The Lost History of the Political Question Doctrine
Tara Leigh Grove*


ABSTRACT

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.

* Professor of Law and and Robert and Elizabeth Scott Research Professor, William and Mary Law School. I am grateful to Amy Barrett, Bob Bone, Rebecca Brown, Seth Davis, Neal Devins, Richard Fallon, Barry Friedman, Mark Graber, John Harrison, Alli Larsen, Kurt Lash, Evan Lee, Daryl Levinson, John Manning, John McGinnis, Gillian Metzger, Henry Monaghan, Jim Pfander, Richard Re, David Shapiro, Kevin Stack, Chris Walker, Patrick Woolley, John Yoo, and Tim Zick for discussions of this project or comments on earlier drafts of the paper. The paper was selected for presentation at the Seventh Annual Junior Federal Courts Workshop at the University of Georgia School of Law. The paper was also presented at the University of Texas School of Law; the Seventeenth Annual Faculty Conference, Federalist Society for Law and Public Policy Studies; and the Constitutional Theory, History, and Law Colloquium at the University of Illinois College of Law. I am grateful for the comments received at those events. I also wish to thank Joe Castor, Chris Keslar, Ed Linnecke, Kalina Parker, Lenny Simmons, Allyson Wiley, and Chris Willis for excellent research assistance.
The Lost History of the Political Question Doctrine  
Tara Leigh Grove

TABLE OF CONTENTS

I. Introduction ............................................................................................................. 1

II. Rediscovering the Traditional Political Question Doctrine ........... 7
   A. Political Questions as Rules of Decision ..................................................... 9
   B. Understanding Luther v. Borden .............................................................. 16
   C. Constitutional Questions Were Not Treated as Political Questions ................................................................. 21
      1. Constitutional Amendments ............................................................... 21
      2. The Guarantee Clause ....................................................................... 24
   D. The Traditional Doctrine and Judicial Review .......................... 27

III. The (Lack of) Clear Change in Supreme Court Doctrine ........... 30
   A. Pacific States: A New Paradigm .......................................................... 31
   B. The Splintered Opinions in Coleman and Colegrove .......... 35

IV. The Academic Debate: Changing Understandings of the “Political Question Doctrine” ......................................................... 38
   A. The Shifting Focus to Pacific States and Its Progeny .......... 38
   B. The “Political Question Doctrine” in Law School Texts ........ 41
   C. Explaining the Shift in Scholarly Understanding ................. 45

V. The Modern Doctrine and Judicial Supremacy ...................................... 50
   A. A New Doctrine in Baker v. Carr ....................................................... 51
   B. Comparing the Traditional and the Modern Doctrines ......... 59
   C. Assessing the Modern Doctrine ....................................................... 61

VI. Conclusion ....................................................................................................... 65
I. 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. 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.

Scholars have strongly disputed the nature, scope, and wisdom of this doctrine, 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. Since Marbury v. Madison (1803), scholars assert, the federal

---


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. 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 it may bar judicial enforcement of actual legal constraints on government behavior.”); see also Lawrence Gene Sager, Fair 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.”).


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 239–40 (tracing
courts have treated some constitutional questions as outside the scope of judicial review. Second, and relatedly, scholars claim that this longstanding doctrine has recently been on the decline. During the past few decades, the Supreme Court has asserted itself as the “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. Rachel Barkow nicely captured the prevailing sentiment, when she argued that “[t]he political question doctrine…cannot coexist” with the current Court’s conception of itself as “the ultimate expositor of the constitutional text.”

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

---


5 5 U.S. (1 Cranch) 137 (1803); see sources cited supra note 4.


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) (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 240–41, 300 (quoting United States v. Morrison, 529 U.S. 598, 616 n.7 (2000)).
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.”\(^9\) 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.”\(^10\)

Aside from dicta in one case, however,\(^11\) 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—as they do under the current doctrine (the “modern political question doctrine”). 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.\(^12\)

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 Company v. Oregon* (1912) that a Guarantee Clause claim was a

---


\(^10\) 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* 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”). *See also infra* notes 30–32 and accompanying text (noting other scholarship that has mentioned some early cases).

\(^11\) In *Luther v. Borden*, 48 U.S. 1 (1849), the Court suggested in dicta that the judiciary was required to apply Congress’s judgment on Guarantee Clause matters. *Id.* at 42. I discuss *Luther* in detail below. *See infra* Part II.B.

\(^12\) *See infra* Part II.C.
nonjusticiable political question, 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. 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. 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 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. 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

---

13 223 U.S. 118, 133 (1912); see infra Part III.A (discussing *Pacific States*).
14 See infra Part III.B (discussing *Coleman v. Miller*, 307 U.S. 433 (1939), and *Colegrove v. Green*, 328 U.S. 549 (1946)).
15 See infra Part IV.
16 See infra Part IV.C.
canon” of the field for a generation.\footnote{Akhil Amar, \textit{Law Story}, 102 HARV. L. REV. 688, 689–90 (1989); \textit{see infra} Part IV.C.} 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.”\footnote{Cooper v. Aaron, 358 U.S. 1, 18 (1958). In \textit{Cooper}, the Court asserted its “supremacy” \textit{vis-à-vis} state and local governments. Following \textit{Baker v. Carr}, 369 U.S. 186 (1962), the Court used its political question cases to assert its supremacy \textit{vis-à-vis} the other branches of the federal government. \textit{See infra} Part V.A.} Instead, I argue that the Court in \textit{Baker v. Carr} (1962)\footnote{369 U.S. 186 (1962).} articulated a new political question doctrine that would serve, not as a doctrine of judicial restraint (or subservience), but as a source of judicial power. First, in a part of the opinion that has often been overlooked by scholars, \textit{Baker} signaled the demise of the traditional political question doctrine. The \textit{Baker} Court declared that it would no longer enforce the political branches’ factual determinations, whether they “be right or wrong.”\footnote{Williams v. Suffolk Ins. Co., 38 U.S. 415, 420 (1839).} Instead, the Court would independently decide both the legal and the factual issues arising in any case or controversy.\footnote{\textit{See infra} Part V.A.} 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 \textit{ultima interpreter of the Constitution}.”\footnote{\textit{Baker}, 369 U.S. at 211 (emphasis added).} 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. Moreover, this analysis turns on its head the assumption of most scholars that the modern doctrine is at odds with judicial supremacy.\footnote{See, e.g., Barkow, \textit{supra} note 3, at 242; David Orentlicher, \textit{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}
doctrine, the Court asserts for itself the power to decide who decides any constitutional question. 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 v. Carr has most often used its political question cases—to claim that various constitutional issues are committed to the Court, and not to a political branch. 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. 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 II describes the traditional doctrine of the nineteenth century, recounting how courts treated as conclusive the political branches’ determination of certain factual issues but showed no such subservience as to constitutional questions. Part III explains that the Supreme Court continued to apply this traditional doctrine through favor judicial supremacy tend to strongly oppose the political question doctrine. See 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. See Mark Tushnet, Taking the Constitution Away from the Courts 9, 107–08 (2000); 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).

24 See Part V.A.
25 See Part V.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. See Gary Lawson & Christopher D. Moore, The Executive Power of Constitutional Interpretation, 81 Iowa L. Rev. 1267, 1270, 1279, 1303 (1996); infra notes 337–338 and accompanying text.
the mid-twentieth century, but that a new type of “political question” case also emerged. Part IV documents how academics began to treat the fledging group of constitutional cases as the political question doctrine. Part V examines how the Court in Baker v. Carr and subsequent cases transformed the political question doctrine into a source of judicial power.

II. 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. Although scholars today often assume that this doctrine has deep historical roots, the modern doctrine differs significantly from the political question doctrine applied by courts in the nineteenth and early twentieth centuries—what I refer to as the “traditional political question doctrine.” 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.

27 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 IV, that there was a change in the scholarly understanding of the term “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. 1, 37 (1849), United States v. Holliday, 70 U.S. 407, 419 (1865), Coyle v. Smith, 221 U.S. 559 (1911), Pacific States Telephone and 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 II.A are, in my view, illustrative of that doctrine.
28 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.
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. 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 have been no political question doctrine, even during this early period. But that is a misunderstanding of the history. 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

See Georgia v. Stanton, 73 U.S. (6 Wall.) 50, 76–77 (1867) (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 816–18 (Henry St. George Tucker ed., 1899) (describing, in addition to the traditional cases discussed in this Article, Georgia v. Stanton, 73 U.S. 50 (1867), and Mississippi v. Johnson, 71 U.S. 475 (1866), as political question cases). But scholars today correctly understand these cases as part of modern standing doctrine. See Harrison, supra note 10, at 1373 n.10; Henry P. Monaghan, Constitutional Adjudication: The Who and When, 82 Yale L.J. 1363, 1367–68, 1382, 1382 nn.28 & 29 (1973) (“[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.

For an explanation of how I uncovered the history discussed here, see supra note 27.

See Henkin, supra note 3, at 600-01, 608-09, 610-13 (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 326-327 and accompanying text. Moreover 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 10 (noting other scholarship that has discussed some of the relevant early cases, without recognizing the nature or breadth of the early doctrine).

Professor Henkin also assumed (inaccurately) that the early cases involved no “extraordinary deference” to the political branches. Henkin, supra note 3, at 612; see infra note 77 and accompanying text (discussing the subservience of the courts to factual determinations that were deemed political questions).
is crucial to understanding how far from its roots the current doctrine has evolved.\footnote{For a discussion of how the current doctrine differs from the traditional doctrine, see Part V.B.}

\section*{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;\footnote{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”); \textsc{Tucker}, supra note 28, at 816 (the judiciary must “accept the determination of the political departments…as conclusive” on “what is the de facto government of another country”).} the date on which a war began or ended;\footnote{See \textsc{Henry Campbell Black}, \textsc{Handbook of American Constitutional Law} \S 56, 101 (3d ed. 1910) (“the judicial tribunals must follow the political departments [as to the existence of a state of war] and accept their determination as conclusive”).} whether the United States continued to have a treaty with a foreign country;\footnote{See Terlinden v. Ames, 184 U.S. 270, 285, 288 (1902); 2 \textsc{Westel Woodbury Willoughby}, \textsc{The Constitutional Law of the United States}, \S 582 1007 (1910). Courts also treated as a “political question” whether a foreign diplomat had the power to negotiate or terminate a treaty on behalf of his government. See, e.g., Doe v. Braden, 57 U.S. (16 How.) 635, 657 (1853); \textsc{Willoughby}, supra, at 1007.} and whether a certain group of Native Americans constituted a “tribe.”\footnote{See In re Kansas Indians, 72 U.S. (5 Wall.) 737, 751, 755–57 (1866); United States v. Holliday, 70 U.S. 407, 419 (1865) (“[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.”).} Although jurists and scholars in that era often described these issues as “questions of fact,”\footnote{E.g., \textsc{Williams v. Suffolk Ins. Co.}, 38 U.S. 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”); \textsc{Willoughby}, supra note 35, at 999 (stating that the judiciary would treat as binding legislative or executive determinations that a “certain set of facts, a given status, exists”).} most such political questions would likely now be considered mixed questions of fact and law.\footnote{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. \textsc{See supra} note 35.} (For ease of exposition, I generally refer to these determinations as factual decisions, in keeping with the nineteenth-century usage.\footnote{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})
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.

A few examples will help illustrate how courts applied the traditional doctrine. *Williams v. Suffolk Insurance Company* (1839) involved a dispute over an insurance contract. The master of a vessel that was confiscated by the Buenos Ayres government sought the insurance proceeds, but the insurance company refused to pay out on the policy, arguing that the master was himself responsible for the loss of the ship. 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. The master, however, denied that Buenos Ayres controlled the territory and contended that he was therefore justified in ignoring the foreign government’s warning.

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

---

encompass constitutional questions (that is, the interpretation and application of the constitutional text, structure, history, and precedent). 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 35, 38. See supra notes 33–36 (citing cases and treatises); see also TUCKER, supra note 28, 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) (a court must “follow the ruling of the political department” on political questions). As noted, the only other 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 28.

38 U.S. 415 (1839).

Id. at 418–19.

Id. at 419–20.

Id.

Id.
binding and conclusive on this Court.”

Noting that the executive had “denied the jurisdiction which [Buenos Ayres] assumed to exercise over the Falkland islands,” 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.”

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. 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.

Kennett v. Chambers (1852) was an action to enforce a contract arising out of Texas’s war for independence against Mexico.

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. According 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.

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). 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

---

46 Id.; see also Jones v. United States, 137 U.S. 202, 212–13 (1890) (“Who is the sovereign, de jure or de facto, of a territory, is not a judicial, but a political, question”).
48 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.”).
49 Id. at 421 (stating that “[t]he decision of the first point materially affects the second, which turns upon the conduct of the master”).
50 Id.
51 55 U.S. (14 How.) 38 (1852).
52 Id. at 45–46.
53 Id.
54 Id.
55 See id. at 49–50.
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 (1865), 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 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

56 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 Id. at 46–47 (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 See id. at 52 (“[h]olding this contract to be illegal and void”).
60 70 U.S. 407 (1865).
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. See Brief of the United States at 31–32, United States v. Holliday, 70 U.S. 407 (1865) (No. 337). Likewise, Otibsko had to in fact be a member of the tribe. See infra note 65 and accompanying text.
64 Holliday, 70 U.S. at 418–19.
with the tribe and holding that the federal statute at issue was a proper exercise of Congress’s authority under the Indian Commerce Clause. The Court thus upheld Holliday’s conviction.

The traditional political question doctrine applied not only in various federal cases but also in state court. A lawsuit in New York state court, Russian Socialist Federated Soviet Republic v. Cibrario (1923), 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. Although the Bolsheviks had clearly controlled Russia since late 1917, the United States government did not yet recognize the regime as the leader of the country. 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.” The court held, as a matter of law, that such an unrecognized government lacked standing to sue in a New York state court.

The above cases illustrate several important features of the traditional political question doctrine. First, although courts did not

65 Id. at 418.
66 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 416–18 (“If 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, 181–82, 184–86 (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, 139 N.E. 259 (N.Y. 1923).
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. See Antony D’Agostino, The Russian Revolution, 1917–1945, at 40–48 (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).
73 Id. at 257, 260–62 (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”).
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 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

---

74 Accordingly, the judiciary’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 courts 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 the “United States” believed Cuba had at least de facto control, which was sufficient to render the individual liable for the importation tax).

75 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).

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. 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 “abstain 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 executive’s factual determinations, whether they “be right or wrong.”
Congress lacked power under the Indian Commerce Clause to regulate the sale of liquor outside Indian territory.\textsuperscript{78}

Third, the traditional doctrine was \textit{not} a matter of Article III jurisdiction; the doctrine, after all, applied in both state and federal court.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{81} The traditional political 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 \textit{Holliday} illustrates, \textit{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

\textsuperscript{78} See supra note 66 and accompanying text.


\textsuperscript{80} See Ex parte 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, 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”).

\textsuperscript{81} See, e.g., United States v. Arredondo, 31 U.S. 691, 734–36 (1832) (declaring that Congress by statute had “disclaimed [the boundary dispute at issue] as a political 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”).
and the tribal status of a group of Native Americans. But aside from dicta in Luther v. Borden (discussed below), 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.

B. Understanding Luther v. Borden

The description of the traditional political question doctrine provided above sheds light on Luther v. Borden (1849), 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…a republican form of government,” are outside the scope of judicial review. 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

---

82 See, e.g., Doe v. Braden, 57 U.S. (16 How.) 635, 657 (1853) (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 34, at 100–01 (asserting that one reason behind the doctrine was “courts ought not to usurp the functions of the political branches...nor intrude upon their jurisdiction”); see also Note, Determination of Status of Foreign Territory, 16 HARV. L. REV. 134, 134–35 (1901) (arguing that “the 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 Parts II.B, II.C.D; cf. WILLOUGHBY, supra note 35, 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”).

84 See infra Parts II.C,D; cf. WILLOUGHBY, supra note 35, 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”).

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”).
constitution, which significantly restricted the right to vote, and sought in 1841 to form an alternative government. (Although the Dorr supporters did not ultimately gain control over Rhode Island, the Dorr Rebellion did lead to considerable reform.) During this rebellion, Luther Borden, a representative of the existing “charter government,” broke into Martin Luther’s house to search for evidence suggesting that the latter had unlawfully supported the Dorr regime. Luther subsequently sued Borden for trespass, and Borden defended on the ground that he had acted on behalf of the charter government, which had imposed martial law during the crisis. Luther responded that, at the time of the trespass, the Dorr group was the government of Rhode Island. 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 determination of the political branches. In light of the precedents discussed above, this conclusion was unsurprising. The Court found

---

87 WILLIAM M. WIECEK, THE GUARANTEE CLAUSE OF THE U.S. CONSTITUTION 86–87 (1972) (“[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 27 (1976).
88 See Luther, 48 U.S. at 35–36 (discussing how individuals who were “dissatisfied with the charter government” sought to create a new constitution); WIECEK, supra note 87, at 89–92, 94–95 (discussing these events).
89 See WIECEK, supra note 87, at 95 (observing that the newly formed Dorr government met for two days and then adjourned).
90 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”).
91 See Luther v. Borden, 48 U.S. 1, 37 (1849); see also supra note 87 (noting that Rhode Island at this time used its royal charter as its state constitution).
92 See Luther, 48 U.S. at 34.
93 See id. at 34–35.
94 Id. at 46–47 (“[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.”).
95 See supra Part II.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. See Luther, 48 U.S. 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, the bulk 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
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. 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.

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
representatives from which to choose. Absent a congressional
determination, the Court looked to the actions of the executive branch,
which had statutory authority to put down insurrections within States.

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. Accordingly, the executive had, in effect, recognized the
charter government as the government of Rhode Island. This

constitution that creates it—as the Court in Luther seemed to recognize. See Walter F.
Dodd, Judicially Non-Enforceable Provisions of State 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 48
U.S. at 39 (“[T]he question [which government exists in a State] . . . has not heretofore been
recognized as a judicial one in any of the State courts.”). 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.

96 Luther v. Borden, 48 U.S. 1, 42 (1849).
97 Id.
98 See id.
99 Id. at 42–43.
100 Id. at 44; see also DENNISON, supra note 87, at 72, 121 (during the crisis, President
Tyler made clear that he “would support the charter government at all costs”).
101 Luther v. Borden, 48 U.S. 1, 44 (1849).
determination, the Court declared, was as “authoritative” as the executive’s recognition of the government of a foreign country.\footnote{Id. (“In the case of foreign nations, the government acknowledged by the President is always recognized in the courts of justice.”).}

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, stating that “unquestionably, a State may use its military power to put down an armed insurrection.”\footnote{Id. at 45–46. Justice Woodbury dissented only on this point. See id. at 50, 70 (Woodbury, J., dissenting) (disputing “only…the points in issue concerning martial law”).} 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.”\footnote{Luther v. Borden, 48 U.S. 1, 45 (1849).} 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.\footnote{Id. at 42.}

\textit{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.\footnote{See Arthur E. Bonfield, \textit{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, \textit{Judicial Review and the Political Question: A Functional Analysis}, 75 Yale L.J. 517, 589–91 (1966) (describing the Court’s declaration as “dicta”).} As some scholars have recognized, this language was dicta.\footnote{Luther v. Borden, 48 U.S. 1, 45 (1849).} That is true not only because (as the Court stated) “Congress was not called upon to decide the controversy”\footnote{Id. at 42.} but also because the plaintiffs in \textit{Luther} did not challenge the charter government as “unrepublican”; they claimed only that the charter government had been superseded by the Dorr regime.\footnote{The plaintiffs could have made a reasonable claim that the charter government violated the Guarantee Clause, given the suffrage restrictions in the charter constitution. See \textit{supra} note 87 and accompanying text. But my review of the record indicates that the plaintiffs did not raise such a claim. See, \textit{e.g.}, Transcript of Record at 10–17, Luther v. Borden, 48
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.”

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*) was thinking ahead to future disputes over slavery. During the mid-nineteenth century, a number of abolitionists argued that every slave State lacked a “republican” form of government. 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. Congress had, after all, since the Founding accepted representatives and senators from slave States.

In any event, this passage in *Luther v. Borden* was apparently not viewed for many years as declaring that all Guarantee Clause issues

---

U.S. 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 plaintiffs asserted such a claim. *See also* Currie, supra note 95, at 166 (similarly observing that “[t]he plaintiff had not relied on the guarantee clause” in *Luther*).

110 *Luther v. Borden*, 48 U.S. 1, 42 (1849) (“[W]hen 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.”).

111 *Dred Scott v. Sandford*, 60 U.S. 393 (1856). For discussions of how the Guarantee Clause factored into the debate over slavery, see *Wieck*, supra note 87, at 13–65; Bonfield, supra note 107, at 530–32.

112 *See* Wieck, supra note 87, at 136, 145, 158 (“antislavery thinkers” argued that “slavery was incompatible with republican government”); Bonfield, supra note 107, at 531 (same).

113 Such an approach would have been consistent with pro-slavery 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.’” *Wieck*, supra note 87, at 145–46.

114 The Court, however, was never asked to resolve the question whether slavery was “unrepublican.” Bonfield, supra note 107, at 537.
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.\footnote{Likewise, it does not appear that the Court refrained from adjudicating constitutional questions that arose in the realm of foreign policy or war powers. \textit{See} JOHN HART ELY, \textit{War and Responsibility: Constitutional Lessons of Vietnam and Its Aftermath} 54–56 & 176 n.46 (1993) (asserting that “in the nineteenth century the hesitation [about adjudicating cases involving war powers] was not even expressed by commentators”).} 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.\footnote{\textit{See} U.S. \textit{Const.} art 1, § 9; Amanda L. Tyler, \textit{Is Suspension a Political Question?}, 59 \textit{Stan. L. Rev.} 333, 335 (2006) (“there is no settled authority” on whether suspension is a political question). For a powerful argument that such a constitutional question should not be deemed a political question (even under modern law), see Tyler, \textit{supra}.} 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 \textit{Marbury v. Madison}.\footnote{5 U.S. (1 Cranch) 137 (1803); \textit{see infra} Part IV.D.}

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). 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. Indeed, some commentators have argued that it would 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.

That was not, however, the assumption of the early Court. For example, in *Hollingsworth v. Virginia* (1798), 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

---

118 U.S. CONST. art. V.

119 Even scholars who argue that the amendment process should not be a political question agree that *Coleman v. Miller*, 307 U.S. 433 (1939) (discussed below in Part III.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) (observing that “[t]he assumption since Coleman has been” that Congress will decide “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) (noting that “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"]

120 See Orentlicher, supra note 23, at 749–51 (arguing that “[c]ourts should find a political question when their involvement would entail a serious institutional conflict of interest for the judiciary,” such as the areas of impeachment and constitutional amendment); Scharpf, supra note 107, 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”).

121 The early Court assumed that it could rule on the amendment process, like other constitutional questions. See infra notes 122-130 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 (1871) (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”).

122 3 U.S. (3 Dall.) 378 (1798).
signature. 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 consent. But there is no indication that the Supreme Court hesitated in adjudicating *Hollingsworth* on the merits.

Likewise, in the early twentieth century, 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). For example, in *Leser v. Garnett* (1922), the Court held that the Nineteenth Amendment did not result in “so great an addition to the electorate” that it was outside the scope of Congress’s power under Article V. The Court clearly did not assume that Congress alone could determine the validity of constitutional amendments.

---

123 Id. at 381–82 & n. (a) (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.”).
124 2 U.S. (2 Dall.) 419 (1793).
126 See supra note 123 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.”).
127 See Dellinger, supra note 119, at 403 (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).
128 See U.S. CONST. amend XIX, amend XVIII. For substantive challenges, see National Prohibition Cases, 253 U.S. 350, 386 (1920) (upholding the Eighteenth Amendment); infra notes 129–130 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).
129 Id. at 135–37 (noting that the change required by the Nineteenth Amendment was no greater than that demanded by the Fifteenth Amendment).
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.”\(^{131}\) 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.\(^{132}\) But as some modern commentators have recognized, that was not the assumption in the nineteenth and early twentieth centuries.\(^{133}\)

In *Minor v. Happersett* (1874),\(^{134}\) 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.\(^{135}\) The Court found that this history provided “unmistakable evidence” that women’s suffrage was not a prerequisite of “republican” government under the Constitution.\(^{136}\) The Court later adjudicated other Guarantee Clause challenges to state government action, without any suggestion that this constitutional issue might be a political question.\(^{137}\)

---

\(^{131}\) U.S. CONST. art. IV, § 4.

\(^{132}\) See Brown, supra note 3, at 150 (“Every law student knows that a claim under the so-called Guarantee Clause is a political question”).

\(^{133}\) See New York v. United States, 505 U.S. 144, 184 (1992) (noting that “[i]n 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 “Rebuttable Presumption” Analysis*, 80 N.C. L. REV. 1165, 1194–95 (2002). One precedent is ambiguous on this score. See Taylor v. Beckham, 178 U.S. 548, 578–81 (1900) (rejecting a constitutional challenge to a 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 107, at 591 & n.255 (describing Taylor as a political question case).

\(^{134}\) 88 U.S. 162 (1874).

\(^{135}\) See *id.* at 165, 175–78 (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.

\(^{136}\) *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”).

\(^{137}\) See, e.g., Attorney General of State of Michigan 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. City of 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).
Coyle v. Smith (1911)\textsuperscript{138} is especially illuminating. The State of Oklahoma sought by statute to move its state capital from Guthrie to Oklahoma City.\textsuperscript{139} 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.\textsuperscript{140} The central issue in the case was whether Congress had the power to impose such a condition on a State.\textsuperscript{141}

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 binding upon the courts.”\textsuperscript{142} “[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.”\textsuperscript{143} 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,\textsuperscript{144} 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.\textsuperscript{145} The Court emphasized that Congress must admit States “upon an equal

\textsuperscript{138} 221 U.S. 559 (1911).
\textsuperscript{139} Id. at 562–63.
\textsuperscript{140} Id. at 563 (the plaintiff was the “owner of large property interests in Guthrie”).
\textsuperscript{141} Coyle, 221 U.S. 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”).
\textsuperscript{142} Brief and Argument for Plaintiff in Error Coyle v. Smith at 14–15, 53–54, 221 U.S. 559 (1911) (No. 941).
\textsuperscript{143} Id. at 14–15, 18 (“the courts may not question the constitutionality or power of congress but can only accept and give effect to that which Congress has created”).
\textsuperscript{144} See Coyle v. Smith, 221 U.S. 559, 565–66 (1911) (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”).
\textsuperscript{145} Id. at 573–74, 579–80.
footing” with existing States 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.”

146 Id. at 565–68, 573, 579–80.
147 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; Brown, supra note 3, at 151; Choper, supra note 7, at 1505–06. 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; Millard v. Roberts, 202 U.S. 429, 435–37 (1906); Twin City Nat. Bank of New Brighton v. Nebecker, 167 U.S. 196, 202–03 (1897); see also United States v. Munoz-Flores, 495 U.S. 385, 389–96, 397–400 (1990) (rejecting 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; The Pocket Veto Case, 279 U.S. 655, 675, 682–83 (1929).

Nevertheless, commentators have pointed to Field v. Clark, 143 U.S. 649 (1892), which held that the “enrolled act” certified by Congress and the executive is “unimpeachable” evidence of the statute passed by Congress. Id. at 672–73. 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. 186, 187 (1893). 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 (1904) (“there is equal or greater danger of error and fraud in the journals”). For that reason, a number of commentators, including Dean Wigmor in his 1904 Treatise on Evidence, argued that courts should adopt the more efficient approach of looking only at the enrolled act. See id. at 1654–55; Dodd, supra note 95, at 67–68.

This debate reached the Supreme Court in Field v. Clark. 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. 649, 663–66, 668–69 (1892). 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. 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); see also Twin City, 167 U.S. at 201–02 (same).
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 constitutional claims—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 v. Madison, Chief Justice Marshall considered in part whether the Court had to enforce a statute, even if the Court found it unconstitutional. The issue, stated another way, was whether the Court had to accept as conclusive 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?”

The Chief Justice declared that such a proposition was “an absurdity too gross to be insisted on.” 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.” 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.

---

148 5 U.S. (1 Cranch) 137 (1803).
149 Id. at 176–77.
150 Id. at 177.
151 Id.
152 Id. at 178.
153 United States v. Klein, 80 U.S. 128, 145–48 (1871) (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). Although the Court’s reasoning is rather opaque, it appears that the Court struck down the statute in large part because it directed the courts to enforce an unconstitutional law. See Klein, 80 U.S. at 145–48; see also Martin H. Redish & Christopher R. Pudelski, Legislative Deception, Separation of Powers, and the Democratic
Notably, the Court in *Marbury* did not assert that its constitutional rulings were “supreme” 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.  \\

But the Court did firmly declare its independence in resolving any constitutional question that arose in a case.  \\

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.” 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].”  

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 acknowledged the existence of certain questions that are wholly outside the purview of the courts—‘[q]uestions, in their nature political.’”

---

154 See infra Part V. Although the Court would later (in the mid–twentieth century) describe *Marbury* as proclaiming “judicial supremacy,” see 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”), *Marbury* articulated only the more limited notion that the Court could decide constitutional questions in the course of resolving a case. See David E. Engdahl, *John Marshall’s “Jeffersonian” Concept of Judicial Review*, 42 DUKE L.J. 279, 326 (1992). Indeed, even advocates of judicial supremacy have recognized that *Marbury* is “ambiguous” on the question whether the judiciary must be the ultimate interpreter of the Constitution. Erwin Chemerinsky, *Who Should Be the Authoritative Interpreter of the Constitution? Why There Should Not Be a Political Question Doctrine*, in POLITICAL QUESTION DOCTRINE, supra note 2, at 181, 185.

155 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) (courts can “independently” read the Constitution to give the political branches considerable leeway).


158 Barkow, *supra* note 3, at 239; *supra* note 4 (collecting sources).
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. Supp. Marbury sued for a writ of mandamus directing Madison to deliver the commission. Chief Justice Marshall announced that the Court could issue the writ only if Madison’s duty was “ministerial” rather than “discretionary.” 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.

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. 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

---

160. See id. at 153–54 (discussing the background of the case).
161. Id. at 163–73.
162. Id. at 170.
163. See id. at 169–70 (‘to 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’).
his lawful discretion.\textsuperscript{164} (The Court in \textit{Marbury}, however, found that Madison did have a ministerial duty to deliver the commission.\textsuperscript{165})

\textit{Marbury v. Madison} 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 that we know today.

\textbf{III. 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.\textsuperscript{166} In \textit{Oetjen v. Central Leather Company} (1918),\textsuperscript{167} for example, the defendant’s title to a piece of property depended on

\begin{footnotesize}
\textsuperscript{164} 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. § 701(a)(2); see ICC v. Brotherhood of Locomotive Engineers, 482 U.S. 270, 282 (1987).
\textsuperscript{165} \textit{Marbury v. Madison}, 5 U.S. (1 Cranch) 137, 170–72 (1803).
\textsuperscript{166} 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); Chariton v. Kelly, 229 U.S. 447, 457–69, 469, 474–76 (1913) (treating as conclusive the political branches’ determination that the United States 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. 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 \textit{United States v. Holliday}, 70 U.S. 407, 418–19 (1865)).
\textsuperscript{167} 246 U.S. 297 (1918).
\end{footnotesize}
whether the property had been confiscated by the “government” of Mexico or illegally taken by a rogue military regime. 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.”

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 IV) 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 v. Smith* (1911), the Supreme Court took a sharp turn on Guarantee Clause claims in *Pacific States Telephone & Telegraph Company v. Oregon* (1912). *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. The company argued that “the vital element in a

---

168 See id. at 299. 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.

169 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.* at 302. 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.

170 221 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 II.C.2.

171 223 U.S. 118 (1912).

172 See Brief for Plaintiff In Error at 103, 75–115, Pacific States Telephone and Telegraph Co. v. Oregon, 223 U.S. 118 (1912) (No. 822) (“[T]he vital element in a republican form
republican form of government...is representation. Legislation by the people directly is the very opposite."173

In its Supreme Court briefs, Oregon invoked Luther v. Borden and (erroneously characterizing its dicta as a holding) contended that "the determination of political questions," such as the "fact of the existence of a republican form of government, rests with Congress and the Executive."174 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 State."175 Accordingly, "the very question...raised by" Pacific States had been "finally and absolutely determined so far as the judiciary is concerned."176

Pacific States strongly disputed that the political branches’ determination of the “republican” nature of Oregon’s government was “binding upon this court.”177 Pacific States declared: “[J]ust as this court [in Coyle v. Smith] 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 Oregon law, even if the political branches “have, by

of government, as that phrase is used in American political science, is representation. Legislation by the people directly is the very opposite ... of this principle.”) (emphasis in original).

173 Id. at 103 (emphasis in original).

174 Supplemental Brief for Defendant In Error at 57–58, Pacific States Telephone and Telegraph Co. v. Oregon, 223 U.S. 118 (1912) (No. 822); see also Brief for Defendant In Error at 5–6, Pacific States Telephone and Telegraph 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.... [I]t is a political rather than a judicial question.”).


176 See id. at 57–58 (arguing that Pacific States’ “appeal lies to Congress or the Executive”). Interestingly, although Oregon quoted the language from Luther, which urged courts to treat the political branches’ determinations as conclusive, Oregon asked the Court to dismiss the appeal for lack of jurisdiction. See 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 power” 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.

implication, accepted [Oregon’s initiative] as conforming to the Federal Constitution.”

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 Congress.” 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. Accordingly, the Court dismissed Pacific States’ constitutional claim “for lack of jurisdiction.”

Some early twentieth-century commentators noticed that Pacific States was a departure from the traditional political question doctrine. 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.

Writing in 1925, Melvin Fuller Weston also found “a little difficulty… in reconciling” Pacific States with other “political question” cases,

---

178 Id. at 26.
180 Id. at 148–49.
181 Id. at 151 (“As the issues presented, in their very essence, are, and have long since by this court 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”).
182 See infra notes 183–184 and accompanying text; 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 253–57 (Matthew Bender & Co., eds. 1913) (arguing that the Court’s ruling was not compelled by precedent).
where the courts “accept[ed]...the decision of the other branches of government” as controlling on a particular issue.\footnote{184}{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 a claim that Pacific States lacked standing or a cause of action under the Guarantee Clause. See id. at 322–26 (the plaintiffs claimed a “constitutional right...not to person or property...but to political existence and integrity”).}

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.”\footnote{185}{223 U.S. 118, 141 (1912) (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 the contention here advanced makes is not on the tax as a tax, but on the state as a state.”).} Such assertions were clearly overstated.\footnote{186}{Scholars both at the time of Pacific States and more recently have noted that the Court’s assertions were far-fetched. COUNTRYMAN, supra note 182, at 259–60 (describing the Court’s characterization of the case as “absurd” and “illusory”); Richard L. Hasen, Leaving the Empty Vessel of “Republicanism” Unfilled: An Argument for the Continued Nonjusticiability of Guarantee Clause Cases, in POLITICAL QUESTION DOCTRINE, supra note 2, at 75, 81 (the Court’s “‘parade of horribles’” argument was “surely makeweight”).}

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.\footnote{187}{Reply Brief for Plaintiff In Error at 25, Pacific States Telephone and Telegraph Co. v. Oregon, 223 U.S. 118 (1912) (No. 822).} By 1912, many progressives were highly critical of what they perceived as a pro-business federal judiciary; a decision invalidating a state initiative imposing a tax on corporations could have added fuel to that fire.\footnote{188}{See WALTER F. PRATT, JR., THE SUPREME COURT UNDER EDWARD DOUGLASS WHITE 1910–1921 69–71 (1999); 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).}

\footnote{189}{PRATT, supra note 188, 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).}
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*.

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.” But the Court 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.

Then, in a deeply divided opinion in *Coleman v. Miller* (1939), the Justices for the first time declined to rule on the validity of an amendment—a proposal on child labor. A group of Kansas legislators brought the suit, alleging that the amendment had not been properly ratified by their State. Writing for a three-Judge plurality, Chief Justice Hughes asserted that the case presented nonjusticiable

---

190 223 U.S. 118, 133, 148–49 (1912).
191 Ohio ex rel. Bryant v. Akron 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. Learner, 239 U.S. 244, 248 (1915) (“The attempt to invoke § 4 of article 4 of the Federal Constitution is obviously futile.”) (citing Pacific States Telephone & Telegraph Co. v. State of Oregon, 223 U.S. 118 (1912)). However, in one case, the Court seemed to reject the Guarantee Clause claim on the merits—before noting that it was nonjusticiable. *See* Highland Farms Dairy 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”).
192 *See supra* Part II.C.1.
194 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 id.* at 435 & n.1; *David E. Kyvig, Explicit and Authentic Acts: Amending the U.S. Constitution, 1776–1995* 257, 307–09, 469 (1996) (discussing the amendment); *see also* Bailey v. Drexel Furniture, 259 U.S. 20, 36–39, 44 (1922) (taxing power); *Hammer v. Dagenhart*, 247 U.S. 251, 272–73 (1918) (commerce power). 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); *Kyvig, supra*, at 313 (observing that, after *Darby*, “any remaining feeling of need for the still-unratified [child labor] amendment evaporated”).
political questions that Congress had the “ultimate authority” to decide.\textsuperscript{196}

Four other Justices, however, advocated a very different approach. Writing for that group,\textsuperscript{197} Justice Black argued for the extension of the traditional political question doctrine to this area of constitutional law. Relying on cases like \textit{Williams v. Suffolk Insurance Company}, 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.”\textsuperscript{198} 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.\textsuperscript{199} “Neither State nor Federal courts can review that power.”\textsuperscript{200}

It is not clear why seven Justices declined to decide \textit{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,\textsuperscript{201} the fractured opinions in \textit{Coleman} provided little insight into

\textsuperscript{196} \textit{Id.} at 450 (concluding that Congress had “ultimate authority” to determine “the efficacy of ratifications” and “whether by lapse of time…[an] amendment had lost its vitality”).
\textsuperscript{197} Justice Black believed the legislators lacked standing but still discussed justiciability because a majority of the Court found standing. \textit{Id.} at 456–57 (Black, J., concurring).
\textsuperscript{198} \textit{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)); \textit{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 \textit{Williams v. Suffolk Ins. Co.}, 38 U.S. 415, 420 (1839)).
\textsuperscript{199} \textit{Id.} at 458.
\textsuperscript{200} \textit{Id.} at 458–59.
\textsuperscript{201} \textsuperscript{201} One possible explanation is that the Justices in \textit{Coleman} were concerned about potential challenges to the Fourteenth Amendment. Chief Justice Hughes’ plurality alluded to the “special circumstances” under which that amendment was added to the Constitution, 307 U.S. 433, 449–50 (1939). During Reconstruction, Congress instructed the southern States that they could not rejoin the Union, unless they ratified the amendment. See Michael W. McConnell, \textit{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. \textit{Compare, e.g.}, 2 BRUCE ACKERMAN, \textit{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), \textit{with} John Harrison, \textit{The Lawfulness of the Reconstruction Amendments}, 68 U. CHI. L. REV. 375, 378 (2001) (arguing that the amendment was valid under Article V). In \textit{Coleman}, a majority of the Court made clear that it would not entertain any such challenge. See supra
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 future cases. And the remaining two Justices in *Coleman* urged the Court to decide the case on the merits.  

The Court’s next excursion into this terrain, *Colegrove v. Green* (1946), offered little clarity. *Colegrove* involved a challenge to an Illinois statute governing the apportionment of congressional districts. The plaintiffs alleged that the districts were severely malapportioned in violation of, among other things, the Equal Protection Clause of the Fourteenth Amendment.  

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.” But Justice Frankfurter’s effort to extend the approach of *Pacific States* commanded only two other votes. Justice Rutledge concurred on the ground that, in his view, the Court should decline to exercise its discretionary power to issue equitable relief. (That four-Justice vote was sufficient to reject the plaintiffs’ challenge, because the case was heard by a seven-member Court.)

notes 193–200 and accompanying text. I am grateful to Walter Dellinger for making me aware of the possible connection between *Coleman* and the Fourteenth Amendment.

202 Justices Butler and McReynolds asserted that the amendment was invalid because not ratified within a reasonable time. See 307 U.S. 433, 470–474 (1939) (Butler, J., dissenting).

203 328 U.S. 549 (1946).

204 Id. at 550–51.


206 *Colegrove*, 328 U.S. at 554–55 (plurality opinion) (the Constitution “precludes judicial correction” of the alleged “evil[]” of malapportionment); see also id. at 552 (emphasizing that Article I empowers Congress to “make or alter” state regulations of the “times, places, and manner” of congressional elections); see 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. See id. at 552.


208 See Petition for Rehearing at 2, *Colegrove v. Green*, 328 U.S. 549 (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
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.\footnote{Colegrove v. Green, 328 U.S. 549, 569–73 (1946) (Black, J., dissenting).} The divided opinions in \textit{Coleman v. Miller} and \textit{Colegrove v. Green} did not create a new “political question doctrine” extending beyond the Guarantee Clause.\footnote{Following \textit{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 \textit{Colegrove}). See \textit{South v. Peters}, 339 U.S. 276, 277 (1950). In the other cases, the Court denied the appeal for want of a substantial federal question, see \textit{Remmey v. Smith}, 342 U.S. 916, 916 (1952), or without providing any reason, see \textit{Kidd v. McCanless}, 352 U.S. 920, 920 (1956); \textit{Cook v. Fortson}, 329 U.S. 675, 675 (1946).}

\section*{IV. The Academic Debate: \newline 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. It is puzzling that, by the mid-twentieth century, much of the legal community considered \textit{Pacific States} and the plurality decisions in \textit{Coleman} and \textit{Colegrove} to be the core of the “political question doctrine.” I suggest here that this shift can be traced to changes in the academic discourse about the doctrine.

\subsection*{A. The Shifting Focus to \textit{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.”\footnote{\textit{Compare}, e.g., Weston, supra note 184, 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 chief prosecutor at the Nuremberg trial” and “[t]here was no ninth vote because Chief Justice Harlan Stone, recently deceased, had not yet been replaced”).} But this early scholarship also
differed significantly from subsequent commentary on the political question doctrine. First, these early scholars focused on traditional political question cases, characterizing the “political question doctrine” 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.” Although scholars sought, at times with some frustration, to incorporate the Guarantee Clause cases into their analyses, the political question doctrine was not seen primarily as a mechanism for determining which constitutional claims would be subject to judicial review. 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

deligation 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), with Field, supra note 76, at 485, 486–10, 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 (noting that under the traditional doctrine, constitutional considerations likely informed the designation of certain issues as “political questions”).

212 Field, supra note 76, at 486–10; see also Charles K. Burdick, The Law of the American Constitution: Its Origin and Development § 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”); Wright, supra note 80, at 172–73 (stating that “if 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 standing decisions. See Burdick, supra, at 131–32; see supra note 28.

213 See supra note 184 (discussing Professor Weston’s comment in 1925 that he had “a little difficulty” reconciling Pacific States with some other political question cases).

214 See Burdick, supra note 212, at 128–30 (describing the political question doctrine as one in which “the courts will adopt the conclusions reached...by the political departments” and noting that Luther v. Borden 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 212, at 11, 13–14, 15–16, 19 (1936) (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). The exception may be Maurice Finkelstein. He argued that the courts should steer clear of certain (principally constitutional) issues, such as the due process cases of the Lochner era. See Finkelstein, supra note 211, at 361–63.
required to apply the political branches’ decisions on “political questions.””

By the early 1930s, however (surprisingly, even before Coleman v. Miller in 1939), there were signs of a shift in the scholarly definition of a “political question.” A few scholars began to describe “political questions” as constitutional issues that were outside the scope of judicial review and to define the “political question doctrine” as an Article III jurisdictional device. 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. Scholars instead tended to describe all “political questions” as issues that were simply “nonjusticiable.”

By the mid-twentieth century, the shift was largely complete. The paradigmatic “political question” cases were those in which the

216 See, e.g., BLACK, supra note 34, at 100–02; Weston, supra note 184, at 315–16.
217 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.
218 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”).
219 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.”). 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 L. REV. 231, 231 (1948).
220 See John P. Frank, Political Questions, in SUPREME COURT AND SUPREME LAW 36, 36–43 (Edmond Cahn ed., 1954); Note, Judicial Attitude Toward Political Question Doctrine: The Gerrymander and Civil Rights, 3 WASH. U. L.Q. 292, 293 (1960) (asserting that “nonjusticiable...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”).
221 I identified only a few mid-twentieth-century articles that continued to discuss the traditional doctrine. E.g., Edwin D. Dickinson, The Law of Nations as National Law:
Supreme Court dismissed constitutional claims for lack of jurisdiction. According to scholars of this era, such nonjusticiable constitutional questions included not only the Guarantee Clause but also (despite the division in Coleman v. Miller and Colegrove v. Green) constitutional amendments and reapportionment. In short, scholars viewed the political question doctrine much as we do today—as a “limitation, quite vague in outline, on the exercise by the courts of [the] function” of judicial review.

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. In the first edition of his well-
known casebook, published in 1931, then-Professor Felix Frankfurter (working with Wilber Katz) included a short section on “political questions” in a part of the casebook entitled, “Constitutional Limits of the Judicial Power—‘Case and Controversy.’” Frankfurter used, as the only principal case, Pacific States Telephone & Telegraph Company v. State of Oregon (1912). Although Frankfurter’s 1931 casebook cited a few articles that discuss traditional political question cases, 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. The first edition of Armisted Dobie’s federal

758–60 (1993) (identifying the Rightmire, Wheaton, and Medina casebooks as the first three texts for then-emerging courses on federal jurisdiction).

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

228 223 U.S. 118 (1912); see FRANKFURTER & KATZ, supra note 227, at 118–25 & n1.

229 FRANKFURTER & KATZ, supra note 227, at 125 n.1 (citing Melville Fuller Weston, Political Questions, 38 HARV. L. REV. 296 (1925), and Oliver P. Field, The Doctrine of Political Questions in the Federal Courts, 8 MINN. L. REV. 485 (1924)).

230 Several of the early casebooks focused on Pacific States or other constitutional cases. See ARMISTED M. DOBIE & MASON LADD, CASES AND MATERIALS ON FEDERAL JURISDICTION AND PROCEDURE xii, 122–26 (2d ed. 1940) (containing a section entitled “Further Limitations on Jurisdiction of Federal Courts: Political Questions,” 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); ARMISTED M. DOBIE, CASES ON FEDERAL JURISDICTION AND PROCEDURE vii, 71–74 (1935) (same); RAY FORRESTER, DOBIE AND LADD: CASES AND MATERIALS ON FEDERAL JURISDICTION AND PROCEDURE xiii, 83–88 (2d ed. 1950) (containing a section entitled “Further Limitations on Jurisdiction of Federal Courts: Political Questions,” and presenting as principal cases Coleman v. Miller, 307 U.S. 433 (1939), and Colegrove v. Green, 328 U.S. 549 (1946)). 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. CHADBOWN, CASES AND MATERIALS ON FEDERAL COURTS 14–15, 17 n.7, 918 (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. CHADBOWN, CASES AND MATERIALS ON FEDERAL COURTS 12–13, 15 n.5, 876 (1946) (same); see also supra note 28 (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 AND HARRY SHULMAN, eds., CASES AND OTHER AUTHORITIES ON FEDERAL JURISDICTION AND PROCEDURE 30–33 & n.1 (Callaghan, rev. ed. 1937) (using Georgia v. Stanton, 73 U.S. 50 (1867), as the principal “political question” case, and discussing Pacific States and Luther v. Borden in a footnote). 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.
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.\(^{231}\) The second (and only other) principal “political question” case was *Nixon v. Herndon* (1927),\(^{232}\) in which the Supreme Court struck down on equal protection grounds a Texas state law that prevented African Americans from voting in primary elections.\(^{233}\) 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,”\(^{234}\) 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* ("Hart and Wechsler"), 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

---

until the first edition of Hart and Wechsler in 1953. And, as discussed below, Hart and Wechsler still emphasized the decisions involving constitutional claims. *See infra* notes 235–240 and accompanying text.

\(^{231}\) Dobie, *supra* note 230, at vii, 71–73.


\(^{233}\) *Id.* at 539–41; *see* Dobie, *supra* note 230, at 73–74 (including *Nixon v. Herndon* as a principal case). The state officials in *Nixon* urged that the Supreme Court lacked jurisdiction over suits involving state primaries. *See* Brief for the State of 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, 273 U.S. at 540 (“That private damage may be caused by…political action and may be recovered for in suit at law hardly has been doubted for over two hundred years”).

\(^{234}\) Dobie, *supra* note 230, at 74 n.74.
under Article III, placing the section on “Political Questions” in a chapter entitled “The Nature of the Federal Judicial Function: Cases and Controversies.” Hart and Wechsler also focused on constitutional claims. Thus, the principal case for the section was Colegrove v. Green, and the first examples of political question cases were Pacific States and Luther v. Borden. (The casebook inaccurately described the latter as a case about the meaning of the Guarantee Clause, rather than solely as a dispute over which government controlled Rhode Island.) Coleman v. Miller was another leading example of a “political question” case.

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 “duration of a state of war” and “recognition of foreign governments,” and in discussing Oetjen v. Central Leather Company indicated that courts would treat as “conclusive” the political branches’ decision as to which government controlled a given territory. 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?” 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

---

236 *Id.* at 192–93, 199, 197–207.
237 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 109 and accompanying text (noting the plaintiffs in Luther did not make a Guarantee Clause claim).
238 See *HART & WECHSLER, supra* note 235, at 193–94. Hart and Wechsler also highlighted *Field v. Clark*, 143 U.S. 649 (1892), 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 147, 224. As I explain above, *Field* was an evidentiary decision. See *supra* note 147.
239 *HART & WECHSLER, supra* note 235, at 195 (internal quotation marks omitted).
240 *Id.* at 209.
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.241 Indeed, Professors Hart and Wechsler dedicated the first edition of their casebook to Frankfurter.242 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.243 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.244

In the early twentieth century, progressives were deeply critical of what they viewed as a pro-business Supreme Court, which struck down on constitutional grounds federal and state regulations designed

---

241 *See* Amar, *supra* note 17, at 719 & n.161; McManamon, *supra* note 226, at 768–69 (noting that Henry Hart and Herbert Wechsler were “student and collaborator” and “friend” of Frankfurter, and that their book was “clearly a descendant of Frankfurter’s casebook”).
242 HART & WECHSLER, *supra* note 235, at 1x (showing that the first edition was dedicated “to Felix Frankfurter, who first opened our minds to these problems”).
244 I offer here only a brief account of the jurisprudential changes of this era. Cf. MORTON J. HOROWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870–1960: THE CRISIS OF LEGAL ORTHODOXY 169 (1992) (“defining Legal Realism with precision is not…easy”); Amar, *supra* note 17, at 691 (the legal process school “resists a simple one-line encapsulation”).
to protect workers. 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. Around the same time, and partly in reaction to the Court’s pro-business decisions, 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. 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.”

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 legislature—with judges making choices, rather than identifying legal principles—judicial review became much more difficult to justify. At a minimum, the legal realist critique seemed to counsel in

245 See William G. Ross, A Muted Fury: Populists, Progressives, and Labor Unions Confront the Courts, 1890–1937 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).

246 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., 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”).

247 See Minda, supra note 246, 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”).

248 See Kalman, supra note 247, 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.”).

249 Horwitz, supra note 244, at 170.

250 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 Cal. L. Rev. 609, 618 & n.37 (1991).
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. In keeping with the insights of legal realism, legal process scholars acknowledged that judges had discretion when they made decisions, including in constitutional cases. But legal process scholars insisted that judicial discretion could be properly confined through procedure. 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.

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, and the Hart and Wechsler casebook was both heavily influenced by, and contributed to the influence of, this school of thought. Indeed, the legal process framework was “accepted for

919, 941 (1989) (“[L]egal realism challenged the very nature and scope of judicial power.”).

251 See HORWITZ, supra note 244, 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 Principals: A Retrospective, 50 VAND. L. REV. 503, 516-18 (1997) (recounting how legal process theorists sought to respond to legal realists).

252 See id. at 254; MINDA, supra note 246, at 35, 37 (legal process theorists “accepted the realists’ claim that judges engage in policy-making when they decide legal cases”).

253 See KALMAN, supra note 247, 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 246, at 34–35.

254 See NEIL DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE 236, 238 (1995) (noting that, for legal process theorists, “[p]ost-realistic 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 246, at 35, 37 (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 266–268 and accompanying text (noting Alexander Bickel’s reliance on jurisdictional doctrines to limit judicial review).

255 Friedman, supra note 254, at 229–31 (describing Felix Frankfurter and Learned Hand as “heroes of the Legal Process school” whose teachings were extremely influential).

256 See Amar, supra note 17, 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,
nearly forty years by scholars and judges as a starting point of analysis of federal courts issues.”

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.

Over time, this “doctrine” became such an important part of the academic 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), 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. 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.”

Responding to Judge Hand, Herbert Wechsler denied that the Supreme Court had broad discretion to refuse to answer a constitutional question. 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

---

258 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. See Duxbury, supra note 254, at 234–35.
259 See supra note 255; see also Kalman, supra note 247, at 30 (identifying Judge Hand as a member of the legal process school).
260 Felix Frankfurter, John Marshall and the Judicial Function, 69 Harv. L. Rev. 217, 227 (1955) (“There are not a few…instances in which judicial relief was barred because ‘political questions’ were deemed to be involved,” such as Guarantee Clause cases).
261 Hand, supra note 224, at 15–16.
262 Id.
263 Wechsler, supra note 223, at 5–6.
itself, had to be based on “neutral principles.””264 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.”265

The political question doctrine was central to the theory of Supreme Court decisionmaking presented by Alexander Bickel, another prominent legal process scholar.266 Much like Judge Hand, Bickel believed that the doctrine gave the Court broad (albeit not unfettered) discretion to abstain from decision in constitutional cases.267 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.268

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

264 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”).
265 Id. at 7–8. Notably, Wechsler identified various constitutional issues that might involve such a “commitment.” See id. at 7–10 (listing impeachment, the seating or expulsion of a senator or representative, the Guarantee Clause, and state gerrymanders).
267 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).
268 BICKEL, supra note 266, at 50, 71 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 347 U.S. 483, 495 (1954).
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.”\(^{269}\) would not likely have found favor with this group.\(^{270}\) The influence of legal process theory thus helps explain why commentators were drawn away from the traditional doctrine and toward a political question doctrine that could confine the scope of judicial review.

V. 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* (1958)


\(^{270}\) Moreover, under the traditional doctrine, federal and state courts treated as conclusive (what were then described 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 “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 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 Company*), the executive likely had to consider questions of international and/or comparative law. See *supra* notes 37-50 and accompanying text. Just as legal process scholars were reluctant to give juries too much power over mixed 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).
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.  

The Court in Cooper also engaged in some revisionist history, for it declared that this principle of judicial supremacy was first announced in Marbury v. Madison and had “ever since been respected...as a permanent and indispensable feature of our constitutional system.”

The Warren Court’s emphasis on a “principle of judicial supremacy” contrasts 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. 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. 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.

271 358 U.S. 1, 18 (1958).
273 See Friedman, supra note 254, 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 223, at 31–34; see also HORWITZ, supra note 244, at 258 (many process theorists viewed “Brown...as a test of their commitment to judicial restraint”).
275 Id. at 192–95.
During the deliberations over the case, Justice Frankfurter argued emphatically that \textit{Baker} should be dismissed as presenting a nonjusticiable political question.\textsuperscript{276} The Justice circulated a sixty-page memo to his colleagues, insisting that “[t]he present case involves all of the elements that have made Guarantee Clause claims non-justiciable.”\textsuperscript{277} Justice Frankfurter’s arguments to his colleagues 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.\textsuperscript{278} In that vein, as Kim Eisler has observed, Justice Frankfurter advocated dismissal in \textit{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.”\textsuperscript{279}

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

\textsuperscript{276} 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) (similarly reporting that Justice Frankfurter “spoke for nearly two hours” after the first oral argument in \textit{Baker v. Carr}).

\textsuperscript{277} Justice Felix Frankfurter, Memorandum for the Conference at 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://turlton.law.utexas.edu/clark/view_doc.php?page=1&id=a119-05-01 (“The present case involves all of the elements that have made Guarantee Clause claims non-justiciable. It is, in effect, a Guarantee Clause claim masqueraded under a different label.”); Eisler, supra note 276, at 171 (reporting that Justice Frankfurter produced a sixty-page memorandum after the second oral argument in \textit{Baker v. Carr}). Notably, Justice Frankfurter in one sentence of his memo did point toward the traditional political question doctrine. \textit{Id.} at 13 (“Where the question arises in the course of a litigation involving primarily the adjudication of other issues between litigants, the Court accepts as a basis for adjudication the political departments’ decision of it.”). That may help explain why Justice Brennan’s majority opinion acknowledged that strand of the doctrine. See infra notes 282-83 and accompanying text.

\textsuperscript{278} See supra Part IV(C) (discussing legal process theory).

\textsuperscript{279} Eisler, supra note 276, at 174 (“Frankfurter was totally fearful that a decision in \textit{Baker} would constitute such a usurpation of court prerogatives, that it would undermine the authority of the Court itself”).
should avoid getting involved in ‘political questions.’” 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. To secure Justice Stewart’s vote, Justice Brennan endeavored in the opinion for the Court to survey the entire landscape of the Court’s “political question” cases.

I argue that, in providing an “exhaustive and detailed examination of” the Court’s precedents, 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

280 Stern & Wermiel, supra note 276, at 184-88 (stating 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 Justices, 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.”).

281 See Douglas, supra note 280, at 135-36 (“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 208, 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”).

282 This background helps explain the detail in the Court’s opinion. See Douglas, supra note 280, 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 276, at 172 (observing that Justice Stewart would support only a narrow ruling). In the end, Justice Brennan did not need Justice Stewart’s vote; Justice Clark opted to vote with the majority and was willing to support a broad opinion for the plaintiffs. See Douglas, supra note 280, 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 276, 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 opinion, “preferring to accomplish less rather than risk alienating Stewart”).

283 Cf. Douglas, supra note 280, 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.”).
traditional doctrine. Although the opinion did not draw a sharp distinction between traditional cases and those involving constitutional claims, 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.”

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.” The Court would not “shut its eyes to an obvious mistake” in the political branches’ decisionmaking. 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.”

Second, Justice Brennan defined the “political question doctrine” as one that demanded a “dismissal for non-justiciability.” As we have seen, under the traditional doctrine, courts did not dismiss as nonjusticiable an issue that presented a political question but rather

284 Much like the scholars in the decades leading up to Baker, Justice Brennan’s opinion treated the “foreign affairs” and “status of Indian tribes” cases as largely indistinguishable from “validity of enactment” cases like Coleman v. Miller. See id. at 211–17.
285 Id. at 212–13, 215.
286 Williams v. Suffolk Ins. Co., 38 U.S. 415, 420 (1839); see Baker v. Carr, 369 U.S. 186, 216–17 (1962) (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 representative of a foreign government, the executive’s statements will be construed where necessary to determine the court’s jurisdiction”).
287 Baker, 369 U.S. at 213–14 (internal quotation marks omitted).
288 Id. at 216. 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 166 (discussing United States v. Sandoval, 231 U.S. 28 (1913)). The Court in Baker more firmly declared that it would not enforce determinations that it found to be incorrect.
289 See Baker, 369 U.S. at 217 (stating that “a political question’s presence” would lead to a dismissal).
enforced and applied the political branches’ determinations. After Baker, there seemed to be little room for such a doctrine.  

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. 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, and is a responsibility of this Court as ultimate interpreter of the Constitution.  

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.

In subsequent cases, the Court used its “power to decide who decides” to proclaim its supremacy over other areas of constitutional

---

290 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).

291 Id. 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”).

292 Id. at 211.

293 Id. at 209, 226, 309. 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, 232–37.
law. Powell v. McCormack (1969) involved the House of Representatives’ refusal to seat Adam Clayton Powell, a New York representative, due to his alleged misuse of public funds. Article I provides that “[e]ach House shall be the judge of the elections, returns and qualifications of its own members.” 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. Likewise, in the Supreme Court, counsel for the House contended that the Constitution “foreclose[d] any judicial inquiry into the decision of the House to exclude Mr. Powell.” “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.”

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.” In discussing the House’s political question argument, the Court emphasized, “as 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.’” The Court held that there was no such “commitment

---

296 See id. at 489–93.
298 Wechsler, supra note 223, at 8–9 & n.23; see also Scharpf, supra note 107, 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”).
300 Id. at 19 (“[T]he propriety of what the House did in this case was for the House, and the House alone, to decide.”).
301 Powell v. McCormack, 395 U.S. 486, 518–22, 548, 550 (1969). The Court held that the House had the “discretion” only to determine whether an elected member met the age and residency requirements listed in the Constitution. See id. at 548, 550; see also U.S. CONST. art. I, § 2, cl. 2 (requiring representatives to be twenty-five years old, “seven Years a Citizen of the United States, and…when elected…an Inhabitant of [the] State”).
302 Powell, 395 U.S. at 521 (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
in this case.” Nor were any “other formulations of a political question ‘inextricable from the case at bar.’” Again invoking Baker, the Court underscored that “it is the responsibility of this Court to act as the ultimate interpreter of the Constitution.”

United States v. Nixon (1974) involved a Special Prosecutor’s attempt to subpoena White House tape recordings from President Richard Nixon. The President challenged the subpoena on grounds of executive privilege. The Supreme Court rejected the President’s contention that “the separation of powers doctrine precludes judicial review of a President’s claim of [executive] privilege.” 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.’” 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,” 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.”

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 a coordinate political department’ of government and what is the scope of such commitment are questions we must resolve.”).

303 See id. at 518–22, 548.
304 Id. at 548–49, 549 (quoting Baker, 369 U.S. at 217).
305 Id. at 549 (“[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.”).
307 See id. at 686–90, 713.
308 Id. at 686–90.
310 Nixon, 418 U.S. at 703 (“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 Nixon, as it had in Cooper, treated Marbury as a case proclaiming judicial supremacy. See supra note 272.
311 Nixon, 418 U.S. at 704 (quoting Marbury, 5 U.S. at 177).
that another branch had final authority over a constitutional question.\footnote{312} Most recently, in \textit{Nixon v. United States} (1993),\footnote{313} the Court announced that the Senate had “sole” power to determine the procedures used in an impeachment trial.\footnote{314} Notably, even in \textit{Nixon}, the Court underscored its role as the supreme expositor of constitutional law with respect to the other branches of the federal government. First, invoking \textit{Baker} and \textit{Powell}, the Court reiterated its power to decide “whether and to what extent” another branch could engage in constitutional interpretation.\footnote{315} Second, again relying on \textit{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.’”\footnote{316}

The language in the Court’s political question cases is not the language of deference or modesty. In fact, \textit{Powell v. McCormack} (1969) and \textit{United States v. Nixon} (1974) 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.\footnote{317} Accordingly, contrary to the assumption of scholars, the

\footnote{312} The first instance was \textit{Gilligan v. Morgan}, 413 U.S. 1 (1973), 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. \textit{See id.} at 3 (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. \textit{See 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.” \textit{Id.} at 6, 6–12. The Court, however, then qualified this “political question” finding by declaring that “we neither hold nor imply that the conduct of the National Guard is always beyond judicial review.” \textit{Id.} at 11–12. Only a plurality of the Court in \textit{Goldwater v. Carter}, 444 U.S. 996 (1979), found that the President’s unilateral abrogation of a treaty presented a nonjusticiable political question. \textit{See id.} at 1002–06.

\footnote{313} \textit{506 U.S. 224} (1993).

\footnote{314} \textit{See U.S. Const., art. I, § 3, cl. 6 (“The Senate shall have the sole Power to try all Impeachments.”)}; \textit{Nixon, 506 U.S. at 226–28, 229–31, 237–38} (the plaintiff challenged a Senate rule, which allowed a Senate committee to gather evidence in impeachment cases).

\footnote{315} \textit{Id. 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 \textit{Baker v. Carr, 369 U.S. 186, 217} (1962), and \textit{Powell v. McCormack, 395 U.S. 486, 519} (1969)).

\footnote{316} \textit{Id. at 238} (quoting \textit{Baker v. Carr, 369 U.S. 186, 211} (1962)) (brackets in original).

\footnote{317} For a sample of the academic debate over judicial supremacy, see \textit{supra} notes 23, 25; \textit{infra} notes 337–338 (collecting sources); \textit{see also} Gary Lawson, \textit{Interpretive Equality as...
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.”318

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.”319 Accordingly, the traditional doctrine was truly a doctrine 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.320 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 is not clear 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

---

318 Barkow, supra note 3, at 240–41, 300 (quoting Morrison, 529 U.S. at 616 n.7).
320 For one possible modern-day analogue, see supra note 290.
Along these lines, in cases like *Williams v. Suffolk Insurance Company*, 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.322

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.323 Accordingly, it seems that Congress, not the courts, was ultimately in charge of deciding the scope of the traditional doctrine.

The modern political question doctrine, by contrast, was created in the post-realist era, when we more clearly understand judges to have a choice in crafting legal rules. In this environment, the Court in *Baker v. Carr* 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.”324 And because the Court today describes the political question doctrine as an Article III jurisdictional device (and, thus, itself


322 See supra Part II.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 27 (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.

323 See supra notes 79–81 and accompanying text.

a matter of federal constitutional law), Congress cannot override that judgment, other than through constitutional amendment.\textsuperscript{325}

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 \textit{Powell v. McCormack}.\textsuperscript{326} Building on this assumption, Louis Henkin questioned whether there \textit{is} a political question doctrine at all—given how rarely the Court declines review.\textsuperscript{327} 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” a constitutional question. The Court uses the modern political question doctrine as a vehicle for asserting its supremacy over constitutional law.

\textbf{C. Assessing the Modern Doctrine}

The Supreme Court in \textit{Baker v. Carr} and subsequent cases proclaimed for itself the power to decide who decides a constitutional question. Admittedly, that is only an \textit{assertion} of power. The Court cannot unilaterally \textit{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

\textsuperscript{325} 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, \textit{The Political Question Doctrine in State Constitutional Law}, 43 RUTGERS L.J. 573, 579 (2013); Nat Stern, \textit{The Political Question Doctrine in State Courts}, 35 S.C. L. REV. 405, 406-07 (1984).

\textsuperscript{326} E.g., William N. Eskridge, \textit{Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century}, 100 Mich. L. Rev. 2062, 2308 & n.1150 (2002) (asserting that “[a] Court majority has invoked the political question doctrine in only two cases since \textit{Baker}”). This assumption is why so many scholars assert that the political question doctrine is on the decline. \textit{See supra} note 6–8 and accompanying text.

\textsuperscript{327} \textit{See} Henkin, \textit{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).
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.\footnote{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.”).} or advance a particular political agenda through the judiciary.\footnote{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 pro-business agenda); Ran Hirschl, The Political Origins of Judicial Empowerment Through Constitutionalization: Lessons from Four Constitutional Revolutions, 25 LAW & SOC. INQUIRY 91, 116 (2000) (political leaders will empower the judiciary if they believe its decisions will “reflect their ideological preferences”).} 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.

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.\footnote{For a sample of that debate, see sources cited 3, 23.} 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.”\footnote{See Sprint Communications Co., L.P. v. APCC Services, Inc., 554 U.S. 269 (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 on standing on the Court is justified by a long history of reliance on judicial review).} 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 non-historical 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, non-historical arguments in favor 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. If the Court is the supreme expositor of specific constitutional questions, then (for example) when the Court decides that Congress has the power to enact a health care law, or lacks the power to extend voting rights legislation, 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.335

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


332 Alexander & Schauer, supra note 25, at 1385.


334 See Shelby County, Ala. 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).

335 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”).
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 “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.336

For those who oppose “interpretive supremacy,” however, the power claimed by the Supreme Court under the modern political question doctrine should be deeply troubling.337 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).338 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

336 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 Arizona State Legislature v. Arizona Independent Redistricting Comm’n, 135 S. Ct. 2652 (2015)).


338 See Lawson & Moore, supra note 25, at 1270, 1279, 1303; see also David Barron, Constitutionalism in the Shadow of Doctrine: The President’s Non-Enforcement Power, Law & Contemp. Probs., Winter/Spring 2000, at 63; 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 25, 337.
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 non-historical 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. The modern political question doctrine is a species of—not a limitation on—judicial supremacy.

VI. 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 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.

339 See supra note 23 (noting that scholarly opponents of judicial supremacy tend to favor the political question doctrine).