much like Judge Hand,

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[249] *See supra* note 245; *see also* KALMAN, *supra* note 237, at 30 (identifying Judge Hand as a member of the legal process school).

[250] Felix Frankfurter, *John Marshall and the Judicial Function*, 69 HARV. L. REV. 217, 227 (1955) (stating "[t]here are not a few . . . instances in which judicial relief was barred because 'political questions' were deemed to be involved," such as Guarantee Clause cases).

[251] HAND, *supra* note 215, at 15–16.

[252] *Id*.

[253] Wechsler, *supra* note 214, at 5–6.

[254] *See id.* at 7–8, 15–16 ("[T]he judicial process . . . must be genuinely principled, resting . . . on analysis and reasons quite transcending the immediate result . . . .").

[255] *Id.* at 7–9. Notably, Wechsler identified various constitutional issues that might involve such a "commitment." *See id.* at 8–9 (listing impeachment, the seating or expulsion of a senator or representative, the Guarantee Clause, and state gerrymanders).

[256] *See* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 63–64, 69–71, 183–98 (2d ed. 1986) (discussing various applications of the political question doctrine in connection with Bickel's theory of the Supreme Court's decisionmaking process); KALMAN, *supra* note 237, at 30 (identifying Bickel as a "process theorist").

Bickel believed that the doctrine gave the Court broad (albeit not unfettered) discretion to abstain from decision in constitutional cases.[257] But Bickel did not advocate judicial restraint in all contexts. On the contrary, he urged the Court to use the political question doctrine and other jurisdictional devices to "stay[ ] its hand" in some cases, so that it could play its full role in other cases, like *Brown v. Board of Education*, without enduring too much political backlash.[258]

Although legal process theorists did not agree on precisely *how* the Supreme Court should use the "political question doctrine," they consistently characterized the doctrine as an important procedural limit on the Court's judicial review power. In this environment, the traditional political question doctrine may have simply gotten lost—as it was overlooked (or mischaracterized) by casebook after casebook and article after article. But there is a deeper reason that the traditional doctrine may have lost favor among academics in the early to mid-twentieth century. Legal process theorists were supporters of judicial restraint, but not judicial subservience. Indeed, these scholars advocated judicial restraint in specific cases in order to safeguard the federal judicial power in the long run. A doctrine that—like the traditional doctrine—required courts to treat as conclusive the political branches' determinations on certain issues, whether those determinations were "right or wrong,"[259] would not likely have found favor with this group.[260] The influence of legal process theory thus helps explain

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257 Bickel strongly disagreed with Wechsler that the political question doctrine could amount to simple constitutional interpretation. Alexander M. Bickel, *The Supreme Court, 1960 Term—Foreword: The Passive Virtues*, 75 HARV. L. REV. 40, 46 (1961). But Bickel claimed "[t]he antithesis of principle . . . is not whim, nor even expediency, but prudence." *Id.* at 51; *see also id.* at 75 (suggesting factors for applying the political question doctrine).

258 *See* BICKEL, *supra* note 256, at 70–71 ("[A]ll the techniques . . . for staying the Court's hand . . . allow leeway to expediency without abandoning principle . . . . There can be no understanding of the Court without an appreciation of the variety and significance of these techniques, most of which are lumped roughly and often disingenuously together under the rubric of jurisdiction."); *see* Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954) (holding that the "separate but equal" approach to public education violates the Fourteenth Amendment).

259 Williams v. Suffolk Ins. Co., 38 U.S. (13 Pet.) 415, 420 (1839).

260 Moreover, under the traditional doctrine, federal and state courts treated as conclusive (what were then known as) *factual* determinations made by the political branches. But, in the early twentieth century, legal realists began to call into question the distinction between "law" and "fact." *See, e.g.*, Walter Wheeler Cook, *Statements of Fact in Pleading Under the Codes*, 21 COLUM. L. REV. 416, 417 (1921) (arguing that there is no "clear, easily drawn and scientific distinction between so-called 'statements of evidentiary facts,' 'statements of fact,' and 'conclusions of law' "); *see also* Michael Steven Green, *Legal Realism as Theory of Law*, 46 WM. & MARY L. REV. 1915, 1919 (2005) (noting that Walter Wheeler Cook is "commonly agreed to be" a legal realist). Although legal process scholars like Henry Hart did not reject the distinction between "law" and "fact," Professor Hart, in the legal process materials that he prepared along with Albert Sacks, did point out that

why commentators were drawn away from the traditional doctrine and toward a political question doctrine that could confine the scope of judicial review.

IV
The Modern Doctrine and Judicial Supremacy

By 1962, when the Supreme Court decided *Baker v. Carr*, much of the legal community assumed that there was a "political question doctrine" that could serve as a substantial constraint on the Court's constitutional decisionmaking power. Such a "doctrine" was, however, in serious tension with the Warren Court's vision of its institutional role. A few years before *Baker*, the Court declared in *Cooper v. Aaron* that "the federal judiciary is supreme in the exposition of the law of the Constitution," and that the Court's constitutional interpretations were "the supreme law of the land" and binding on state and local actors.[261] The Court in *Cooper* also engaged in some (apparently) revisionist history, for it declared that this principle of judicial supremacy was first announced in *Marbury* and had "ever since been respected . . . as a permanent and indispensable feature of our constitutional system."[262]

"law application" did not fit neatly into either category; accordingly, these scholars suggested that many issues of "law application" ought to be decided by judges, rather than juries. *See* Henry M. Hart, Jr. & Albert M. Sacks, The Legal Process: Basic Problems in the Making and Application of Law 349–52 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) (disagreeing with "critics [who] have concluded that 'law' cannot be distinguished analytically from 'fact'" but asserting that instances of "law application" do not clearly fall into either category). Notably, as I have mentioned, many traditional political questions could be described as the application of law to fact (that is, as mixed questions of law and fact); for example, to determine whether the government of Buenos Ayres controlled the Falkland Islands (the issue in *Williams v. Suffolk Insurance Co.*), the executive likely had to consider questions of international and/or comparative law. *See supra* notes 39–51 and accompanying text. Just as legal process scholars were reluctant to give juries too much power over legal questions, those same scholars may have also doubted that judges should be bound by the political branches' determinations of mixed questions of law and fact (to the extent, of course, that legal process scholars considered the traditional political question doctrine at all).

261 358 U.S. 1, 18 (1958).

262 *Id.* A number of commentators have asserted that the Court's reference to *Marbury* as the source of this principle was not accurate. *See* Davison M. Douglas, *The Rhetorical Uses of* Marbury v. Madison*: The Emergence of a "Great Case,"* 38 Wake Forest L. Rev. 375, 408–10 (2003) ("Marshall did not make [that claim] in his *Marbury* decision."); Mark A. Graber, *Establishing Judicial Review:* Marbury *and The Judicial Act of 1789*, 38 Tulsa L. Rev. 609, 627 (2003) ("[*Marbury*] was not cited as a precedent for the judicial power to bind all government officials until *Cooper v. Aaron* in 1957."); *supra* notes 147–49 and accompanying text (noting the debate over whether *Marbury* proclaimed judicial supremacy); *see also* Barry Friedman & Erin F. Delaney, *Becoming Supreme: The Federal Foundation of Judicial Supremacy*, 111 Colum. L. Rev. 1137, 1172–82 (2011) (describing

The Warren Court's emphasis on a principle of judicial supremacy contrasted sharply with the legal process school's advocacy of a constrained federal judiciary. Indeed, legal process scholars were among the most prominent critics of the Warren Court's jurisprudence.[263] The Court's self-conception also seems in some tension with the traditional doctrine, which instructed that the judiciary must apply the political branches' determinations of certain questions. In this environment, I argue that the Supreme Court in *Baker v. Carr* created a new "political question doctrine"—one that would serve, not as a mechanism of restraint (or subservience), but as a source of judicial power.

A. A New Doctrine in Baker v. Carr

Baker involved an equal protection challenge to a Tennessee law governing state legislative districts.[264] As in *Colegrove*, the plaintiffs in *Baker* alleged that the districts were severely malapportioned, such that the votes of individuals in some districts were accorded less weight.[265]

During the deliberations over the case, Justice Frankfurter argued emphatically that *Baker* should be dismissed as presenting a nonjusticiable political question.[266] The Justice circulated a sixty-page memo to his colleagues, insisting that "[t]he present case involves all of the elements that have made the Guarantee Clause claims non-justiciable."[267] Justice Frankfurter's arguments to his colleagues

how the Court's role as "supreme" vis-à-vis the political branches began to take hold in the mid-twentieth century).

[263] Friedman, *supra* note 244, at 231–34. Several prominent legal process scholars even criticized the Court's most prominent decision—*Brown v. Board of Education*. *See* Wechsler, *supra* note 214, at 31–34 (criticizing the *Brown* Court for its failure to adequately address the freedom of association concerns involved with school segregation); *see also* HORWITZ, *supra* note 234, at 258 (explaining that many process theorists viewed "*Brown* . . . as a test of their commitment to judicial restraint").

[264] 369 U.S. 186, 187–88, 192–95 (1962).

[265] *Id.* at 192–95.

[266] *See* SETH STERN & STEPHEN WERMIEL, JUSTICE BRENNAN: LIBERAL CHAMPION 184–85 (2010) (describing how Justice Frankfurter offered an impassioned ninety-minute speech at conference, during which he "pull[ed] volumes of the Court's cases off the shelves as he darted around the room, gesticulating"); *see also* KIM ISAAC EISLER, A JUSTICE FOR ALL: WILLIAM J. BRENNAN, JR., AND THE DECISIONS THAT TRANSFORMED AMERICA 171 (1993) (reporting, similarly, that Justice Frankfurter "spoke for nearly two hours" after the first oral argument in *Baker*).

[267] Memorandum for the Conference from Justice Felix Frankfurter 28 (Oct. 10, 1961), *in* THE PAPERS OF JUSTICE TOM C. CLARK: CIVIL LIBERTIES AND CIVIL RIGHTS CASES OF THE U.S. SUPREME COURT, *available at* http://tarlton.law.utexas.edu/clark/view_doc.php?page=1&id=A119-05-01 ("The present case involves all of the elements that have made the Guarantee Clause claims nonjusticiable. It is, in effect, a Guarantee Clause claim masqueraded under a different label."); EISLER, *supra* note 266, at 171 (reporting that

embodied the thinking of the legal process movement that he had inspired. Legal process theorists insisted that there was a political question doctrine that would limit the scope of judicial review—and thereby help preserve the legitimacy of the Court.[268] In that vein, as Kim Eisler has observed, Justice Frankfurter advocated dismissal in *Baker*, because he feared that a decision on the merits "would constitute such a usurpation of court prerogatives, that it would undermine the authority of the Court itself."[269]

But Justice Frankfurter's arguments did not ultimately command the majority of the Supreme Court. Justice Brennan—supported by three other members of the Court (Chief Justice Warren and Justices Black and Douglas)—insisted from the outset that the Court could hear the case, giving "little weight to the idea that the Court should avoid getting involved in 'political questions.'"[270] Justice Stewart (the likely swing vote) was, for his part, also inclined to hear the case but apparently concerned that precedents like *Colegrove* might require dismissal. [271] To secure Justice Stewart's vote, Justice Brennan endeav-

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Justice Frankfurter produced a sixty-page memorandum after the second oral argument in *Baker*). Notably, Justice Frankfurter in two sentences of his memo did point toward the traditional political question doctrine. Frankfurter, *supra*, at 13 ("Where the question arises in the course of a litigation involving primarily the adjudication of other issues between the litigants, the Court accepts as a basis for adjudication the political departments' decision of it."). That may help explain why Justice Brennan's opinion acknowledged that strand of the doctrine. *See infra* notes 274–75 and accompanying text.

268 *See supra* Part III.C (discussing legal process theory).

269 EISLER, *supra* note 266, at 174.

270 STERN & WERMIEL, *supra* note 266, at 184–88 (observing that Justice Brennan believed the Court should resolve *Baker* and "gave little weight to [Justice Frankfurter's] idea that the Court should avoid getting involved in 'political questions'" and that Chief Justice Warren and Justices Black and Douglas also advocated a decision on the merits); *see also* WILLIAM O. DOUGLAS, THE COURT YEARS 1939–1975: THE AUTOBIOGRAPHY OF WILLIAM O. DOUGLAS 135 (1980) (stating that "[s]ome judges, notably Frankfurter, held that the apportionment of votes was not fit business for the federal courts" and that "the Frankfurter view was often cited by authors as being the view of the Court. But the Court had never so held . . . . When *Baker v. Carr* . . . triggered a careful analysis of the apportionment decisions, it became clear that the Court had never endorsed the Frankfurter view.").

271 *See* DOUGLAS, *supra* note 270, at 135 ("The Conference vote on whether the question of reapportionment was 'political' rather than 'justiciable' was five to four. Justice Stewart was one of the five, though his vote was tentative, dependent on whether thorough research and a close analysis of the cases would disclose that the question was not foreclosed by prior decisions."); *see also* CLARK, *supra* note 199, at 174–75 (observing that Justice Stewart "had firmly established himself as the . . . 'swing vote' on many significant issues" and that, "[a]ccording to Douglas, Stewart wanted to know whether past decisions had established firmly that apportionment was a political question and hence not justiciable").

ored in the opinion for the Court to survey the entire landscape of the Court's "political question" cases.[272]

I argue that, in providing an "exhaustive and detailed examination of" the Court's precedents,[273] the opinion in *Baker* did not merely describe an existing doctrine but articulated a new "political question doctrine." One change involved the Court's treatment of the traditional doctrine. Although the opinion did not draw a sharp distinction between traditional cases and those involving constitutional claims,[274] Justice Brennan did give more attention to traditional political question cases than many of the scholars in the preceding decades. Justice Brennan observed, for example, that "the judiciary ordinarily follows the executive as to which nation has sovereignty over disputed territory," and "defer[s] to the political departments in determining whether Indians are recognized as a tribe."[275]

The *Baker* Court, however, then seemed to significantly modify—indeed, to signal the demise of—the traditional political question doctrine. First, Justice Brennan's opinion indicated that the judiciary was not obligated to enforce the political branches' determinations, whether they "be right or wrong."[276] The Court would not "shut its

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[272] This background helps explain the detail in the Court's opinion. *See* DOUGLAS, *supra* note 270, at 136 ("Chief Justice Warren assigned the opinion to Justice Brennan on the theory that if anyone could convince Stewart, Brennan was the one. Brennan worked long and hard on the opinion, its length being due to the exhaustive and detailed examination of precedents which he undertook."); EISLER, *supra* note 266, at 172 (observing that Justice Stewart would support only a narrow opinion). In the end, Justice Brennan did not need Justice Stewart's vote; Justice Tom Clark opted to vote with the majority and was willing to support a broad opinion for the plaintiffs. *See* DOUGLAS, *supra* note 270, at 136 ("Without talking to anyone, [Tom Clark] had changed his mind and written a short concurrence, which, if it had happened earlier, would have made Brennan's long, scholarly but tedious opinion unnecessary."); STERN & WERMIEL, *supra* note 266, at 188–89 (noting that Clark withdrew from Frankfurter's dissent and that "Clark was inclined to go much further than Stewart; he was willing to announce a remedy rather than merely hold that the district court had jurisdiction over the case" but that Brennan nevertheless decided to stick with the narrower result, "preferring to accomplish less rather than risk alienating Stewart").

[273] *Cf.* DOUGLAS, *supra* note 270, at 136 ("Brennan worked long and hard on the opinion, its length being due to the exhaustive and detailed examination of precedents which he undertook.").

[274] Much like the scholars in the decades leading up to *Baker*, Justice Brennan's opinion treated "foreign relations" and "status of Indian tribes" cases as largely indistinguishable from "validity of enactments" cases like *Coleman*. *See* Baker v. Carr, 369 U.S. 186, 210–13, 214–17 (1962) (finding that, although cases in all three categories are often assumed to be nonjusticiable political questions, courts will exercise judgment on certain types of cases in all three categories).

[275] *Id.* at 212–13, 215.

[276] Williams v. Suffolk Ins. Co., 38 U.S. (13 Pet.) 415, 420 (1839); *see Baker*, 369 U.S. at 216–17 (emphasizing that Congress may not "'arbitrarily call [a group] an Indian tribe.' Able to discern what is 'distinctly Indian,' the courts will strike down any heedless extension of that label" (quoting United States v. Sandoval, 231 U.S. 28, 46 (1913)); *id.* at 213 (asserting that "though it is the executive that determines a person's status as

eyes to an obvious mistake" in the political branches' decision-making.[277] Instead, the judiciary could independently decide both the factual and the legal issues arising in a case or controversy—giving deference to the political branches when it chose to do so. According to *Baker*, the judiciary would "not stand impotent before an obvious instance of a manifestly unauthorized exercise of power."[278]

Second, Justice Brennan defined the "political question doctrine" as one that demanded a "dismissal for non-justiciability."[279] As we have seen, under the traditional doctrine, courts did *not* dismiss as nonjusticiable an issue that presented a political question but rather enforced and applied the political branches' determinations. After *Baker*, there seemed to be little room for such a doctrine.[280]

The *Baker* Court also took control over (what existed of) the constitutional side of the political question doctrine. In crafting its six-part test for the doctrine, the Court indicated that the judiciary would decline to decide questions only when there was "a textually demonstrable constitutional commitment of the issue to a coordinate political department," "a lack of judicially discoverable and manageable standards for resolving it," or strong prudential grounds for declining review.[281] But the Court also underscored that it would be in charge of determining whether a matter was "committed" to another branch:

> Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation,

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representative of a foreign government, the executive's statements will be construed where necessary to determine the court's jurisdiction").

277 *Baker*, 369 U.S. at 214 (internal quotation marks omitted).

278 *Id.* at 217. Notably, in a few traditional cases in the early twentieth century, the Court had suggested that it might not enforce the decisions of the political branches, if they were arbitrary. *See supra* note 161 (discussing *Sandoval*, 231 U.S. 28). The Court in *Baker* more firmly declared that it *would not* enforce determinations that it found to be incorrect.

279 *See Baker*, 369 U.S. at 217 (stating that "a political question's presence" would lead to a dismissal).

280 This analysis of *Baker* helps explain why the traditional political question doctrine is unfamiliar to most jurists and scholars today. But some modern practices do bear a resemblance to the traditional doctrine, such as the judiciary's deference to the executive on factual issues in national security cases. For an important discussion of this tendency, see Robert M. Chesney, *National Security Fact Deference*, 95 VA. L. REV. 1361 (2009).

281 *Baker*, 369 U.S. at 217 (listing, as prudential factors, "the impossibility of deciding [the question] without an initial policy 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").

> and is a responsibility of this Court as ultimate interpreter of the Constitution.[282]

The Court thus declared that, as the "ultimate interpreter of the Constitution," it had the "power to decide" which institution may decide any constitutional question. With control over that first-order question, the Court could conclude not only that a constitutional issue was committed to a political branch but also that an issue was committed to the Court itself. Applying this new principle, the *Baker* Court held that it had the power to decide the plaintiffs' equal protection challenge.[283]

In subsequent cases, the Court used its "power to decide who decides" to proclaim its supremacy over other areas of constitutional law.[284] *Powell v. McCormack* involved the House of Representatives' refusal to seat Adam Clayton Powell, a New York representative, due to his alleged misuse of public funds.[285] Article I provides that "[e]ach house shall be the judge of the elections, returns and qualifications of its own members."[286] Some scholars, including Herbert Wechsler, had argued before the *Powell* case that this provision was an "explicit" textual commitment to Congress to determine whether to seat a member.[287] Likewise, in the Supreme Court, counsel for the House contended that the Constitution "foreclose[d] any judicial inquiry into

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[282] *Id.* at 211.

[283] *See id.* at 209, 226 (finding the case justiciable, in part, because there was "no question decided, or to be decided, by a political branch of government coequal with this Court"). The Court dealt with *Colegrove*—which, of course, also involved an equal protection challenge to malapportionment—by observing that four of the seven Justices in that case found the constitutional issue to be justiciable. *Id.* at 232–37.

Some readers may assert that the Court in *Baker* could have more readily enhanced the Court's power by simply doing away with any notion that constitutional questions may be political questions. I strongly doubt, however, that such an approach could have commanded a majority of the Court. By 1962, there was such a strong sense within the legal community that there *was* a "political question doctrine" that applied to constitutional claims—a sense fueled not only by legal process scholars but also by influential jurists like Justice Frankfurter and Judge Learned Hand—that an opinion rejecting the concept entirely would not likely have garnered five votes. Instead, *Baker* did the next best thing—subtly transforming any such "political question doctrine" into a vehicle for asserting the Court's role as the ultimate interpreter of the federal Constitution.

[284] *See, e.g.*, Zivotofsky *ex rel.* Zivotofsky v. Clinton, 132 S. Ct. 1421, 1426–30 (2012) (concluding that the Court had the power to decide a constitutional issue arising in a foreign affairs case involving passports); United States v. Munoz-Flores, 495 U.S. 385, 389–400 (1990) (same for the Origination Clause); INS v. Chadha, 462 U.S. 919, 940–42 (1983) (same for the Naturalization Clause); *infra* notes 285–89 and accompanying text.

[285] 395 U.S. 486, 489–93 (1969).

[286] U.S. CONST. art. I, § 5, cl. 1.

[287] Wechsler, *supra* note 214, at 8–9 & n.23; *see also* Scharpf, *supra* note 106, at 539–40 (asserting that it may be "reasonable to construe" the provision as an "explicit exception to the general grant of judicial power to the courts in Article III").

the decision of the House to exclude Mr. Powell."[288] Counsel further argued, "The decisions [the House] makes pursuant to its exclusive power under article I, whether right or wrong, must command the same respect from the other branches as do the decisions of this Court acting within the scope of its powers under article III."[289]

The Supreme Court, however, held that it had the power to decide the case on the merits and declared that "the House was without power to exclude [Powell] from its membership." [290] In discussing the House's political question argument, the Court emphasized, "[A]s we pointed out in *Baker v. Carr*, '[d]eciding whether a matter has in any measure been committed by the Constitution to another branch . . . is a responsibility of this Court as ultimate interpreter of the Constitution.'"[291] The Court held that there was no such "commitment" in this case.[292] Nor were any "other formulations of a political question 'inextricable from the case at bar.'"[293] Again invoking *Baker*, the Court underscored that "it is the responsibility of this Court to act as the ultimate interpreter of the Constitution."[294]

United States v. Nixon involved a Special Prosecutor's attempt to subpoena White House tape recordings from President Richard Nixon.[295] The President challenged the subpoena on grounds of executive privilege.[296] The Supreme Court rejected the President's conten-

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[288] Brief for Respondents at 19, Powell v. McCormack, 395 U.S. 486 (1969) (No. 138).

[289] *Id.* ("[T]he propriety of what the House did in this case was for the House, and the House alone, to decide.").

[290] *Powell*, 395 U.S. at 521–22, 547–50. The Court held that the House had the power only to determine whether an elected member met the age and residency requirements listed in the Constitution. *Id.* at 522, 550; *see* U.S. CONST. art. I, § 2, cl. 2 (requiring that representatives be twenty-five years old, "seven Years a Citizen of the United States, and . . . when elected . . . an Inhabitant of [the represented] State").

[291] *Powell*, 395 U.S. at 521 (second alteration in original) (citation omitted) (quoting Baker v. Carr, 369 U.S. 186, 211 (1962)); *see also id.* ("[W]hether there is a 'textually demonstrable constitutional commitment of [an] issue to a coordinate political department' of government and what is the scope of such commitment are questions we must resolve . . . .").

[292] *See id.* at 518–22, 548 (concluding that there is, at most, a limited commitment to Congress to judge only the qualifications of elected members, as set forth in the Constitution).

[293] *Id.* at 549 (quoting *Baker*, 369 U.S. at 217).

[294] *Id.* ("[A] judicial resolution of petitioners' claim will not result in 'multifarious pronouncements by various departments on one question.' For, as we noted in *Baker v. Carr*, . . . it is the responsibility of this Court to act as the ultimate interpreter of the Constitution.").

[295] *See* 418 U.S. 683, 686–88 (1974) (reviewing the denial of a motion to quash a third-party subpoena duces tecum issued by the United States District Court, District of Columbia, directing the President to produce certain tape recordings and documents relating to his conversations with aides and advisors).

[296] *See id.* at 686–90, 692–93 (arguing that the court lacked jurisdiction to issue the subpoena because it was an intrabranch dispute between subordinate and superior officers

tion that "the separation of powers doctrine precludes judicial review of a President's claim of [executive] privilege."[297] Although the Court would accord "great respect" to the President's view that "the Constitution [provides] an absolute privilege of confidentiality for all Presidential communications," it was "emphatically the province and duty of the judicial department to say what the law is."[298] Invoking *Baker*, the Court underscored that "'[d]eciding whether a matter has in any measure been committed by the Constitution to another branch . . . is a responsibility of this Court as ultimate interpreter of the Constitution,'"[299] and "reaffirm[ed] that it is the province and duty of this Court 'to say what the law is' with respect to the claim of privilege presented in this case."[300]

In fact, in the fifty-three years since *Baker v. Carr*, the Supreme Court has on only two occasions exercised its "power to decide" to hold that another branch had final authority over a constitutional question.[301] Most recently, in *Nixon v. United States*, the Court announced that the Senate had "sole" power to determine the procedures used in an impeachment trial.[302] Notably, even in *Nixon v.*

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of the Executive Branch); *see also* Brief for the Respondent-Cross-Petitioner at 16–17, 44–48, United States v. Nixon, 418 U.S. 683 (1974) (Nos. 73-1766, 73-1834) (arguing that the case raised nonjusticiable political questions).

297 United States v. Nixon, 418 U.S. at 703. For a discussion of the argument and holding, see *id.* at 692–97, 703–05, 713.

298 *Id.* at 703 (internal quotation marks omitted) ("Many decisions of this Court, however, have unequivocally reaffirmed the holding of *Marbury* . . . that '[i]t is emphatically the province and duty of the judicial department to say what the law is.'" (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803))). The Court in *United States v. Nixon*, as it had in *Cooper*, treated *Marbury* as a case proclaiming judicial supremacy. *See supra* note 262 and accompanying text.

299 United States v. Nixon, 418 U.S. at 704 (quoting Baker v. Carr, 369 U.S. 186, 211 (1962)).

300 *Id.* at 705 (citing *Marbury*, 5 U.S. (1 Cranch) at 177).

301 The first instance was *Gilligan v. Morgan*, where the Court declined to rule on allegations that the Ohio National Guard violated the free speech and due process rights of student Vietnam War protesters by using violence to stop a demonstration. *See* 413 U.S. 1, 3–4 (1973) (recounting the events at Kent State University). Notably, part of the Court's opinion suggests that the Court believed the plaintiffs lacked standing to seek prospective relief. *Id.* at 5–6, 9–10. But the Court also stated that Congress's power under Article I, Section 8 "to prescribe and regulate the training and weaponry of the National Guard . . . clearly precludes any form of judicial regulation of the same matters." *Id.* at 68; *see also id.* at 6–12. The Court, however, then qualified this "political question" analysis, declaring that "we neither hold nor imply that the conduct of the National Guard is always beyond judicial review." *Id.* at 11. Only a plurality of the Court in *Goldwater v. Carter* found that the President's unilateral abrogation of a treaty presented a nonjusticiable political question. 444 U.S. 996, 1002–06 (1979).

302 *See* 506 U.S. 224, 226–31, 237–38 (1993) (explaining that the plaintiff challenged a Senate rule, which allowed a Senate committee to gather evidence in impeachment cases); U.S. CONST. art. I, § 3, cl. 6 ("The Senate shall have the sole Power to try all Impeachments.").

United States, the Court underscored its role as the supreme expositor of constitutional law with respect to the other branches of the federal government. First, invoking *Baker* and *Powell*, the Court reiterated its power to decide "whether and to what extent" another branch could engage in constitutional interpretation. [303] Second, again relying on *Baker*, the Court declared: "As we have made clear, 'whether the action of [either the Legislative or Executive Branch] exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution.'"[304]

The language in the Court's political question cases is not the language of deference or modesty. In fact, *Powell v. McCormack* and *United States v. Nixon* contain some of the first examples of a phenomenon that scholars began to comment on much later—the Court's tendency to proclaim itself as the "ultimate interpreter" of constitutional law, whose constitutional views are binding not only on state and local governments but also on the other branches of the federal government.[305] Accordingly, contrary to the assumption of scholars, the modern political question doctrine can not only "coexist with" but is a reflection of the current Court's conception of itself as "the ultimate expositor of the constitutional text."[306]

B. Comparing the Traditional and the Modern Doctrines

The modern political question doctrine bears little resemblance to the traditional version. Under the traditional doctrine, both federal and state courts treated as conclusive the decisions of the political branches on certain factual issues, whether those decisions were "right or wrong."[307] Accordingly, the traditional doctrine was truly a doc-

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[303] Nixon v. United States, 506 U.S. at 228 ("[C]ourts must, in the first instance, interpret the text in question and determine whether and to what extent the issue is textually committed." (citing *Baker*, 369 U.S. at 217, and Powell v. McCormack, 395 U.S. 486, 519 (1969))).

[304] *Id.* at 238 (brackets in original) (quoting *Baker*, 369 U.S. at 211).

[305] For a sample of the academic debate over judicial supremacy, see *supra* notes 24, 27; *infra* notes 325–26 (collecting sources); *see also* Gary Lawson, *Interpretative Equality as a Structural Imperative (or "Pucker Up and Settle This!")*, 20 CONST. COMMENT. 379, 379–80 (2003) (noting that challenges to judicial supremacy began in earnest in the early 1990s). Much of the recent scholarship has responded to declarations of judicial supremacy in decisions interpreting Congress's power under Section 5 of the Fourteenth Amendment. *See, e.g.*, United States v. Morrison, 529 U.S. 598, 616 n.7 (2000) ("[E]ver since *Marbury* this Court has remained the ultimate expositor of the constitutional text."); City of Boerne v. Flores, 521 U.S. 507, 524 (1997) ("The power to interpret the Constitution in a case or controversy remains in the Judiciary.").

[306] Barkow, *supra* note 3, at 313 (quoting *Morrison*, 529 U.S. at 616 n.7); *see also id.* 240–41, 300.

[307] Williams v. Suffolk Ins. Co., 38 U.S. (13 Pet.) 415, 420 (1839).

trine of judicial restraint—indeed, judicial subservience; the judiciary not only refrained from deciding the issue but also served as an enforcement mechanism for the political branches. After *Baker v. Carr*, there was little, if anything, left of this doctrine of judicial subservience.[308] In its place, the Supreme Court crafted a doctrine of judicial power, which permits Article III federal courts—and, ultimately, the Supreme Court itself—to decide who decides a constitutional question.

Some readers may argue, however, that the traditional and modern doctrines are not necessarily as distinct as I suggest. One could contend that, under *both* doctrines, the Supreme Court must make a choice to designate an issue (factual or constitutional) as a "political" or "judicial" question. Thus, even under the traditional doctrine, the judiciary was ultimately in control; it was "subservient" to the political branches only if it *chose* to call a factual issue a "political question."

But this argument overlooks the very different jurisprudential assumptions underlying the traditional doctrine. First, it does not appear that the nineteenth-century judiciary that developed the traditional doctrine viewed itself as having much discretion in designating certain issues as political questions. Before the legal realist movement of the early twentieth century, there seems to have been a greater sense that judges did not "make" law but "found" legal principles that applied to a given case.[309] Along these lines, in cases like *Williams v. Suffolk Insurance Co.*, there is little indication that the judges viewed themselves as making a "choice" to designate a given question as a political question; instead, both federal and state judges seemed to assume that some issues simply qualified as political questions, such that judges were bound to apply the political branches' determinations of those questions.[310]

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[308] For one possible modern-day analogue, see *supra* note 280.

[309] *See* MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780–1860, at 255–57 (1977) (noting the decidedly "formalistic cast" of public law during this period); *supra* note 236 and accompanying text.

[310] *See supra* Part I.A. I do not mean to suggest that nineteenth-century judges were simply "finding" political questions, without any justification. As noted above, it seems likely that the judges relied (at least implicitly) on the assumption that the political branches had superior constitutional authority over, and greater expertise with respect to, certain issues, such as foreign affairs and relations with Native American tribes. *See supra* note 82 and accompanying text. But in my review of the cases, I saw little indication that the judges of this era understood themselves as having broad discretion to designate certain issues as political questions. *See also supra* note 29 (discussing my methodology in identifying the early cases). Indeed, there was very little discussion in the opinions about why some issues, rather than others, qualified as political questions.

Second, in contrast to the modern doctrine, the traditional doctrine was *not* a constitutional matter arising out of Article III. Instead, it appears to have been a common law rule governing the power of the federal and state judiciaries—a rule that was subject to legislative override. Thus, when courts found that an issue was a "political question," they treated it as such only as a default matter; courts and commentators in the nineteenth century assumed that Congress could transform a "political question" into a "judicial question" by asking courts to decide the issue.[311] Accordingly, it seems that Congress, not the judiciary, was ultimately in charge of deciding the scope of the traditional doctrine.

The modern political question doctrine, by contrast, was created in the postrealist era, when we more clearly understand judges to have a choice in crafting legal rules. In this environment, the Court in *Baker* made clear which institution would have the power to choose who decides a constitutional question: "Deciding whether a matter has in any measure been committed by the Constitution to another branch . . . is a responsibility of this Court as ultimate interpreter of the Constitution."[312] And because the Court today describes the political question doctrine as an Article III jurisdictional device (and, thus, itself a matter of federal constitutional law), Congress cannot override that judgment, other than through constitutional amendment.[313]

This understanding of the modern doctrine—as an assertion of judicial power rather than a form of judicial restraint—not only distinguishes the modern from the traditional doctrine but also calls into question a common scholarly assumption about the modern doctrine. Scholars often presume that the political question doctrine has no impact, unless the Supreme Court declines to review a constitutional claim. Under this view, the Court does not "invoke" the doctrine when it decides a case on the merits, as it did in *Powell v. McCormack*.[314] Building on this assumption, Louis Henkin ques-

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311 *See supra* notes 79–81 and accompanying text.

312 369 U.S. 186, 211 (1962); *see also supra* notes 23, 283 (offering an exposition of the same quote).

313 Notably, it is not clear that the current doctrine should be an Article III jurisdictional device. If the federal Constitution does "commit" certain issues to the political branches, then it would seem that neither federal nor state courts could adjudicate those federal constitutional questions. This particular puzzle about the modern doctrine is beyond the scope of this Article. For scholarship suggesting that state courts do in practice dismiss certain claims as nonjusticiable political questions (at least as a matter of state constitutional law), see Daniel B. Rodriguez, *The Political Question Doctrine in State Constitutional Law*, 43 RUTGERS L.J. 573, 579 (2013); Nat Stern, *The Political Question Doctrine in State Courts*, 35 S.C. L. REV. 405, 406–07 (1984).

314 *E.g.*, William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062, 2308 & n.1150

tioned whether there *is* a political question doctrine at all—given how rarely the Court declines review.[315] But I argue that the modern political question doctrine serves an important function not only when the Court denies review but also when it (far more commonly) declares that it has the "power to decide" constitutional questions. The Court uses the modern political question doctrine as a vehicle for asserting its supremacy over constitutional law.

C. Assessing the Modern Doctrine

The Supreme Court in *Baker v. Carr* and subsequent cases proclaimed for itself the power to decide who decides a constitutional question. Admittedly, that is only an *assertion* of power. The Court cannot unilaterally *make* itself "supreme"; its assertions of supremacy will ultimately have a practical impact only if other members of society, particularly political actors, acquiesce. But as political scientists have urged, Congress and the executive branch have good reason to acquiesce in the Court's declarations of "supremacy." If political actors treat the Supreme Court as generally "in charge" of constitutional questions, they can, for example, more easily refer controversial issues to the judiciary,[316] or advance a particular political agenda through the judiciary.[317] Political actors are thus likely to take seriously the Court's declarations of supremacy in its modern political question cases. For this reason, it is important to ask whether such claims have any normative justification.

(2002) (asserting that "[a] Court majority has invoked the political question doctrine in only two cases since *Baker*"). This assumption is why so many scholars assert that the political question doctrine is on the decline. *See supra* note 6–9 and accompanying text.

315 *See* Henkin, *supra* note 3, at 609–10, 622–23 (assuming the "political question doctrine" consists only of cases, like Guarantee Clause cases, where the Court declines review).

316 *See* Mark A. Graber, *The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary*, 7 STUD. AM. POL. DEV. 35, 36 (1993) (asserting that "prominent elected officials consciously invite the judiciary to resolve" contentious issues); Keith E. Whittington, *"Interpose Your Friendly Hand": Political Supports for the Exercise of Judicial Review by the United States Supreme Court*, 99 AM. POL. SCI. REV. 583, 584 (2005) ("The establishment and maintenance of judicial review is a way of delegating some kinds of political decisions to a relatively politically insulated institution.").

317 *See* Howard Gillman, *How Political Parties Can Use the Courts to Advance Their Agendas: Federal Courts in the United States, 1875–1891*, 96 AM. POL. SCI. REV. 511, 512–13, 516–17 (2002) (discussing the Republican Party's efforts to use the judiciary to advance a probusiness agenda); Ran Hirschl, *The Political Origins of Judicial Empowerment Through Constitutionalization: Lessons from Four Constitutional Revolutions*, 25 L. & SOC. INQUIRY 91, 116 (2000) (arguing that political leaders will empower the judiciary if they believe its decisions will "reflect their ideological preferences").

One of the primary goals of this Article is to show that, at a minimum, the Court's assertion of the power to decide who decides a constitutional question cannot be justified on historical grounds. There was *no* "political question doctrine" that applied generally to constitutional claims until *Baker*. And even the scholars (primarily of the legal process school) who advocated a political question doctrine governing constitutional claims in the early to mid-twentieth century envisioned a doctrine that would constrain the judiciary, not one that would empower it.

This lack of historical pedigree has important implications for ongoing debates over the political question doctrine.[318] In federal courts scholarship and jurisprudence, there is a widespread assumption that Article III jurisdictional rules are legitimate only if they have a long "history and tradition."[319] This Article demonstrates that the modern political question doctrine cannot be defended on that basis. Accordingly, those who seek to preserve or expand the political question doctrine must find an alternative ground to support it.

The analysis here should also impact future debates about whether the doctrine can be justified on nonhistorical grounds. Although scholars have long assumed that the political question doctrine is at odds with judicial supremacy, I demonstrate that the modern doctrine is part and parcel of the Court's assertions of supremacy. Accordingly, nonhistorical arguments in favor of the doctrine should naturally build on existing arguments for judicial supremacy.

One can envision such a defense of the modern political question doctrine. Larry Alexander and Fred Schauer, for example, have advocated judicial supremacy on the ground that the Supreme Court can serve an important settlement function.[320] If the Court is the supreme

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[318] For a sample of that debate, see sources cited *supra* notes 3, 24.

[319] *See* Sprint Commc'ns Co. v. APCC Servs., Inc., 554 U.S. 269, 274 (2008) (noting the Court's reliance on "history and tradition" in determining "the types of cases that Article III empowers federal courts to consider"). For example, in debates over Article III standing doctrine, many jurists and scholars assume that the legitimacy of the doctrine depends on whether it has a long historical pedigree. *Compare* Cass R. Sunstein, *What's Standing After* Lujan*? Of Citizen Suits, 'Injuries,' and Article III*, 91 MICH. L. REV. 163, 168, 178 (1992) (arguing that the notion that Article III limits Congress's power to confer standing "seems most adventurous as a matter of history"), *with* Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 MICH. L. REV. 689, 691, 694–724 (2004) (contending that "constitutionalization [of standing] does not contradict a settled historical consensus about the Constitution's meaning"); *see also* Vt. Agency of Natural Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 774 (2000) (upholding the standing of qui tam relators in part because of "the long tradition of *qui tam* actions in England and the American Colonies").

[320] Alexander & Schauer, *supra* note 27, at 1385.

expositor of specific constitutional questions, then (for example) when the Court decides that Congress has the power to enact a health care law,[321] or lacks the power to extend voting rights legislation,[322] that issue is "settled" and political actors can carry on with other legislative proposals, with the common understanding that all other actors will treat as binding the principles laid down by the Supreme Court.[323]

By the same reasoning, one could argue that constitutional law will be much more predictable and coherent if the Supreme Court can designate a single institution to be in charge of "settling" the meaning of specific constitutional provision(s). Thus, the Court can declare itself to be in charge of most areas of constitutional law, while delegating control over specific realms, such as the Guarantee Clause and the Impeachment Clause, to another institution. As long as there is a single final decisionmaker for each provision of the Constitution, constitutional law will be largely settled. Moreover, with control over the first-order question of "who decides," the Court can also take back any such delegation of interpretive authority. The Court has, for example, suggested that it may revisit its prior decisions on the Guarantee Clause and once again assert the power to decide constitutional questions arising under that provision.[324]

For those who oppose "interpretive supremacy," however, the power claimed by the Supreme Court under the modern political

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321 *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2600–01 (2012) (upholding the individual mandate provision of the Affordable Care Act as a proper exercise of the taxing power).

322 *See* Shelby Cnty. v. Holder, 133 S. Ct. 2612, 2631 (2013) (invalidating the extension of a Voting Rights Act provision requiring certain states to preclear their voting changes with the Department of Justice or a federal court due to an outdated coverage formula).

323 Various scholars have emphasized the coordinating function of judicial decisions. *See*, *e.g.*, ZACHARY ELKINS, TOM GINSBURG & JAMES MELTON, THE ENDURANCE OF NATIONAL CONSTITUTIONS 108 (2009) (asserting that "[i]f the constitution is vague . . . [c]onstitutional review provides focal points for enforcement").

324 *See* New York v. United States, 505 U.S. 144, 184–86 (1992) (raising the question whether Guarantee Clause claims should be justiciable and declaring that the Court "need not resolve that difficult question," because "[e]ven if we assume that [the] claim [here] is justiciable," it failed on the merits); *see also* DAVID L. SHAPIRO, FEDERALISM: A DIALOGUE 68 n.46 (1995) (noting the Court's assumption that some Guarantee Clause claims may be justiciable). A case from the Tenth Circuit Court of Appeals may eventually give the Court an opportunity to revisit its Guarantee Clause rulings. *See* Kerr v. Hickenlooper, 744 F.3d 1156, 1161–62, 1172–81 (10th Cir. 2014) (holding that state legislators' Guarantee Clause challenge to a Taxpayer's Bill of Rights, which required voter approval for tax laws, did not present a nonjusticiable political question), *vacated and remanded by* Hickenlooper v. Kerr, 135 S. Ct. 2927 (2015) (mem.) (directing the lower court to reconsider the decision in light of Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 135 S. Ct. 2652 (2015)).

question doctrine should be deeply troubling.[325] Many scholars today advocate "departmentalism"—the notion that each branch of government should independently interpret the Constitution in performing its functions and need not be bound by the views of the Supreme Court (at least not outside the context of a specific case or controversy). [326] Under the modern political question doctrine, the Supreme Court declares that there is no such background principle of interpretive independence. Instead, the Court decides who decides any constitutional question. Thus, under the modern doctrine, the political branches have a role in defining constitutional meaning only to the extent permitted by the Supreme Court.

I do not seek here to resolve whether the modern political question doctrine can be justified on nonhistorical grounds; the answer to that question is bound up in the ongoing debate over judicial supremacy and departmentalism. But I do aim to challenge the common assumption that the political question doctrine may serve as a refuge for those who believe that the Supreme Court should not have the final word on all constitutional issues.[327] The modern political question doctrine is a species of—not a limitation on—judicial supremacy.

Conclusion

The political question doctrine that we study today does not have a long historical pedigree. In the nineteenth century, "political questions" were *not* constitutional questions but instead were factual determinations made by the political branches that courts treated as conclusive in the course of deciding cases. Moreover, this traditional political question doctrine did not arise under Article III. Both federal and state courts, in both civil and criminal cases, were required to

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[325] *E.g.*, Neal Devins & Louis Fisher, *Judicial Exclusivity and Political Instability*, 84 Va. L. Rev. 83, 85 (1998) (doubting that the Supreme Court should have "the last word on the Constitution's meaning"); Sanford Levinson, *Constitutional Protestantism in Theory and Practice: Two Questions for Michael Stokes Paulsen and One for His Critics*, 83 Geo. L.J. 373, 373–74 (1994) (rejecting judicial supremacy); Saikrishna Prakash & John Yoo, *Against Interpretive Supremacy*, 103 Mich. L. Rev. 1539, 1541 (2005).

[326] *See* Lawson & Moore, *supra* note 27, at 1270, 1279, 1303; *see also* David Barron, *Constitutionalism in the Shadow of Doctrine: The President's Non-Enforcement Power*, 63 L. & Contemp. Probs. 61, 63 (2000); Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 Yale L.J. 1943, 1947 (2003) (arguing that Congress may under the Fourteenth Amendment enact laws "premised on an understanding of the Constitution that differs from the Court's"); *supra* notes 27, 325.

[327] *See supra* note 24 (noting that scholarly opponents of judicial supremacy tend to favor the political question doctrine).

enforce and apply the political branches' determinations on "political questions."

The current political question doctrine was not created until the mid-twentieth century, when it was used by the Supreme Court to secure its growing supremacy over constitutional law. Under the modern doctrine, the Court asserts for itself the power to decide which institution decides any constitutional question. With control over that first-order question, the Court can conclude not only that an issue is textually committed to a political branch but also that an issue is committed to the Court itself. Indeed, that is how the Court has most often used its modern political question cases—as a vehicle to assert its supremacy over various areas of constitutional law. For this reason, the modern doctrine is a reflection of—not a limitation on—the current Court's view of itself as the ultimate expositor of constitutional law.