JUDICIAL REVIEW AND THE POLITICAL QUESTION: A FUNCTIONAL ANALYSIS*

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I. THE POLITICAL QUESTION AND THE COURT'S "DUTY TO SAY WHAT THE LAW IS"

IN recent years, the Supreme Court's use of the political question doctrine has come to be regarded as a touchstone for the validity of competing theories of judicial review. The issue is joined on whether the doctrine is, or can be, employed as a discretionary technique for avoiding questions of law on which the decision of cases properly before the courts would otherwise depend. For the protagonists of the

* This article is an attempt to restate and elaborate some of the conclusions which I have reached in a book-length study, published in Germany, of the political question doctrine as applied by the Supreme Court of the United States, SCHARPF, *GRENZEN DER RICHTERLICHEN VERANTWORTUNG: DIE POLITICAL QUESTION DOKTRIN IN DER RECHTSPRECHUNG DES AMERIKANISCHEN SUPREME COURT* (1965).

Unlike the book, this article obviously cannot carry the burden of a descriptive presentation of the Court's political question practice. This limitation is a serious one because, with one exception (POST, *THE SUPREME COURT AND POLITICAL QUESTIONS* (1936)) which is by now somewhat dated, American authors dealing with the doctrine have tended to use the cases in a rather selective fashion. They have cited and discussed primarily those decisions which seemed to support their particular theory about why and how the doctrine was employed (or ought to be employed) and disregarded both political question cases which did not seem to fit their explanation and cases decided on their merits in areas where, according to the theories, the doctrine should have been applied. See e.g. Field, *The Doctrine of Political Questions in the Federal Courts*, 8 MINN. L. REV. 485 (1924); Finkelstein, *Judicial Self-Limitation*, 37 HARV. L. REV. 338 (1924); Weston, *Political Questions*, 38 HARV. L. REV. 296 (1925); Finkelstein, *Further Notes on Judicial Self-Limitation*, 39 HARV. L. REV. 221 (1925); Frank, *Political Questions*, in *SUPREME COURT AND SUPREME LAW* 36 (Cahn ed. 1954); Tollett, *Political Questions and the Law*, 42 U. DET. L.J. 439 (1965); Strum, *The Supreme Court and the "Political Question"* (unpublished Ph.D. dissertation, The New School for Political and Social Science, 1964).

There is, therefore, no easily available summary of the Court's actual practice to which I could refer in lieu of my own presentation. Even though my concern in this article is primarily analytical and evaluative, it will thus be necessary to sketch in at least those areas of the case law which, in my opinion, have not been fully considered in American treatments of the political question.

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"classical theory" of judicial review, there can be no such discretion. They insist, as did John Marshall in *Marbury v. Madison*,¹ that the power of judicial review rests ultimately upon the constitutional duty of the judiciary "to say what the law is"—that is, to exercise its independent judgment in finding, interpreting and applying the law (including the law of the Constitution) whenever the decision of a case and controversy should depend on it. To acknowledge that the courts might be free to disregard this duty by treating a "political" determination as conclusive of some questions of law would destroy the assumption of a judicial duty which is fundamental for the classical theory. This difficulty would disappear, however, if it could be shown that in those instances in which the courts do in fact defer without inquiry to a decision by the political departments, this deference is itself compelled by the constitutional allocation of competence to decide. Professor Wechsler, to whom we owe a classical reaffirmation of the classical theory,² has made it clear that compatibility with the logic of *Marbury v. Madison* requires that the political question doctrine be understood as a command of the Constitution: "all the doctrine can defensibly imply is that the courts are called upon to judge whether the Constitution has committed to another agency of government the autonomous determination of the issue raised, a finding that itself requires an interpretation" but which "is *toto caelo* different from a broad discretion to abstain or intervene."³

These categorical assertions were made in response to the challenge which Judge Learned Hand had delivered from the same rostrum a year before. Judge Hand, who professed himself unpersuaded by the

1. 5 U.S. (1 Cranch) 137, 177-178 (1803). The full passage reads as follows:

It is, emphatically, the province and duty of the judicial department, to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each. So, if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case, conformable to the law, disregarding the constitution; or conformable to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case: this is of the very essence of judicial duty.

In my reading of the opinion, this is the only passage where Marshall addresses himself to the crucial issue of why the courts should not have to accept the (implicit) legislative determination that a statute is constitutional; if this passage is to make sense at all, it must rest on (constitutional) notions about the independence of the judicial power with regard to the determination of all questions upon which the decision of a case and controversy properly before the court should depend.

See also the re-affirmation (and over-statement) of the *Marbury* rationale in *Cooper v. Aaron*, 358 U.S. 1, 18-20 (1958).

2. Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 1-6 (1959).

3. *Id.* at 7-9.

classical theory, had relied on the political question doctrine to show that the Supreme Court was not itself prepared to take literally its supposed duty to decide independently all questions of law whenever the outcome of a case would depend upon them. If the Court was at liberty to accept a political determination for some constitutional issues, then it would follow that judicial review generally "need not be exercised whenever a court sees, or thinks it sees, an invasion of the Constitution." Not the avoidance but the exercise of judicial review would then require a positive justification in the individual case, depending upon "how importunately the occasion demands an answer." And Judge Hand was quite explicit in pointing out that short of destructive conflicts of competence between the federal government and the states or among the departments of the federal government, the occasions justifying an exercise of judicial review would be very rare indeed.⁴

There is no need for me to discuss the merits of these radically opposed positions.⁵ What is important here is that both sides assume that there is a close and necessary relationship between the legitimacy of judicial review and the theories that might explain the political question cases.

II. THE POLITICAL QUESTION AND THE TECHNIQUES OF AVOIDANCE

To a certain degree, this assumption seems to be shared by Professor Bickel. In his view, the legitimacy of judicial review derives from the societal value of the Court's institutional capacity to define, pronounce and (to a degree) enforce principle, the "sober second thought" of the community.⁶ But the emphasis of Professor Bickel's analysis is upon the "passive virtues,"⁷ on the prudential techniques for avoiding the exercise of the Court's reviewing power and on their justification. It is in this context that he describes the political question as the "culmination of any progression of devices for withholding the ultimate constitutional judgment of the Supreme Court—and in a sense their sum. . . ."⁸

While I share Professor Bickel's understanding of the legitimacy and function of judicial review and while I am willing to accept much of his justification for the "passive virtues," I am not persuaded that these same explanations fully support the political question doctrine. It

4. HAND, *THE BILL OF RIGHTS* 15-18 and *passim* (1958).

5. For an incisive critique of both positions, see, BICKEL, *THE LEAST DANGEROUS BRANCH* 1-14, 46-65 (1962).

6. *Id.* at 23-28 and *passim*.

7. *Id.* at 69-71 and *passim*. See also, Bickel, *Foreword: The Passive Virtues*, 75 HARV. L. REV. 40 (1961).

8. BICKEL, *op. cit.* *supra* note 5, at 183.

seems helpful to discuss the techniques of avoidance and their function in greater detail in order to bring into sharper focus the analytical contours of the political question itself.

1. *Avoidance and the Classical Theory of Judicial Review*

It is Professor Bickel's concern to show that even when a constitutional issue is raised in a dispute which is a case and controversy, the Court is not inevitably confronted with the choice of having either to uphold a challenged act of government as constitutional, or to strike it down as violating the Constitution. The Court may do neither by availing itself of its "almost inexhaustible arsenal of techniques and devices" for avoiding this ultimate constitutional judgment.⁹ Such an avoidance, Professor Bickel maintains, need not rest on constitutional principle; it may legitimately express the Court's prudential estimate of the desirability of deciding a given constitutional issue under the particular circumstances.

An avoidance on such prudential grounds would, of course, also conflict with the basic assumptions of the classical theory, that the exercise of judicial review should be the necessary consequence of the Court's postulated duty to decide all cases properly within its jurisdiction,¹⁰ and to decide constitutional questions whenever the outcome of the case should depend upon such a question.

Of the "techniques" which Professor Bickel has discussed,¹¹ the substantive doctrines of "vagueness" and "delegation" and the restrictive interpretation of constitutionally doubtful statutes would seem to raise the least difficulties in this respect. While the Court will avoid the ultimate constitutional question of whether Congress could have adopted measures of this kind if it had expressed its intent less equivocally, it is nevertheless deciding the case upon its merits and is providing a remedy for the injuries suffered by complainants. And this is, of course, all that the classical theory can ask the Court to do. Equally

9. *Id.* at 69-71 and *passim*. For a critique which, while pointing up some difficulties, fails to blunt the thrust of Bickel's reasoning, see Gunther, *The Subtle Vices of the "Passive Virtues"—A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1 (1964).

10. The premise that the courts should interpret and apply all law when they are deciding a case is, of course, logically distinct from the further assumption that the courts should have to decide all cases properly before them. But Chief Justice Marshall accepted this second assumption as well, *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821), and Mr. Wechsler has approvingly cited this famous passage, WECHSLER, *supra* note 2, at 10.

11. BICKEL, *op. cit. supra* note 5, at 156-164, 169-183 and *passim*. See generally Amsterdam, *The Void for Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67 (1960).

compatible with the classical theory, and indeed its indispensable foundation, is the jurisdictional requirement of "case and controversy," which includes that of "constitutional standing." If judicial review is premised upon the Court's duty to apply the law to cases properly before it, the Court, by definition, cannot exercise this power outside of a case and controversy which, for challenges to governmental measures, requires the complainant to show an injury to his private legal interests. Of course, the outer limits of these requirements may not be very sharply drawn. The Court may, therefore, have some leeway in accepting or rejecting jurisdiction, as appears to be true for taxpayers' suits¹² and competitors' suits.¹³ But this discretion, if it is discre-

12. Compare *Frothingham v. Mellon*, 262 U.S. 447 (1923) with *Wieman v. Updegraff*, 344 U.S. 183 (1952); *Adler v. Board of Educ.*, 342 U.S. 485 (1952); *Doremus v. Board of Educ.*, 342 U.S. 429 (1952); *Everson v. Board of Educ.*, 330 U.S. 1 (1947). The cases seem to conflict if one accepts, as Justice Jackson did in *Doremus*, the automatic applicability of the *Frothingham* rule for a Supreme Court determination of state taxpayers' suits: Everson had not shown that his individual tax burden would increase—thus his case was a "good faith pocket book action" only in the sense that he had challenged "a measurable disbursement of funds" to which his taxes had contributed. But in this respect, *Everson* seems hardly distinguishable from *Frothingham*; there will be at least some federal taxpayers whose contribution to the federal budget will be as great or greater than the contribution of most state taxpayers to the budget of their state, or even their school district: Comment, *Taxpayers' Suits: A Survey and Summary*, 69 YALE L.J. 895, 917 (1960). For this reason, the Court has been urged to overrule either *Everson* or *Frothingham* (and preferably *Frothingham*): Davis, *Standing to Challenge Governmental Action*, 39 MINN. L. REV. 353, 386-391 (1955); Jaffe, *Standing to Secure Judicial Review: Public Actions*, 74 HARV. L. REV. 1265, 1312 (1961).

The difficulty may disappear, however, once one begins to examine the premise that "case and controversy" can have only one, unchangeable, meaning for all cases that reach the Supreme Court. In *Frothingham*, the Court based its narrow interpretation of this jurisdictional requirement upon an understanding of the federal allocation of functions to the three departments of government: the Court's only legitimate function *within that framework* is to decide "normal" cases and controversies, and any expansion of that concept would change this balance. Within the limitations of the guarantee clause however, the Federal Constitution would seem to leave the states free to divide their functions of government differently, and to define the "judicial power" of their own courts somewhat more broadly than Article III of the Federal Constitution does. Thus, if a state permits its own courts to decide taxpayers' suits, and if a federal question should be determined by a state court in such a suit, it seems that the "separation-of-powers" rationale should carry little or no weight for the Supreme Court's definition of what is a proper "case and controversy" for purposes of its appellate jurisdiction. In this situation, "case and controversy" might well have a more permissive content, protecting only the functional requisites for the correctness of the Court's constitutional decision: a well developed case, litigated by the best possible parties. For instance, if parents are most vitally and directly affected, taxpayers should not be allowed to raise a church-and-state issue—a rationale which might help to reconcile *Everson* and *Doremus*. There may be good reasons for permitting federal taxpayers' suits as well, but I am not persuaded that the alleged logical inconsistency between *Frothingham* and *Everson* is one of them.

13. Compare *Tennessee Electric Power Co. v. TVA*, 306 U.S. 118 (1939) and *Alabama Power Co. v. Ickes*, 302 U.S. 464 (1938), with *Scripps Howard Radio Inc. v. FCC*, 316 U.S. 4

tion, would not seem to be very broad, and it is usually used to expand, rather than to contract the scope of the Court's reviewing power.

Compatibility with the logic of *Marbury v. Madison* becomes more troublesome when the Court refuses to decide a constitutional case on the ground that the dispute is not "ripe" for adjudication because the injury to complainants' legal interests is not yet concrete enough.¹⁴ It is true that there are cases where the Court will explain its refusal to determine the constitutionality of a statute at the instance of parties against whom no sanctions for its violation have yet been applied in terms which seem to imply that such a dispute is not (yet) a case and controversy in the constitutional sense.¹⁵ But this rule has suffered so many exceptions, and there seems to be so little consistency in its application,¹⁶ that one is forced to assume that the Court finds here a degree of flexibility, and a freedom of choice, which would be incompatible with the application of the rigid constitutional standards of case and controversy.¹⁷

This non-constitutional quality of avoidance seems undeniable when the Court refuses to decide constitutional issues at the instance of parties claiming that a statute which applies to them is unconstitutional because it violates the constitutional rights of third parties.¹⁸ At least in those instances where "standing to raise the issue" is used to limit the defenses available to defendants in ordinary criminal or civil proceedings, there can be no doubt that there is a case and controversy.

(1942) and *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470 (1940). The cases are in conflict if one assumes that Congress cannot expand "case and controversy" beyond its traditional scope (which requires that a plaintiff must be injured in a "right" before he can challenge governmental action), and if one further assumes (as the Court did in the FCC cases) that the Federal Communications Act of 1934 did not create a substantive right of competitor stations to be free from economic injury caused by the wrongful grant of a broadcasting license. See Jaffe, *supra* note 12, at 1313-1314. For a persuasive answer to this conundrum, see 3 DAVIS, *ADMINISTRATIVE LAW*, § 22.04 at 222 (1958).

14. See generally Davis, *Ripeness of Governmental Action for Judicial Review*, 68 HARV. L. REV. 1122, 1326 (1955); 3 DAVIS, *ADMINISTRATIVE LAW*, ch. 21 (1958); HART & WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 148-156 (1953).

15. *E.g.*, *United Public Workers v. Mitchell*, 330 U.S. 75 (1947).

16. See, *e.g.*, *Adler v. Board of Educ.*, 342 U.S. 485 (1952); *Connecticut Mut-Life Ins. Co. v. Moore*, 333 U.S. 541 (1948); *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923).

17. BICKEL, *op. cit. supra* note 5, at 123-125, 143-156 and *passim*; Davis, *Ripeness of Governmental Action for Judicial Review*, 68 HARV. L. REV. 1122, 1364-73 (1955); 3 DAVIS, *ADMINISTRATIVE LAW* § 21.10 (1958).

18. *E.g.*, *McGowan v. Maryland*, 366 U.S. 420 (1961); *United States v. Raines*, 362 U.S. 17 (1960); *Tileston v. Ullman*, 318 U.S. 44 (1943). See generally: 3 DAVIS, *ADMINISTRATIVE LAW* § 22.06-07 (1958).

Defendant will go to jail, will have to pay damages, or will be enjoined on the basis of a law which he claims is invalid. By deciding such a case without examining the constitutionality of the statute, the Court seems clearly to be departing from the premises of *Marbury v. Madison*. At least in some cases, the Court has expressly acknowledged the non-constitutional quality of these "rules of practice,"¹⁹ and it has declared that it will not apply them in situations where the third parties ultimately injured are not before the Court and cannot readily vindicate their own rights or where a loosely drawn criminal statute, while perhaps constitutional as applied to the concrete facts of the case, would deter others from exercising important constitutional rights in situations for which such deterrence would be intolerable.²⁰

Taken together with their exceptions, these rules of ripeness and non-constitutional standing seem to give the Court considerable freedom of choice to decide or avoid constitutional questions upon which the outcome of a concrete case would depend, and to that extent they seem to be in conflict with the premises of the classical theory. It is this undeniable freedom of choice upon which Professor Bickel has built his theory of the "passive virtues." But before I reach his justifications, I wish to outline a more limited explanation of these procedural or jurisdictional techniques of avoidance which, it seems to me, might account for much of the Court's actual practice on grounds which are, in a functional²¹ sense, very intimately related to the power of judicial review.

2. *Avoidance and the Constitutional-Court Function*

When the Court is deciding a question of constitutional law or international law (and, to a somewhat lesser degree, when it is interpreting a statute), its decisions have an importance and an impact which go far beyond a mere determination of the rights and duties of the litigants in the instant case. The rules of precedent and of *stare decisis* and, more important, the willingness of the political departments and of the

19. *NAACP v. Alabama*, 357 U.S. 449 (1958); *Barrows v. Jackson*, 346 U.S. 249 (1953).

20. See, e.g., *Aptheker v. Secretary of State*, 378 U.S. 500 (1964); *Winters v. New York*, 333 U.S. 507 (1948); *Thornhill v. Alabama*, 310 U.S. 88 (1940); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *United States v. Reese*, 92 U.S. 214 (1876). See generally Sedler, *Standing to Assert Constitutional Jus Tertii in the Supreme Court*, 71 *YALE L.J.* 599 (1962).

21. The term "functional" as used throughout this article refers to the interrelationship between the nature of the task which the Court is performing and the means which it can employ for the performance of this task. If its ordinary means prove inadequate for a particular task, the Court may react either by enlarging its arsenal of means or by limiting the tasks which it will perform. Both reactions will be characterized as functional.

public to accept the Court's pronouncements as the authoritative determination of the *issue*, combine to give these decisions of the Supreme Court virtually the same effect which some of the decisions of the German Constitutional Court are expressly given by statute: they have the force of a general law.²²

But while the "legislative effect" of their pronouncements appears to be quite similar, the process by which the Supreme Court arrives at such a decision is significantly different from that of a modern constitutional court. The jurisdiction of a specialized constitutional court, like that of West Germany, is, of course, not defined in terms of "ordinary litigation." Disputes regarding the constitutional allocation of competence among the organs of the federal government²³ and between the federal government and the states (*Laender*)²⁴ are litigated primarily by these governmental bodies themselves. Significantly, these bodies also have standing to challenge the constitutionality of federal and state legislation on all other grounds, regardless of whether they are injured in their own rights and duties.²⁵ In order to assure the fullest presentation of facts and issues, governmental organs which are not original parties to the dispute are invited to intervene, or are given opportunity to be heard, in all cases,²⁶ including those which are initiated by private parties.²⁷

In view of the active participation of some of the opposition-controlled state governments in constitutional litigation, this system works to assure the court of the competent presentation of the case *against, as well as for*, the constitutionality of governmental measures. But even in the absence of government participation, the court would not be restricted by the willingness or ability of the participants to present information and to clarify issues. The court can and will take

22. § 31 *Gesetz ueber das Bundesverfassungsgericht* (hereinafter cited as BVerfGG) of March 12, 1951 (I *Bundesgesetzblatt* 243) provides:

(1) The decisions of the Federal Constitutional Court are binding for the constitutional organs of the federal government and of the states as well as for all courts and administrative officers.

(2) In the instances . . . [in which the Court has to determine the validity of federal or state law] the decisions of the Federal Constitutional Court have the force of a statute. That part of the tenor of decision which has statutory force shall be promulgated in the *Bundesgesetzblatt* by the Federal Minister of Justice.

23. *Grundgesetz fuer die Bundesrepublik Deutschland* (hereinafter cited as GG) Art. 93, para. 1, no. 1; BVerfGG §§ 63-67.

24. GG Art. 93, para. I, no. 3; BVerfGG §§ 68-70.

25. GG Art. 93, para. I, no. 2; BVerfGG §§ 76-79.

26. BVerfGG §§ 65, 69, 77, 88.

27. GG Art. 100; BVerfGG §§ 82, para. II; 83, para. II; 94, para. IV.

evidence and call experts on its own initiative²⁸ in order to inform itself not only of the "adjudicative facts" of the particular case, but also, and more important, of the "legislative facts,"²⁹ that is of the sociological,³⁰ economic,³¹ or political³² data upon which the validity of a

28. BVerfGG §§ 26-29.

29. These categories have been developed and persistently elaborated by Professor DAVIS, See, e.g., 2 DAVIS, ADMINISTRATIVE LAW § 15.03 (1958); Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364, 402-410 (1942); Davis, *Judicial Notice*, 55 COLUM. L. REV. 945, 952-959 (1955). For a more specific treatment of constitutional litigation see Baade, *Social Science Evidence and the Federal Constitutional Court of West Germany*, 23 J. POLITICS 421 (1961); Karst, *Legislative Facts in Constitutional Litigation*, 1960 SUPREME COURT REVIEW 75.

30. See, e.g., 6 *Entscheidungen des Bundesverfassungsgerichts* [hereinafter cited as BVerfGE] 389 (1957). In order to determine whether the biological, psychological, sociological and criminological differences between male and female homosexuality were significant enough to support, against a challenge relying on the constitutional guarantee of equality of men and women, the provisions of the Criminal Code punishing male (but not female) homosexuals, the Court requested *sua sponte* the submission of written expert opinions and oral testimony by a professor of sociology, a public youth welfare official, the chief of police of a large city, two psychiatrists, a psychologist, a professor of medical jurisprudence, and by an Austrian criminologist. The case is fully discussed by Baade, *supra* note 29, at 448-450.

31. See, e.g., 7 BVerfGE 377 (1958)—"Pharmacy Case"—and 11 BVerfGE 30 (1960)—"Health Insurance Case." Both cases dealt with the constitutional right to choose one's profession, and to practice it within the limits of statutory regulation. Art. 12 para. 1 GG. As interpreted by the Court, this guarantee establishes three levels of protection: (a) *regulations of the practice* of a profession are permissible if reasonably related to a legitimate public interest, (b) *subjective qualifications* for the *choice* of a profession (e.g. apprenticeship, examinations, reliability) are permissible to the degree that they are necessary to protect the public against incompetence, (c) *objective qualifications* for the *choice* of a profession (e.g. certificates of convenience and necessity which may have the effect of excluding fully qualified applicants) are permissible only where required by proven or demonstrable dangers to a pre-eminent public interest which cannot be prevented by appropriate regulations on level (a) or level (b).

In the *Pharmacy Case*, the Court invalidated a state statute under which otherwise qualified applicants could be denied permission to open their own pharmacy if this might endanger the economic viability of neighboring pharmacies. In order to test the state's contention that such a regulation was necessary for the protection of overriding public health interests, the Court heard the expert testimony of federal and state public health officials, the managing director of the Pharmacists' Association of the state, an economist, the director of the Swiss Public Health Office, the secretary of the Swiss Pharmacists' Association, and it received the written opinion of the Secretary General of the *Fédération Internationale Pharmaceutique*. On the basis of this investigation, the Court concluded that the dangers which the state had assumed would follow from an unrestrained freedom to establish new pharmacies (e.g. concentration of pharmacies in cities at the expense of pharmaceutical service in rural areas and deterioration of professional standards as a result of cut-throat competition) were either not likely enough, or could be met by other regulations.

In the *Health Insurance Case*, the Court invalidated, on the basis of a study made by a Court-appointed expert, the provisions of the German law of compulsory health insurance which limited the access of doctors to insurance practice by a system of "insurance

governmental measure might depend under the court's fact-oriented interpretation of the Constitution. The hearings before the court would often remind an American observer of a legislative investigation

physicians' places," established on the basis of one physician for each 500 insured persons. These places were filled by qualified physicians according to seniority and merit. In view of the income statistics of the medical profession, the Court was unable to see any serious dangers which might arise from unrestricted access to insurance practice.

These two cases are more fully discussed by Baade, *supra* note 29, at 451-56. See generally Spanner, *Standards for Judging Reasonableness of Laws Governing Business Regulation in the German Federal Republic*, 21 OHIO ST. L.J. 516 (1960). See further 11 BVerfGE 168 (1960)—certificates of convenience and necessity for taxis and rental cars; 13 BVerfGE 97 (1961)—requirement of a "masters' examination" for taking up a trade; 13 BVerfGE 237 (1961)—closing hours; 16 BVerfGE 147 (1963)—special tax on transportation by industry-operated trucks; 17 BVerfGE 269 (1964)—prohibition against visiting farms for the purpose of selling, or soliciting orders for, animal medicine.

In all these cases, the Court upheld or invalidated the challenged regulations on the basis of a fully articulated examination of their economic impact upon the individual or the industry, their effectiveness with respect to the public interests which they were supposed to serve and the availability of less restrictive alternative methods for serving these interests. The legitimacy of this broad scope of "economic due process" has been questioned by authors familiar with the American experience. See, e.g., Ehmke, *Prinzipien der Verfassungsinterpretation*, 20 VERÖFFENTLICHUNGEN DER VEREINIGUNG DEUTSCHER STAATS-RECHTSLEHRER (1963). But there does not seem to exist any widespread political dissatisfaction with the Court's practice.

32. See, e.g., 8 BVerfGE 51 (1958). The federal income and corporation income tax laws of 1954 provided for tax-exemptions for contributions to political parties. On the application of the state government of Hesse (which was joined by the governments of Hamburg and North-Rhine-Westphalia—all of which were controlled by the Social Democratic Party, SPD), the Court declared these provisions unconstitutional on two grounds. Taking judicial notice (enlightened by the expert opinion of a professor of political science) of the fact that political parties in Germany differed significantly in their goals and in their relative concern for the interests of the different social and economic groups, the Court found that state support for parties in the form of tax exemptions would have the effect of favoring those parties which primarily represented the interests of high-income groups and was therefore in violation of the constitutional requirement of "equality of chances" for political parties. Taking further judicial notice of the fact that campaign contributions may influence the effectiveness of campaigns and the political strength of a party, and that therefore a voter who is able to make a large contribution may be more effective in supporting his political preferences than if he could only cast his ballot, the Court found that the tax exemptions (in view of progressive taxation) were government subsidies favoring high-income groups, and violated the citizen's right to equal participation in the political process.

In addition to requesting the opinion of a political science expert, the Court had invited all political parties to appear at the oral argument. Only the SPD and the Free Democratic Party, FDP, had availed themselves of this opportunity. The Christian Democrats, CDU, and the Christian Socialists, CSU, had declined on the ground that the issue was purely one of constitutional law, and because they felt that they should not enter into a partisan political dispute before the Court. After the expert and the representatives of the SPD had presented factual data concerning the scope and effect of campaign contributions, the Federal Government and the CDU/CSU requested reargument in order to present further expert testimony. The request was denied by the Court on the ground that its

—an analogy which seems valid in view of the importance of the “legislative function” which constitutional courts are performing.

By contrast, the American Supreme Court was not designed to decide constitutional issues *per se*. Its jurisdiction is defined by the requirement of case and controversy, which the Court has restrictively interpreted as referring only to the kind of litigation which would be before the courts even if there were no dispute about a constitutional question.³³ By this rule alone, governmental organs, federal or state, are largely prevented from precipitating a constitutional decision even though for many issues they would seem to be best qualified to present factual data and realistic and responsible recommendations. Not until the Judiciary Act of 1937³⁴ was the Attorney General authorized to intervene in any case involving the constitutionality of an act of Congress to which the United States is not a party. Although this rule allows for the effective defense of federal statutes even in cases litigated among private parties,³⁵ there is no similar assurance of the presentation of the states’ point of view, or of the case *against* the constitutionality of federal measures. *Amicus* briefs may carry part of the burden of advocacy, and they may, in a not entirely satisfactory fashion, help to enlighten the Court’s judicial notice.³⁶ But they will not, it seems, alter the basic ground rules of ordinary litigation.

decision was not based on any specific findings as to the ratios of membership dues and special contributions or as to the amounts of campaign spending by the various parties. 8 BVerfGE 47, 50 (1958).

33. See, e.g., *Massachusetts v. Mellon*, 262 U.S. 447 (1923) and *Muskral v. United States*, 219 U.S. 346 (1911). Professor Davis has argued that the latter case was unsound to begin with and that, in any case, it lost all meaning after the Federal Declaratory Judgment Act was held constitutional. 3 DAVIS, *ADMINISTRATIVE LAW* § 21.01 (1958). I am not entirely persuaded. Cf. *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227 (1937), where the Court seems to have seen no conflict between a declaratory judgment and the *Muskral*-holding. What emerges for me from the concededly opaque *Muskral* opinion is the Court’s unwillingness to permit the creation of unfamiliar types of proceedings for the sole purpose of precipitating a constitutional decision. In this respect, *Muskral* would indeed have gone very far toward permitting Congress to establish a specialized constitutional court if it had upheld the statute, permitting four named Indians (and only them—which feature alone might raise serious doubts about the adversary character of the litigation) to challenge the constitutionality of certain prior acts of Congress. While these plaintiffs happened to be affected in their private interests, their suit was not based upon any alleged violation of their individual rights, it was based upon their authorization to sue in order to determine the constitutionality of legislation which Congress considered doubtful.

34. 50 STAT. 751 (1937).

35. This rule falls short of the Canadian practice, after which it seems to be patterned. See, Grant, *Judicial Review in Canada: Procedural Aspects*, 42 CAN. B. REV. 195, 214-22 (1964).

36. See Krislov, *The Amicus Curiae Brief: From Friendship to Advocacy*, 72 YALE L.J.

An important, though perhaps not a necessary, consequence of these ground rules is the fact that constitutional issues are determined within a procedural framework which was designed for the adjudication of ordinary lawsuits, and which severely restricts the Court's control over the presentation of facts and issues. If litigation is conducted in the form of an adversary contest, in which the initiative rests almost entirely with the parties, and in which the Court is reduced to the role of an impartial umpire, then one must of course also accept the consequence that a litigant who fails to fight hard enough or well enough should lose his case, even though from an objective point of view he ought to have won. But this consequence, which otherwise may be entirely acceptable for Anglo-American jurisprudence,³⁷ must surely become highly problematical when a constitutional decision is at stake. Even though constitutional questions are decided in ordinary lawsuits, the litigants are in an important sense (which is only more obvious in taxpayers' suits and competitors' or consumers' suits) representatives of the public interest in constitutional government.³⁸ And the public in-

694 (1963); Karst, *supra* note 29, at 106. The major problem is, of course, that the factual allegations in an *amicus* brief are not "evidence" and are not subjected to the rigorous scrutiny of the adversary process. The same is true of the most celebrated technique for bringing legislative facts to the Court's attention, the Brandeis brief; see Baade, *supra* note 29, at 426-30; Doro, *The Brandeis Brief*, 11 VAND. L. REV. 783 (1958); Freund, *Review of Facts in Constitutional Cases*, in SUPREME COURT AND SUPREME LAW 47 (Cahn ed. 1954); FREUND, ON UNDERSTANDING THE SUPREME COURT 86-92 (1949); Biklé *Judicial Determination of Questions of Fact Affecting the Constitutional Validity of Legislative Action*, 38 HARV. L. REV. 6 (1924). For the problems and implications of judicial notice, see generally, Davis, *Judicial Notice*, 55 COLUM. L. REV. 945 (1955).

37. As Professor Rheinstein has suggested, the procedural differences between the Anglo-American and the Continental legal systems may be the expression of broader and deeper differences in the underlying jurisprudential assumptions about the nature and function of law. If it is true that Continental jurisprudence conceives of law as a *rule of conduct* (addressed to the citizen), as "the order by which rights and duties are, at least as a postulate, justly distributed among the members of the community," then it would seem to follow that the role of the Courts in the process by which these rights are protected and these duties are enforced should be more active and more important than it might be in a legal system which understands law primarily as a *rule of decision*, coming into play only after the social processes for the settlement of disputes according to community standards of "religion, ethics, convention and tradition" have failed: Rheinstein, Book Review, 13 AM. J. COMP. L. 318, 322-26 (1964).

For American appraisals of German civil procedure, emphasizing these differences in the roles of the court, see: Kaplan, von Mehren & Schaefer, *Phases of German Civil Procedure*, 71 HARV. L. REV. 1193, 1443 (1958); Kaplan, *Civil Procedure—Reflections on the Comparison of Systems*, 9 BUFFALO L. REV. 409 (1960).

38. See Judge Frank's theory of "private Attorney Generals" in *Associated Indus. Inc. v. Ickes*, 134 F.2d 694, 700-04 (1943). See generally, Jaffe & Henderson, *Judicial Review and the Rule of Law: Historical Origins*, 72 L.Q. REV. 345 (1956); Jaffe, *Standing to Secure Judicial Review: Private Actions*, 75 HARV. L. REV. 255 (1961). Professor Jaffe's argument for severing the "public law function of the courts" from requirements whose

terest in responsible and realistic constitutional decisions is much too serious to be left unprotected against the accidents of ordinary litigation.

If this protection cannot be afforded by an enlargement of the Court's jurisdiction to permit the most competent parties to sue, or by an enlargement of the Court's procedural powers to conduct an independent investigation of facts and issues, then it seems reasonable to expect that this protection will be provided by restrictive techniques which will permit the Court to screen the cases in order to select those which provide an adequate basis for the responsible performance of the reviewing function. In order to qualify for the exercise of judicial review, the factual situation of the case would have to illuminate in a concrete fashion the practical implications of the constitutional issue, and the litigants themselves would have to be vitally and antagonistically interested, not only in the outcome of their lawsuit, but in the determination of the constitutional issue as such. I submit that it is this screening function which is being served by the Court's use of the non-constitutional rules of standing, ripeness and adversariness.³⁹

Of course, this formula does not yet explain the seeming inconsistencies in the Court's use of these rules.⁴⁰ But it suggests an approach to this question which is different from the traditional analysis which seems to measure consistency primarily by reference to the intensity of the interest of the litigants in a decision of their case and therefore takes the Court to task for avoiding real and present issues in cases of concrete injuries while deciding hypothetical and abstract questions in other cases where there is no such present injury.⁴¹ If these rules are

purpose it is to define "conventional litigation" and for replacing them with limitations of judicial power in terms of the justiciability of the issues presented (*id.* at 302-05 and *passim*) seems to go very far toward recognizing what I have called the "constitutional court function." It may be asked, however, whether the dilution of the "concreteness" and "adversariness" of the case, which might result from Professor Jaffe's recommendations, would not endanger the reliability of constitutional judgments unless it were accompanied by correlative adjustments of the procedural structure. *But see*, Jaffe, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 495-500 (1965) where Professor Jaffe expresses some doubts about the desirability of a "generally available public action in the federal constitutional sphere." *Id.* at 495 (Emphasis in original.)

39. Justice Brennan, in *Baker v. Carr*, 369 U.S. 186 (1962), has expressed some of these considerations by the following formula:

Have the appellants alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions? This is the gist of the question of standing.

369 U.S. at 204.

40. See notes 14-20 *supra* and accompanying text.

41. 'cc. *e.g.*, 3 DAVIS, ADMINISTRATIVE LAW chs. 21, 22.

understood as functional requisites for the responsible performance of the constitutional-court function, then it seems entirely reasonable to expect that the stringency of these requirements might vary considerably with the character of the constitutional questions which are in issue. The more abstract or absolute the constitutional standards, the less will their application turn upon close and difficult questions of fact and upon a weighing of competing values in the light of empirical data, and the less will the Court depend upon the suitability of the case and upon the qualifications of the parties.⁴²

In *Chicago & Grand Trunk R.R. v. Wellman*,⁴³ for instance, the Court refused to decide a constitutional question upon an agreed statement of facts in a "friendly" dispute. Measured by the same standards of adversariness, the case for avoidance would have been even stronger in *Fletcher v. Peck*.⁴⁴ But in *Fletcher*, the Court was able to reach the merits because it was ready to treat in an entirely abstract manner the substantive question whether a state could, under the Contract Clause, revoke its own grants, while the "reasonableness" of the rate regulation challenged in *Wellman* would have depended entirely upon a close

42. It seems possible that the more important interrelationship between substantive law and procedure might run the other way, and that the kind of substantive-law rules which a court is likely to announce may be strongly influenced by the procedural framework within which the judicial system is operating. More specifically, it seems not unreasonable to expect that a court might be more inclined to adopt "abstract" or "absolute" criteria for defining the protection of important constitutional values if it cannot be sure that its fact finding processes (or its own expertise) are reliable enough to permit a realistic and responsible evaluation of the concrete balance of values in the individual situation.

Questions of democratic responsibility aside, it seems to me fairly obvious that the German Constitutional Court could (and should) never have adopted its "three-level-test" for the right to choose one's profession (See note 31 *supra*) if it had not been fully assured that its own grasp of the economic and public health implications and of the possible policy alternatives was at least equal to that of the legislature which had adopted the statute in question.

The dilemma of a court which would like to be both realistic in terms of the necessities of national security and responsible in terms of the protection of important individual rights, but whose grasp of the factual situation is not sure enough to support an independent evaluation, has been stated most forcefully in Justice Jackson's dissenting opinion in *Korematsu v. United States*, 323 U.S. 214, 242-48 (1944). And is it altogether unreasonable to suspect that an estimate of the effectiveness of the American judicial process in applying (realistic, fact-oriented) "balancing tests" may also have something to do with the adoption of an "absolutist position" on First Amendment rights by Justices Black and Douglas? See also Black, *Mr. Justice Black, The Supreme Court, and the Bill of Rights*, Harper's Magazine, February 1961, p. 63, in BLACK, *THE OCCASIONS OF JUSTICE* 89 (1963); Mendelson, Book Review, 28 U. CHI. L. REV. 583 (1961).

43. 143 U.S. 339 (1892).

44. 10 U.S. (6 Cranch) 87 (1810).

scrutiny of the economics of railroad operation which the parties had foreclosed by stipulating the profits of the railroad.

A functional approach might also help to explain *Carter v. Carter Coal Co.*⁴⁵ and *United Public Workers v. Mitchell*,⁴⁶ two cases which Professor Davis insists must be decided the other way before the law of "ripeness" can begin to make sense.⁴⁷ It is, of course, true that in the *Mitchell* case (which was avoided) the provisions of the Hatch Act limiting the freedom of federal employees to engage in political activities were in force when the suit was initiated, while in the *Carter* case (which was decided on the merits) the wages and hours regulations which were authorized by the Bituminous Coal Conservation Act not only had not yet been issued but were dependent upon an entirely uncertain agreement by qualified majorities of both employers and employees. But, on the other hand, the Court may well have regarded the constitutional balance between the political rights of civil servants and the legitimate public interest in a neutral civil service as an extremely close one, depending very much upon the actual scope of enforcement and upon the concrete nature of the activities against which sanctions were to be applied. In the *Carter* case, by contrast, the Court was willing to strike down any federal regulation of wages and hours in an industry which affected interstate commerce only "indirectly," a standard whose abstractness is best characterized by direct quotation:

Whether the effect of a given activity or condition [upon interstate commerce] is direct or indirect is not always easy to determine. The word "direct" implies that the activity or condition invoked or blamed shall operate proximately—not mediately, remotely, or collaterally—to produce the effect. It connotes the absence of an efficient intervening agency or condition. And the extent of the effect bears no logical relation to its character.⁴⁸

45. 298 U.S. 238 (1936).

46. 330 U.S. 75 (1947).

47. 3 DAVIS, ADMINISTRATIVE LAW § 21.10, at 200 (1958). The other six cases are: *Connecticut Mut. Life Ins. Co. v. Moore*, 333 U.S. 541 (1948), and *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923), (both of which the Court found ripe for adjudication); and *Public Utilities Commission v. United Air Lines*, 346 U.S. 402 (1953); *Eccles v. Peoples Bank*, 333 U.S. 426 (1948); *United States v. Los Angeles & Salt Lake R.R.*, 273 U.S. 299 (1927); *Standard Computing Scale Co. v. Farrell*, 249 U.S. 571 (1919) (all four of which the Court refused to decide on their merits).

Of these, *Pennsylvania v. West Virginia*, *Standard Scale*, and *Eccles* seem to fit quite well into the pattern which I have suggested. *Connecticut Mutual* does so also if one is willing, as the majority did, to close one's eyes to the broader and more difficult problems of interstate accommodation which were raised by the dissents. In the remaining two cases, it is not clear how the Court would have defined the substantive-law criteria if it had reached the merits.

48. 298 U.S. 238, 307-08 (1936).

For a Court so emphatically determined to disregard all the complexities of the case and of the economic crisis that had led to the enactment of the statute, there could surely be no reason for postponing the application of its semantic abstractions in order to assure a fuller clarification of facts and issues.

Finally, an almost perfect example for my thesis is *Adler v. Board of Education*.⁴⁹ A majority of the Court there upheld New York's Feinberg Law providing for the listing of subversive organizations by the State Board of Regents and for the dismissal of all teachers in the public school system who were members of such an organization and aware of its subversive purpose. As Justice Frankfurter pointed out in dissent, the *Mitchell* rule should have applied *a fortiori* because no such listings had yet been issued, and the complaining teachers had not even alleged that the statute itself deterred them from any activities in which they would otherwise have engaged. But Justice Minton, writing for the majority, saw no such difficulties. For him, the statute was clearly constitutional because it in no way deprived teachers of their freedoms of speech and association—it merely put before them the choice of either exercising these freedoms or continuing their employment in the public school system which, after all, was not a right but merely a privilege. Justices Black and Douglas, dissenting, also saw no reason to worry about standing or ripeness. For them the statute was clearly unconstitutional because it penalized teachers for the exercise of their “absolute” freedoms of speech and association. The conclusion seems inevitable that Justice Frankfurter alone advocated avoidance because he alone defined the substantive issues in terms of a close balance between the equally legitimate interests of society in its self-preservation and of the teachers in their freedom of thought, inquiry and expression. Thus, in order to strike this balance in the particular case, Frankfurter would have had to know much more about the actual practices of enforcement and the degree of surveillance to which the teachers would be subjected than the bare text of an unenforced statute permitted him to know.⁵⁰

It is my impression, in short, that much of the seeming inconsistency in the law of standing, ripeness and adversariness would disappear if the cases were analyzed in terms of the “legislative” or “constitutional-court function” of the Supreme Court. Such an analysis would have to begin with the examination of the constitutional issue itself, as expressly or tacitly defined by the Court. One should then ask whether the fact-situation of the case, the stage of its development and

49. 342 U.S. 485 (1952).

50. *Id.* at 497-508.

the qualifications of the parties in view of the availability of other potential litigants and of the intensity of their interest in the issue itself,⁵¹ were optimally or at least adequately suited for the full presentation and clarification, within the limitations of the adversary process, of this particular constitutional question.

3. *Avoidance and the Rule of Principle*

Professor Bickel's justification for the "passive virtues," while perhaps including the considerations outlined above,⁵² goes much further, permitting the Court to avoid a decision even in cases which do not restrict its access to relevant information, but which, in the Court's prudential judgment, would not permit a truly principled decision on the merits.

For Professor Bickel, the only justification for judicial review in a democratic polity is society's commitment to government under the rule of principle, and the need for an institution capable of guarding, defining and developing society's enduring values with a view to the changing circumstances.⁵³ But judicial review remains a countermajoritarian force whose impact upon the democratic political processes must be strictly delimited by reference to its exceptional justification. Whenever the Court invalidates a political decision as unconstitutional, its judgment must be securely rooted in principle. But this must also be so whenever the Court upholds a governmental measure as constitutional. Drawing upon an analysis developed by Professor Charles L. Black, Jr.,⁵⁴ Bickel insists that a permissive decision on the merits does not merely signify the absence of judicial intervention. In a society which has come to rely upon the Court for the authoritative determination of issues of principle, such a decision may "legitimate" disputed measures. It will engage the Court's institutional prestige against those who have objected on grounds of principle; thus it may "generate consent," and it may impart permanence to measures "that may have been

51. It seems to me that the "factors" which Professor Sedler (Sedler, *supra* note 20, at 627 and *passim*) has found affecting the "standing to assert constitutional *jus tertii*" could well be employed for the functional analysis which I am suggesting in order to determine whether there might be better parties for raising the particular issue and, if not, whether the party before the Court is sufficiently interested in the constitutional issue itself to assure its adequate presentation.

52. This seems to be suggested by Mr. Bickel's discussion of the interrelationship between "ripeness" and the substantive standards which the judge might have in mind, BICKEL, *THE LEAST DANGEROUS BRANCH* 169-70 (1962).

53. *Id.* at 23-28.

54. BLACK, *THE PEOPLE AND THE COURT* 34-55 *passim* (1960). See also, KIRCHHEIMER, *POLITICAL JUSTICE* 175-188 (1961).

tentative . . . or that are on the verge of abandonment in the execution."⁵⁵ And, one might add, permissive decisions will shape and channel the future course of political decision by providing certain constitutional options in very much the same way in which negative decisions do so by foreclosing others. Surely, the Civil Rights Act of 1964 was as much influenced by some of the more permissive commerce-power cases as it was by *The Civil Rights Cases*.⁵⁶

But if all constitutional decisions must be entirely principled, there will be occasions, Professor Bickel maintains, where prudence will not permit the Court to issue a principled judgment. Principle itself may be in a process of evolution, and even where it has ripened society may not yet be ready to accept it, or to accept it in its full measure, or as applied to a particularly sensitive problem. Political society survives and grows in the tension between principle and expediency, and even though it may be firmly committed to the rule of principle, there must be room for the temporary compromise and the "expedient muddling through." A Court that would unconditionally enforce absolute principle would destroy this dynamic balance. But at the same time, the Court could not legitimate necessary but unprincipled political decisions, or imperfect approximations of principle, without violating its own "*raison d'être*."

In the face of this dilemma, the Court should be able to escape from the alternative between validation and invalidation; it should be able to let the political decision stand for the time being, without having to approve and to legitimate it. This is the purpose which is being served, or which should be served, by the Court's use of its "almost inexhaustible arsenal of techniques and devices" for avoiding a constitutional judgment.⁵⁷

Like the more limited explanation which I have suggested, Professor Bickel's justification of the passive virtues is, at bottom, a functional one. By avoiding the legitimation of imperfect compromise as well as the untimely, and therefore self-defeating, enforcement of pure principle, the Court is paving the way for a more effective vindication of principle under more auspicious circumstances. The passive virtues are legitimate "because they make possible performance of the Court's grand function as proclaimer and protector of the goals."⁵⁸ While I am persuaded of the validity of this theory of the Court's use of pro-

55. BICKEL, *op. cit. supra* note 52, at 129.

56. 109 U.S. 3 (1883).

57. BICKEL, *op. cit. supra* note 52, at 70.

58. *Id.* at 71.

cedural and jurisdictional techniques of avoidance, I disagree with Professor Bickel's assumption that these same justifications will also support the political question doctrine.

4. *The Uniqueness of the Political Question*

It is true, of course, that an application of the political question doctrine is also a form of avoidance in the sense in which Professor Bickel uses the term. When it defers without re-examination to the position which the political departments have taken upon a question of law, the Court explicitly refuses to assume any responsibility for the lawfulness of this political position. It will let the political decision stand, but it will not engage its own institutional prestige in support of its legitimacy.⁵⁹ *Colegrove v. Green*⁶⁰ gave none of the aid and comfort

59. I should like to point out, however, that the line between "legitimation" in this essentially political sense, and non-legitimation, is neither unchanging nor very clear, nor does it necessarily coincide with the analytical distinction between a permissive decision on the merits and a non-intervention on political question grounds. Whether a permissive decision, upholding a challenged measure as "not unconstitutional," will be able to generate much, or any, consent among the public, and, most importantly, among those who oppose the measure on grounds of principle, would seem to depend on two factors: the opponents must be willing (as President Jackson, for instance, was not) to accept the Court's decision as the authoritative determination of the constitutional issue; and the opponents must be persuaded that the Constitution will provide standards which are at least responsive to their principled objections. Where this is not so, the objectors might see themselves impelled into civil disobedience against the constitutional order, rather than into acceptance. See Black, *The Problem of the Compatibility of Civil Disobedience with American Institutions of Government*, 43 TEXAS L. REV. 492 (1965); Keeton, *The Morality of Civil Disobedience*, 43 TEXAS L. REV. 507 (1965).

Thus, the scope of the legitimating effect would seem to depend very much upon the scope of constitutional law. Where the governmental measure is opposed on the ground that it violates the proper allocation of powers and functions among the departments of the federal government, or between the federal government and the states, it seems obvious that the Constitution must have an answer to this dispute, and that a constitutional decision (provided that the Court's authority is being accepted) will indeed settle the issue. But is this equally true in all those cases where the objection is to the fairness or to the substantive justice of a governmental measure? Will the long lines of cases holding that the Fifth and Fourteenth Amendments will not stand in the way of tax classifications challenged as discriminatory or destructive do much to persuade an opponent who is convinced that fairness and justice are essential to the legitimacy of all governmental action? Will a conscientious objector change his mind if the Court tells him that the Constitution does not protect his right of conscience? Or would the public acceptance of Connecticut's anti birth control law have been helped much if, in *Griswold v. Connecticut*, 381 U.S. 479 (1956), Justice Black had been able to persuade a majority that the right of privacy would not fit into any of the textual boxes, separated by expanses of constitutional *terra incognita*, which for him seem to make up the substantive content of the due process clause?

It seems to me that the "legitimizing effect" will be weakened and may disappear altogether in direct proportion to the importance of the objections which are treated as

to the protagonists of malapportionment which Attorney General Kennedy found in the permissive commerce-power cases when he had to persuade a doubting House Judiciary Committee of the constitutionality of the Civil Rights Bill introduced in 1963.⁶¹

But if the political question is analytically a form of avoidance, its effect is quite different from that of an avoidance on jurisdictional or procedural grounds. A denial of *certiorari* will not affect the decision below, and it will not stand in the way of the Supreme Court's later determination of a case involving similar facts and issues. Lack of "ripeness" will preclude a constitutional decision in the case, but the same party may be able to obtain a decision once he has been affected more concretely. If the avoidance is expressed in terms of "standing to raise the issue" or "adversariness," the party before the Court will be unable to raise the constitutional question, but the decision will, of course, not bar "better" parties from eventually precipitating a decision of this question. In short, all these forms of avoidance affect the individual case only, not the constitutional issue as such. Thus the Court, in 1866, could hold unconstitutional trial of civilians by military commission⁶² even though it had avoided the same issue only two years before.⁶³ And the challengers of Connecticut's law against birth

irrelevant when the Court declares that it is concerned solely with the constitutionality, and not with the desirability, the wisdom, or the justice, of a governmental measure. In such situations, even the *analytical* line between a constitutional decision and a political question decision may become blurred. For instance, in the decisions dealing with the exclusion and expulsion of aliens (see note 218 *infra*), it seems extremely difficult to distinguish analytically between decisions on the merits, holding that the Fifth Amendment does not provide for procedural safeguards when an alien is excluded and does not limit the substantive grounds upon which an expulsion may be based, and political question decisions, holding that the scope of Fifth Amendment protection in this field must be determined by Congress, rather than by the courts.

Of course, all that follows from this discussion is that not all permissive decisions on the merits will have much of a legitimating effect. Even though there may be a broad spectrum of gradations between legitimation and non-legitimation, the political question decision will invariably be found at its far end: it is not intended to, and it cannot, legitimate a governmental measure that is challenged before the Court.

60. 328 U.S. 549 (1946). As Anthony Lewis has reported, the fact that the Illinois Congressional districts were indeed reapportioned one year after *Colegrove* was attributed to the fear that the Court might change its mind in the face of continuing state inaction. Thus, far from validating malapportionment, the decision seems to have had exactly the opposite political effect. Lewis, *Legislative Apportionment and the Federal Courts*, 71 HARV. L. REV. 1057, 1088 (1958).

61. See *Excerpts from R. F. Kennedy's Statements on Civil Rights Bills*, N.Y. Times, June 27, 1963, p. 11, col. 2.

62. *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866). See also the Court's handling of an equally explosive issue in *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831) and *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832).

63. *Ex parte Vallandigham*, 68 U.S. (1 Wall.) 243 (1864). In view of Chief Justice

control, after failing first on grounds of "standing,"⁶⁴ and then of "ripeness"⁶⁵ were finally able to succeed when they appealed actual conviction under the statute.⁶⁶

The political question, by contrast, is not premised upon the specific constellation of the individual case; it attaches to the issue itself.⁶⁷ That the Court is not merely interested in avoiding the individual case seems to follow from the fact that some of the most important political question cases reached the Court by way of *certiorari*.⁶⁸ It is an indication of this essential difference that the political question doctrine can be described and discussed by reference to a limited number of fairly well-defined questions of substantive law,⁶⁹ while procedural grounds for avoidance do not fall into such patterns and can be employed with respect to an unspecified variety of substantive issues. Once the political question doctrine has been applied to a particular issue, the rules of precedent and of *stare decisis* come into play and will prevent a judicial

Taney's experience in *Ex parte Merryman*, 17 Fed. Cas. 144 (CC Md. 1861), the avoidance on procedural grounds in *Vallandigham* would seem to fit very well into Professor Bickel's analysis.

64. *Tileston v. Ullman*, 318 U.S. 44 (1943).

65. *Poe v. Ullman*, 367 U.S. 497 (1961). But see BICKEL, *THE LEAST DANGEROUS BRANCH* 143-56 (1962).

66. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

67. "The doctrine . . . is one of 'political questions,' not one of 'political cases.'" *Baker v. Carr*, 369 U.S. 186, 217 (1962).

68. See, e.g., *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953); *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952); *Ludecke v. Watkins*, 335 U.S. 160 (1948); *Chicago & So. Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103 (1948); *Mexico v. Hoffman*, 324 U.S. 30 (1945); *United States v. Pink*, 315 U.S. 203 (1942); *Coleman v. Miller*, 307 U.S. 433 (1939).

69. In *Baker v. Carr*, *supra* note 67, at 211-26, Justice Brennan listed and discussed the following categories: foreign relations, dates of duration of hostilities, validity of enactments, the status of Indian tribes, republican form of government. More specifically, the political question doctrine seems to have been limited to the following issues:

The validity of treaties under international and foreign constitutional law; the validity of federal statutes under international law; the international boundaries of the United States; the territorial sovereignty of foreign states; the existence of foreign insurgents, belligerents, governments (*de facto* or *de jure*) and states; (perhaps) the effect which American courts should accord to acts of foreign insurgents, belligerents, and governments; the immunity of foreign diplomats and of foreign state-owned or state-operated vessels; (perhaps) the constitutionality of the exclusion and expulsion of aliens; the legality of a license for air line service abroad; the duration of the civil war; the existence of a state of facts justifying an exercise of the war power against alien enemies, and (perhaps) against citizens suspected of participating in an insurrection; the necessity of continuing federal protection of Indians in a process of assimilation; the recognition of competing groups or persons as the lawful government or officers of a state; the validity of state laws under the republican-form-of-government clause of the Constitution; the validity of statutes allegedly enacted in violation of procedural requirements; the validity of ratifications of a constitutional amendment; and, from *Colegrove* until *Baker*, the constitutionality of apportionment statutes.

determination of this issue in future cases.⁷⁰ If the validity of a governmental measure was in issue, this measure has not only survived one abortive challenge; henceforth both the government and the public will be able to discount the probability of judicial interference with measures of this kind. When using the procedural techniques of abstention, the Court still retains its ultimate responsibility for defining and enforcing the constitutional principle which is at stake; it remains the "protector and proclaimer of the goals." But when it holds that a question is "political" rather than "judicial," the Court renounces this responsibility altogether, and leaves the performance of this function to the political institutions. Such an abstention cannot be justified instrumentally; its purpose is not to prepare the ground for a more responsible, or more effective vindication of principle under more auspicious circumstances. When it applies the doctrine to a question, the Court abdicates its responsibility "to say what the law is."

This form of abstention not only raises difficulties for the classical theory, but also is not easily reconciled with Professor Bickel's theory of judicial review. The doctrine seems to have wider and more disturbing implications than any of the procedural or jurisdictional techniques of avoidance, and the question of its function and legitimacy would seem to require further investigation even if one accepts Professor Bickel's rationale of the passive virtues in all other respects.

III. THE CLASSICAL THEORY OF THE POLITICAL QUESTION

The classical theory attempts to eliminate the difficulties suggested above by insisting that the political question doctrine is itself a product of constitutional interpretation, rather than of judicial discretion. And in *Baker v. Carr*, the Court's most thorough re-examination of the political question doctrine, Justice Brennan, speaking for the majority,⁷¹ as well as Justice Douglas, have maintained that the political question doctrine should be understood as a function of the federal separation of power. In the words of Justice Douglas: "Where the Constitution assigns a particular function wholly and indivisibly to another department, the federal judiciary does not intervene."⁷²

Even if it were true, as it is not,⁷³ that the doctrine applies only where

70. Of course, the Court may overrule or distinguish a political question decision, but it seems to do so no more readily or easily than with respect to cases decided on their merits.

71. 369 U.S. 186, 210-11 (1962).

72. *Id.* at 246.

73. See, e.g., *Moyer v. Peabody*, 212 U.S. 78 (1909), where, in an opinion written by Justice Holmes, the Court accepted as conclusive the determination by the Governor of

a decision by one of the co-ordinate branches of the *federal* government is actually or potentially in issue, the proponents of this theory would have the burden of showing why some, but not all, constitutional grants of power to Congress and to the President should be interpreted as precluding judicial review. And they would further have to demonstrate that the Court's actual practice of decision does indeed conform to any such pattern.

Professor Wechsler alone appears to have dealt specifically with the first of these tasks. He takes as his point of departure the constitutional provisions for impeachment by the House and trial of impeachment by the Senate,⁷⁴ and the provisions that "Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members"⁷⁵ and that "Each House may . . . punish its Members for disorderly Behavior, and, with the Concurrence of two thirds, expel a Member."⁷⁶ But even if it is true that Congressional decisions under these heads of power are not reviewable by the courts,⁷⁷ it seems doubtful whether the rationale behind this conclusion also supports, as Wechsler suggests, the political question doctrine in other areas, such as conformity of state law to the standards of the guarantee clause and legislative districting.

I am rather hesitant to accept this suggestion. It seems to me that the examples upon which it relies are unique in that these grants of power all concern functions that are essentially *adjudicative*. The trial of impeachment, and the decision whether a member of Congress was

Colorado that a state of insurrection had existed which had justified the incarceration without trial of labor leaders who were suspected of contributing to the unrest. See also, *Home Building & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934); *Sterling v. Constantin*, 287 U.S. 378 (1932), where the Court, while reviewing the necessity of state emergency measures, seemed to assume that the scope of its reviewing power vis-a-vis state measures was governed by the same principles as its review of federal emergency action.

See further *Harwood v. Wentworth*, 162 U.S. 547 (1896); *Lyons v. Woods*, 153 U.S. 649 (1894) and *Clough v. Curtis*, 134 U.S. 361 (1890), in which the political question doctrine was applied in cases challenging the regularity of enactments of territorial legislatures. The Court, as a matter of course, assumed that its review of territorial enactments was limited by the same considerations which applied to its review of federal legislation: see note 106 *infra*.

74. U.S. CONSR. art. I, § 2, cl. 5 "The House of Representatives . . . shall have the sole Power of Impeachment." U.S. CONSR. art. I, § 3, cl. 6: "The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present."

75. U.S. CONSR. art. I, § 5 cl. 1.

76. U.S. CONSR. art. I, § 5 cl. 2.

77. Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 12 (1959).

validly elected, or whether he should be punished or expelled for misconduct, all seem to involve the determination of a concrete dispute in the light of pre-existing constitutional, statutory or conventional standards. They concern disputes which might well be regarded as "cases and controversies" in the sense of Article III of the Constitution, and which under some constitutions are, indeed, decided by the judiciary.⁷⁸ It may therefore be reasonable to construe the express constitutional authorization of Congress to decide these disputes as an equally explicit exception to the general grant of judicial power to the courts in Article III. But this rationale is unavailable, even as the basis of a valid analogy, where the Court, as is normal in political question cases, is presented with a challenge to the validity of a *legislative* or *executive* decision of one of the co-ordinate branches of the federal government. Thus there seems to exist, in spite of Professor Wechsler's effort, considerable obscurity about the nature of the constitutional analysis which would require the Court to regard some legislative and executive powers as committed "wholly and indivisibly to another department," while the Congressional and Presidential decisions under other (equally explicit) constitutional heads of power should remain reviewable.

Assuming that the classical theory could establish a canon of interpretation, it would still have to show that any such interpretation

78. See, e.g., the following provisions of the West German *Grundgesetz*:

Art. 41(1) The scrutiny of elections is the responsibility of the *Bundestag*. It also decides whether a deputy has lost his seat in the *Bundestag*.

(2) Against the decision of the *Bundestag* an appeal can be made to the Federal Constitutional Court.

Art. 61(1) The *Bundestag* or the *Bundesrat* may impeach the Federal President before the Federal Constitutional Court for willful violation of the Basic Law or any other Federal law. The motion for impeachment must be brought forward by at least one-fourth of the members of the *Bundestag* or one-fourth of the votes of the *Bundesrat*. The decision to impeach requires a majority of two-thirds of the members of the *Bundestag* or of two-thirds of the votes of the *Bundesrat*. The prosecution is conducted by a person commissioned by the impeaching body.

(2) If the Federal Constitutional Court finds the Federal President guilty of a willful violation of the Basic Law or of another Federal law, it may declare him to have forfeited his office. After impeachment, it may issue an interim order preventing the Federal President from exercising the powers of his office.

Art. 98(1) . . .

(2) If a Federal judge, in his official capacity or unofficially, infringes upon the principles of the Basic Law or the constitutional order of a *Land*, the Federal Constitutional Court may decide by a two-thirds majority, upon the request of the *Bundestag*, that the judge be transferred to another office or placed on the retired list. In a case of an intentional infringement, his dismissal may be ordered. (Cited in ANDREWS, CONSTITUTIONS AND CONSTITUTIONALISM 100 ff (2d ed. 1963)).

could consistently explain the Court's actual practice. This attempt has not been undertaken since 1925, when, in an extensive discussion of the cases, Mr. Weston tried to show that in every instance "the line between judicial and political questions . . . is the line drawn by the constitutional delegation, and none other."⁷⁹ Unfortunately, it is quite difficult to verify or controvert this thesis by a mere textual analysis of political question decisions. There is usually no doubt in political question cases (and if there were doubt, the doctrine would not apply) that the President or Congress has the constitutional power to act in this particular field, and it is therefore almost inevitable that the Court will refer to this "textually demonstrable" (express or implied) constitutional grant of power in its opinion. The question before the Court is whether, granted the power to act, the action of the President or of Congress is lawful under international or constitutional law; and the Court's answer, in a political question decision, is that it will not review measures of this particular kind. Whether this disposition is based upon an interpretation of the Constitution cannot, of course, be determined merely by searching for references to a constitutional grant of power in the opinion. In order to answer this question it becomes necessary to take a broader look at the Court's practice in one particular field, and to determine whether the overall pattern of political question cases and cases decided on their merits could be explained in terms of any reasonable interpretation of the Constitution.

In view of the "absolutist" claims of the classical theory it seems sufficient to test its validity in one particularly important area. A fair test would seem to be the field of the foreign relations power, which gave rise to a great number of political question decisions⁸⁰ for which Mr. Weston has offered the following explanation:

The rule whereby the courts accept as their guide the decisions of the other two departments upon questions involving international relations is fairly well settled.⁸¹

. . . .

These cases and similar ones require for their support two circumstances only: first, that the entire active conduct of foreign affairs shall have been entrusted to the executive, and to some degree to the legislative, departments; and, second, that the imperative need of unity at home for dealing abroad shall be recognized. The first is found in the Constitution. . . .⁸²

79. Weston, *Political Questions*, 38 HARV. L. REV. 296, 331 (1925).

80. See generally JAFFE, *JUDICIAL ASPECTS OF FOREIGN RELATIONS* (1933); Dickinson, *The Law of Nations as National Law: "Political Questions,"* 104 U. PA. L. REV. 451 (1956).

81. Weston, *supra* note 79, at 315-16.

82. *Id.* at 318-19.

Even more explicit is the footnote which Weston inserted at this point:

It is hardly necessary to quote the relevant provisions of the Constitution to this point, nor to discuss the division as between the two departments. It is sufficient that they divide the power of administering foreign affairs, *to the complete exclusion of the judiciary*.⁸³

If this were also the Court's view of the constitutional division of functions, there should have been no decisions on the merits at all in this broad area. The cases show that this is not so.

First, it should be pointed out that with the exception of a few cases dealing with the exclusion and expulsion of aliens⁸⁴ and, arguably, of *United States v. Pink*,⁸⁵ the Court has consistently decided on their merits all constitutional issues arising out of cases involving the foreign relations power. The constitutional scope of the treaty power vis-à-vis the states⁸⁶ and vis-à-vis individual rights,⁸⁷ and the allocation of competence in this field among the executive and legislative departments,⁸⁸ were never held to present non-justiciable questions. And although issues concerning the international boundaries of the United States were usually regarded as political,⁸⁹ the corresponding issues of whether

83. *Id.* at 319, n.89. (Emphasis added.)

84. Exclusion: *The Chinese Exclusion Case*, 130 U.S. 581 (1889); *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950); *Shaughnessy v. United States ex rel. Mezel*, 345 U.S. 206 (1953).

Deportation: *Fong Yue Tmg v. United States*, 149 U.S. 698 (1893); *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952); *Galvan v. Press*, 347 U.S. 522 (1954).

85. 315 U.S. 203 (1942). It seems possible to read the *Pink* case as holding that the President's "policy of recognition," as expressed in the Litvinov Assignment, was also determinative of the question whether the Assignment, as applied, violated the Fifth Amendment. *Contra*, McDougal & Lans, *Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy* (1945) in McDougal & ASSOCIATES, *STUDIES IN WORLD PUBLIC ORDER* 404, 572 n.38 (1960), who argue that the *Pink* case should be read as holding that, under the facts of the case, the Fifth Amendment did not preclude the Federal Government from giving itself priority over foreign creditors. *But see* *United States v. New York Trust Co.*, 75 F. Supp. 583 (S.D.N.Y. 1946); *Steingut v. Guaranty Trust Co.*, 58 F. Supp. 623 (S.D.N.Y. 1944), *aff'd*, 161 F.2d 571 (2d Cir. 1947), where the courts, citing *Pink*, applied the Assignment against American creditors as well.

86. See, e.g., *United States v. Belmont*, 301 U.S. 324 (1937); *Missouri v. Holland*, 252 U.S. 416 (1920); *Geofroy v. Riggs*, 133 U.S. 258, 267 (1890); *Ware v. Hylton*, 3 U.S. (3 Dall.) 199 (1796).

87. *Reid v. Covert*, 354 U.S. 1 (1957).

88. See generally McDougal & Lans, *supra* note 85. See, e.g., *United States v. Guy W. Capps, Inc.*, 204 F.2d 655 (4th Cir. 1953), *aff'd on other grounds*, 348 U.S. 296 (1955); *United States v. Belmont*, *supra* note 86; *B. Altman & Co. v. United States*, 224 U.S. 583 (1912).

89. See *Pearcy v. Stranahan*, 205 U.S. 257 (1907); *In re Cooper*, 143 U.S. 472 (1892);

territories concededly under the sovereignty of the United States were to be treated as part of the United States for purposes of applying the Constitution or federal statutes,⁹⁰ or whether activities outside the United States should nevertheless come within the territorial scope of a federal statute,⁹¹ were consistently (though not without opposition) decided by the Court.

But even if, in fairness to Mr. Weston, one accepted a qualification suggested by him and excluded "points of constitutional law"⁹² from the scope of this inquiry, there would remain numerous decisions which seem incompatible with his theory that the courts should, by force of the Constitution, be prevented from deciding issues that have a bearing upon the external relations of the United States. While the courts will not question the correctness, under international law, of the President's recognition of foreign insurgents, belligerents, governments, states or state boundaries, the correlative rule that any foreign group exercising effective power which is not officially recognized by the United States must be treated as non-existent by American courts⁹³ has suffered numerous exceptions in cases where the courts took judicial notice of the existence of a *de facto* government, or where they found evidence for this existence in official pronouncements which had been carefully worded to exclude any implication of an official diplo-

Jones v. United States, 137 U.S. 202 (1890); United States v. Reynes, 50 U.S. (9 How.) 127 (1850); Garcia v. Lee, 37 U.S. (12 Pet.) 511 (1838); Foster v. Neilson, 27 U.S. (2 Pet.) 253 (1829).

90. See *Balcac v. Puerto Rico*, 258 U.S. 298 (1922); *Dorr v. United States*, 195 U.S. 138 (1904); *Hawaii v. Mankichi*, 190 U.S. 197 (1903); *Downes v. Bidwell*, 182 U.S. 244 (1901); *De Lima v. Bidwell*, 182 U.S. 1 (1901); *Cross v. Harrison*, 57 U.S. (16 How.) 164 (1853); *Fleming v. Page*, 50 U.S. (9 How.) 602 (1850).

91. See *Foley Bros. v. Filardo*, 336 U.S. 281 (1949); *Vermilya-Brown Co. v. Connell*, 335 U.S. 377 (1948). See also, *Romero v. International Terminal Operating Co.*, 358 U.S. 354 (1959).

92. With regard to the "political decisions" which the Court will accept in the field of foreign relations, Mr. Weston adds: "It is to be noted also that these determinations are largely issues of fact, and not often decisions on points of constitutional law." Weston, *supra* note 79, at 319. But it should also be noted that the distinction between "fact" and "law" is misleading and might profitably be replaced by a distinction between issues of domestic (constitutional, statutory, and judge-made) and international and foreign law. For instance, in *Foster v. Neilson*, *supra* note 89, one of the cases which Weston discussed, the only point in issue was the interpretation of the Louisiana Purchase treaty which, of course, was purely a question of law.

93. See, e.g., *Russian Socialist Federated Soviet Republic v. Cibrario*, 235 N.Y. 225, 262-63, 139 N.E. 259, 262 (1923); *The Rogdai*, 278 Fed. 294, 296 (N.D. Cal. 1920). See also, *Williams v. Suffolk Ins. Co.*, 38 U.S. (13 Pet.) 414, 420 (1839); *United States v. Klinton*, 18 U.S. (5 Wheat.) 144, 150 (1820); *Gelston v. Hoyt*, 16 U.S. (3 Wheat.) 246, 323 (1818); *Rose v. Himely*, 8 U.S. (4 Cranch) 241, 271 (1803).

matic "recognition."⁹⁴ Furthermore, and more important, the courts have usually (at least until Justice Sutherland dealt with the "Litvinov Assignment"⁹⁵) decided for themselves what effect, if any, should be

94. See, e.g., *United States v. The Three Friends*, 166 U.S. 1 (1897); *The Ambrose Light*, 25 Fed. 408 (S.D.N.Y. 1885); *Salimoff & Co. v. Standard Oil Co.*, 262 N.Y. 220, 186 N.E. 679 (1933); *Sokoloff v. National City Bank*, 239 N.Y. 158, 145 N.E. 917 (1924); *Wulfsohn v. Russian Socialist Federated Soviet Republic*, 234 N.Y. 372, 138 N.E. 24 (1923).

95. *United States v. Belmont*, 301 U.S. 324 (1937).

In *Underhill v. Hernandez*, 168 U.S. 250 (1897), the Court had decided that an officer of a foreign revolutionary government was not personally liable for damages arising out of military measures in the course of a civil war. The subsequent diplomatic recognition by the United States of the revolutionary government was treated as evidence of the "governmental" or "military" (rather than "private") character of its prior acts, bringing into play the act of state doctrine. The same rule was applied in *Oetjen v. Central Leather Co.*, 246 U.S. 297 (1918), but was misleadingly restated in the following passage:

It is also the result of the interpretation by this court of the principles of international law that when a government which originates in revolution or revolt is recognized by the political department of our government as the *de jure* government of the country in which it is established, such recognition is retroactive in effect and validates all the actions and conduct of the government so recognized from the commencement of its existence.

Id. at 302-03. This relatively harmless misstatement of the *Hernandez* rule was seized upon by Justice Sutherland in the *Belmont* case in order to establish the novel theory that the American recognition of the Soviet government also had the effect of immunizing Soviet confiscations against objections based upon the public policy of the forum. Moore, *The New Isolation*, 27 AM. J. INT'L L. 607, 618 (1933); Borchard, *Editorial Comment: Extraterritorial Confiscations*, 36 AM. J. INT'L L. 275, 279-80 (1942).

The Court's position may well be explained as the result of a political practice of withholding diplomatic recognition from governments whose effective power is well established. If recognition has been denied because of the illegitimacy of a foreign government, or because of a moral disapproval of its acts, then it becomes indeed possible for the courts to find in the subsequent act of recognition an implicit official declaration that the past conduct of this government should no longer be regarded as violating American standards of public policy. This interrelationship seems to be most obvious in the British decision *A. M. Luther Co. v. James Sagor & Co.*, 3 K.B. 532 (1921), which was cited in the *Belmont* opinion.

While the Court, in *United States v. Pink*, 315 U.S. 203 (1942), professed to follow the new *Belmont* rule, it seems possible to read the opinion somewhat more narrowly as holding that the "policy of recognition" with regard to the settlement of Russian debts was determined by the President in the exercise of his power to establish diplomatic relations, and that therefore the Litvinov Assignment should be read as embodying a specific federal policy, overriding other public-policy exceptions. See, Note, *United States v. Pink—A Reappraisal*, 48 COLUM. L. REV. 890, 895-96 (1948). It should be noted, however, that some lower federal courts have subsequently treated a "policy of non-recognition" as equally conclusive: See, e.g., *The Maret*, 145 F.2d 431, 442 (3rd Cir. 1944) and cases cited in Briggs, *Non-Recognition in the Courts: The Ships of the Baltic Republics*, 37 AM. J. INT'L L. 585 (1943).

Of course, the "Bernstein exception" to the act-of-state rule has opened another avenue for the executive department to determine the effect which American courts should give to foreign governmental action. *Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij*, 173 F.2d 71 (2d Cir. 1949), modified, 210 F.2d 375 (2d Cir. 1954).

accorded the acts of foreign powers, recognized or unrecognized.⁹⁶

Turning to the constitutional grant of the treaty power, in regard to which the textual argument for "the complete exclusion of the judiciary" would seem to be strongest, the Court has indeed treated as "political" the questions whether the foreign partner to a treaty had constitutional authority to assume a particular obligation,⁹⁷ and whether a treaty, or a treaty provision, has become ineffective because of the partner state's loss of independence⁹⁸ or because of changes in the territorial sovereignty of the partner state.⁹⁹ But at the same time, the Court itself decided that under international law the violation of a treaty by the partner state will not *ipso facto* render the treaty ineffective,¹⁰⁰ and, what is more important, the Court decided on the merits

But cf. the discussion of this exception in *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 419-20, 428 (1964).

96. See, e.g., *United States v. Reynes*, 50 U.S. (9 How.) 127, 153 (1850); *Garcia v. Lee*, 37 U.S. (12 Pet.) 511, 521 (1838); *Keene v. McDonough*, 33 U.S. (8 Pet.) 308 (1834). The rule which seems to emerge from these cases is that the acts of an unrecognized *de facto* government may be treated as valid as long as they do not violate the rights which are based upon the *de jure* situation. This would also seem to explain the result in *Williams v. Suffolk Ins. Co.*, 38 U.S. (13 Pet.) 415 (1839), which was criticized by Professor Dickinson for its disregard of the "relevance of a *de facto* situation." Dickinson, *supra* note 80, at 456.

97. *Doe v. Braden*, 57 U.S. (16 How.) 635 (1853). This opinion clearly does not rest upon the constitutional ground that the provisions of a self-executing treaty ratified by the Senate are the law of the land, regardless of whether the international treaty itself was validly concluded. This theory, however, seems to have been adopted with regard to treaties concluded with Indian tribes: *United States v. Minnesota*, 270 U.S. 181, 200-02 (1926); *Fellows v. Blacksmith*, 60 U.S. (19 How.) 366, 372 (1857).

98. *Terlinden v. Ames*, 184 U.S. 270 (1902). The Court assumed, with regard to an extradition treaty concluded with Prussia before the establishment of the German Empire, that the "loss of separate existence" of Prussia would have terminated the American obligations under the treaty. Only after a lengthy discussion of the constitutional law of Germany which tended to support the position taken by the State Department, did the Court finally accede to the "controlling" political determination that Prussia still existed and that the treaty was still in force. See also *Clark v. Allen*, 331 U.S. 503, 514 (1947).

99. *Kennett v. Chambers*, 55 U.S. (14 How.) 38 (1852).

100. See Justice Iredell's opinion in *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 260-61 (1796); *Charlton v. Kelly*, 229 U.S. 447 (1913).

These cases are usually cited as political question decisions: JAFFE, *JUDICIAL ASPECTS OF FOREIGN RELATIONS* 77 n.207 (1933); Dickinson, *The Law of Nations as National Law: "Political Questions"*, 104 U. PA. L. REV. 451, 486-87 (1956). This seems incorrect. In both cases, the Court dealt with the claim that, as a matter of international law, treaty provisions had become inoperative because the partner state had failed to fulfill its own obligations. The Court rejected this theory, holding that, under international law, non-fulfillment by one party might entitle the partner state to seek compensation or, perhaps, to renounce its own obligations, but that, as long as the United States had not chosen to exercise any of these rights, the treaty remained in force. The language reminiscent of the political question occurs in passages which explain the obvious proposition that it is

and without reference to the political departments, that some treaties and treaty provisions, but not others, will survive a state of war between the United States and its treaty partner.¹⁰¹ Whatever may explain these differing results, I fail to see how such an explanation could be reduced to any internally consistent interpretation of the constitutional grant of the treaty power. And if the "entire active conduct of foreign affairs" were entrusted exclusively to the political departments, it would be equally difficult to explain the numerous instances in which the courts have interpreted international agreements without reference to, and sometimes in direct conflict with, the interpretation adopted by the executive department.¹⁰²

Similar vacillations between political question cases and cases decided on their merits, which cannot readily be explained in terms of "the constitutional delegation," appear in the decisions dealing with

for the political departments, rather than for the courts, to exercise, or not to exercise, the options which international law (*as interpreted by the Court*) offers to the United States.

101. *Karnuth v. United States ex rel. Albro*, 279 U.S. 231 (1929); *Society for the Propagation of the Gospel v. Town of New Haven*, 21 U.S. (8 Wheat.) 464 (1823). See also *The Sophie Rickmers*, 45 F.2d 413 (S.D.N.Y. 1930); *Techt v. Hughes*, 229 N.Y. 222, 128 N.E. 185 (1920). *But see* *Clark v. Allen*, *supra* note 98, at 508-09 where Justice Douglas would have been willing to declare a treaty terminated by war if the Executive or Congress had "formulated a national policy quite inconsistent with the enforcement of a treaty in whole or in part." Of course, Congress can always derogate a valid treaty by passing a statute which is in conflict with it. *The Chinese Exclusion Case*, 130 U.S. 581 (1889). Therefore, Justice Douglas' reference to an inconsistent Congressional policy should probably be read as an indication that in such a situation the Court will not attempt to construe the later statute so as to avoid a conflict with American international obligations, which would otherwise be the rule. *Lem Moon Sing v. United States*, 158 U.S. 538, 549 (1895); *United States v. Forty-three Gallons of Whiskey*, 108 U.S. 491, 496 (1883); *The Charming Betsy*, 6 U.S. (2 Cranch.) 64, 118 (1804).

102. See, e.g., *Perkins v. Elg*, 307 U.S. 325 (1939); *United States v. Rauscher*, 119 U.S. 407 (1886); *Wilson v. Wall*, 73 U.S. (6 Wall.) 83 (1867); *United States v. Arredondo*, 31 U.S. (6 Pet.) 691 (1832); *Tartar Chemical Co. v. United States*, 116 Fed. 726 (S.D.N.Y. 1902), *rev'd*, 127 Fed. 944 (2d Cir. 1903) (after the State Department had succeeded in concluding an amendment to the agreement in question which expressly sustained the Department's prior interpretation); *United States v. Watts*, 14 Fed. 130 (D.Cal. 1882).

On the whole, the Supreme Court's practice of treaty interpretation appears to be much more flexible than a rigorous constitutional doctrine would permit. It ranges from *Foster v. Neilson*, *supra* note 89, where the issue of treaty interpretation, coinciding with territorial claims asserted by both Congress and the President, was treated as an outright political question, through numerous cases asserting that an interpretation by the political departments, while not conclusive, should be given much weight, to *Perkins v. Elg*, *supra*, where the Court rejected, in an internationally not very important case, a treaty interpretation by the State Department which would have resulted in the (constitutionally doubtful) involuntary expatriation of an American citizen. It seems that the Court is paying much more attention to the political and legal implications of the concrete case than to the logic of any theory which might be derived from the constitutional grant of the treaty power.

exercises of the war power,¹⁰³ with the guarantee clause,¹⁰⁴ with the process of constitutional amendment¹⁰⁵ and with the process of legislative enactment.¹⁰⁶

If the Court could decide on the merits cases which according to the

103. *Compare, e.g.,* Commercial Trust Co. v. Miller, 262 U.S. 51 (1923) with Woods v. Miller, 333 U.S. 138 (1948); and Chastleton Corp. v. Sinclair, 264 U.S. 543 (1924). *Compare* Ludecke v. Watkins, 335 U.S. 160 (1948) with Lee v. Madigan, 358 U.S. 228 (1959). *Compare* Martin v. Mott, 25 U.S. (12 Wheat.) 19 (1827) with Mitchell v. Harmony, 54 U.S. (13 How.) 115 (1851).

104. *Compare* Luther v. Borden, 48 U.S. (7 How.) 1 (1849) with Texas v. White, 74 U.S. (7 Wall.) 700 (1869). *Compare* Attorney General ex rel. Kies v. Lowry, 199 U.S. 233 (1905); Forsyth v. Hammond, 166 U.S. 506 (1897); *In re* Duncan, 139 U.S. 449 (1891); and Minor v. Happersett, 88 U.S. (21 Wall.) 162 (1875) with Highland Farms Dairy v. Agnew, 300 U.S. 608 (1937); Cochran v. Louisiana State Bd. of Educ., 281 U.S. 370 (1930); Ohio ex rel. Bryant v. Akron Park Dist., 281 U.S. 74 (1930); Mountain Timber Co. v. Washington, 243 U.S. 219 (1917); Ohio ex rel. Davis v. Hildebrandt, 241 U.S. 565 (1916); O'Neill v. Leamer, 239 U.S. 244 (1915); Kiernan v. Portland, 223 U.S. 151 (1912); and Pacific States Tel. & Tel. Co. v. Oregon, 223 U.S. 118 (1912). See generally Bonfield, *The Guaranty Clause of Article IV, Section 4: A Study in Constitutional Desuetude*, 46 MINN. L. REV. 513 (1962).

105. *Compare* United States v. Sprague, 282 U.S. 716 (1931); Leser v. Garnett, 258 U.S. 130 (1922); Dillon v. Gloss, 256 U.S. 368 (1921); Hawke v. Smith, 253 U.S. 221 (1920); National Prohibition Cases, 253 U.S. 350 (1920); and Hollingsworth v. Virginia, 3 U.S. (3 Dall.) 378 (1798), with Coleman v. Miller, 307 U.S. 433 (1939). See generally ORFIELD, *THE AMENDING OF THE FEDERAL CONSTITUTION* (1942).

106. *Compare* Gardner v. The Collector, 73 U.S. (6 Wall.) 499 (1868) with Harwood v. Wentworth, 162 U.S. 547 (1896); and Field v. Clark, 143 U.S. 649 (1892).

See also Missouri Pac. Ry. v. Kansas, 248 U.S. 276 (1919); Rainey v. United States, 232 U.S. 310 (1914); Flint v. Stone Tracy Co., 220 U.S. 107 (1911); Twin City Bank v. Nebeker, 167 U.S. 196 (1897); Lyons v. Woods, 153 U.S. 649 (1894); United States v. Ballin, 144 U.S. 1 (1892). It is important to note that in all these cases the Supreme Court did assume the task of constitutional interpretation (a statute becomes law only if it conforms *fully* to the text which was voted upon in Congress; a quorum is reached if a majority of the members is present, even if not all of them will vote; a two-thirds majority requires the assent of two thirds of the members voting, not of two thirds of all members; a regulatory tax is not a "bill for raising revenue" which must be introduced in the House; Senate amendments to revenue bills are permissible only if they are "germane" to the subject matter of the House bill). The "political question" in these cases was limited to the issue of whether these standards, as laid down by the Court, had *in fact* been met by Congress. Field v. Clark, *supra*, Harwood v. Wentworth, *supra*, (conformity of the published text to the text voted upon) and, perhaps, Rainey v. United States, *supra*, ("germaneness" of a Senate amendment) are the only cases where the result was squarely based on the theory that the Court could not go behind a duly promulgated statute to determine for itself whether it had been properly enacted. In all other cases, the Court did in fact ("for the sake of argument") look at the journals and other evidence to show that even if the political question doctrine would not apply the challenge would be unsuccessful on the merits. In the Pocket Veto Case, 279 U.S. 655 (1929), there was, of course, no room for the political question doctrine. To whom should the Court have deferred: to Congress which thought that the bill had become law, or to the President who insisted that it had been vetoed by virtue of his inaction? See also Wright v. United States, 302 U.S. 583 (1938); Edwards v. United States, 286 U.S. 482 (1932); La Abra Silver Mining Co. v. United States, 175 U.S. 423 (1899).

classical theory it should be constitutionally unable to decide, then the theory cannot be accepted as a sufficient explanation even of those cases which might seem to conform to the postulated rule. It is true that the Court time and again refers to the constitutional delegation of power to the political departments in its political question decisions, and it would be a mistake to discount the relevance of such pronouncements. Once they have been formulated, they acquire a weight of their own, and they may then prevent the Court's intervention even in situations where there may be no otherwise compelling reasons for such deference to a political decision.¹⁰⁷ However, it is not enough to show that the Court sometimes couches its results in terms of constitutional interpretation. The "classicists" attempt to account for and, in Professor Bickel's accurate phrase, to domesticate, the doctrine fails on two counts: they have been unable to develop a canon of interpretation which would relate the various clusters of political question cases to the Constitution; and it seems that within these clusters the Court's actual practice of decision will not fall into patterns which would fit any reasonable interpretation of the specific constitutional grants of power which are involved.

IV. THE PRUDENTIAL THEORIES OF THE POLITICAL QUESTION

The critics of the classical theory not only challenge the logical syllogisms of *Marbury v. Madison* and the notion of a constitutional duty of the Court to exercise its reviewing power in all cases and controversies, they also deny the constitutional quality of the political question doctrine. In their view, the doctrine is "something greatly more flexible, something of prudence, not construction and not principle."¹⁰⁸ Writing in 1924, Mr. Finkelstein described these prudential factors in the following passage:

There are certain cases which are completely without the sphere of judicial interference. They are called, for historical reasons, "political questions." [The term] applies to all those matters of which the court, at a given time, will be of the opinion that it is impolitic or inexpedient to take jurisdiction. Sometimes this idea of inexpediency will result from the fear of the vastness of the consequences that a decision on the merits might entail. Sometimes it will result from the feeling that the court is incompetent to deal with the particular type of question involved. Sometimes it will

107. The independent weight of past pronouncements which may preclude a re-examination of the underlying factors is shown most clearly by Justice Frankfurter's opinion in *Galvan v. Press*, 347 U.S. 522 (1954). See *supra* note 84.

108. BICKEL, *THE LEAST DANGEROUS BRANCH*, 125-26 (1962).

be induced by the feeling that the matter is "too high" for the courts. But always there will be a weighing of considerations in the scale of political wisdom.¹⁰⁹

1. An "Opportunistic" Theory of the Political Question?

There are some indications that Mr. Finkelstein was ready to explain the doctrine primarily in terms of the Court's instincts for political survival, instincts which would persuade it to avoid the decision of "prickly issues" and "contentious questions" touching the "hyper-sensitive nerve of public opinion."¹¹⁰

If the opportunistic theory should be premised upon the Court's apprehensions about the effectiveness of its disposition of a particular case, it seems unpersuasive. Whenever the doctrine was applied in a lawsuit between private parties, as it was in some of the most seminal

109. Finkelstein, *Judicial Self-Limitation*, 37 HARV. L. REV. 338, 344-45 (1924).

110. *Id.* at 339, 363.

Professor Philippa Strum has recently undertaken a somewhat similar analysis of the doctrine in terms of what she calls the "enforcement problem." The following passage appears to be a fair summary of this more sophisticated variation of the "opportunistic" theory:

All Court decisions are political in their effects, and yet not all of them are labelled political questions. They all affect the distribution of power—political, economic, social—but in most cases popular opinion is already agreed or is willing to agree that a particular power configuration is beneficial to society. The political question appears before that agreement has had a chance to come into existence; and until such a consensus is reached, it would be insufferable for the judiciary to force one. Here, then, is the justification par excellence for the political question: it can frequently enable the Court to restrain itself from precipitating impossible situations which might otherwise rip the always delicate social fabric. No rules are forced upon a country not yet ready for them; on the contrary, the country at large is permitted to work out its own rules, which can then be translated into law through judicial fiat. The self-restraint exercised by the Court is more than a self-saving mechanism; it is also the affirmation of a government which finds the source of its actions in popular desires.

STRUM, *THE SUPREME COURT AND THE "POLITICAL QUESTION"* 235, Unpublished Ph.D. dissertation, The New School for Political and Social Science, 1964. However persuasive as a prescription, this theory—apparently patterned after the evolution of reapportionment decisions—does not seem to describe very accurately the Court's actual political question practice. Apart, perhaps, from some language in the *Sabbatino* case regarding the act of state doctrine and, arguably, some exclusion and deportation cases, the theory seems to have no relevance at all for the political question decisions in the area of foreign relations (with which this dissertation, however, was not concerned). But I also fail to see in what way the Court would have preempted the field of an emergent popular consensus in its decisions dealing with the duration of war, the status of Indians, legislative procedure, and the procedure for ratifying constitutional amendments. Miss Strum, therefore, prefers to explain most of the cases which she discusses by a "hot potato" theory which appears to be quite similar to Finkelstein's.

political question decisions,¹¹¹ there was no doubt that the litigants would have obeyed a decision on the merits. And the same obedience might have been expected in the majority of cases in which a decision on the merits could have gone against a state or the federal government.

It is true that there have been a number of instances in which the Court did reach, or even overstep, the limits of its effective power. It may have done so in its encounters with the conflict between the Cherokees and Georgia, with Lincoln's suspension of the writ of Habeas Corpus during the Civil War or with racial segregation. But in *Worcester v. Georgia*¹¹² Chief Justice Marshall did finally decide against Georgia in spite of the high probability that his order would be disregarded;¹¹³ in *Ex parte Merryman*,¹¹⁴ Chief Justice Taney had even gone out of his way to provoke the conflict with the President;¹¹⁵ and in its integration decisions the present Court has time and again put its authority on the line to enforce its understanding of the constitutional commands.

I am not suggesting, of course, that the Court will never choose to avoid a fight; but it seems that as a rule it will not employ the heavy artillery of the political question doctrine to cover its retreat from trouble in an individual case. Its avenue of escape may be chosen as ingeniously as in *Marbury v. Madison* or as disingenuously as some commentators claim it was in *Ex parte Vallandigham*¹¹⁶ and in *Naim*

111. E.g., *Oetjen v. Central Leather Co.*, 246 U.S. 297 (1918); *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849); *Foster v. Neilson*, 27 U.S. (2 Pet.) 253 (1829).

112. 31 U.S. (6 Pet.) 515 (1832).

113. At the time of decision, compliance with the Court's reversal of these convictions of missionaries working in the Cherokee territories without having taken the oath of allegiance required by Georgia's annexation statutes, seemed no more likely than it had been in *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831). In both cases, the Georgia legislature had in advance enjoined state officers from carrying out any orders of the Supreme Court, and in view of President Jackson's well known sympathy for Georgia's Indian policy, federal enforcement could not be expected. That Georgia was finally willing to compromise, and to release the defendants, was due to a surprising change of Jackson's policy. See COMMAGER, DOCUMENTS OF AMERICAN HISTORY, DOCS. 142-46 (5th ed. 1949); HAINES, THE AMERICAN DOCTRINE OF JUDICIAL SUPREMACY 325-32 (rev. ed. 1959); 1 HAINES, THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT AND POLITICS 553 (1944); 1 WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 753, 776 (rev. ed. 1932).

114. 17 Fed. Cas. 144 (C.C. Md. 1861).

115. See ROSSITER, THE SUPREME COURT AND THE COMMANDER IN CHIEF 20-26, esp. 21 (1951).

116. 68 U.S. (1 Wall.) 243 (1863). Vallandigham, a resident of Ohio, had been tried before a military commission established under authority of the President and had been convicted on a charge of having expressed sympathies for the rebel cause. His application for writ of certiorari challenging the jurisdiction of the military commission over civilians was denied by the Supreme Court on the ground that the commission was not a "court"

v. Naim,¹¹⁷ or the Court may simply avail itself of its opportunities for procrastination,¹¹⁸ exercise its discretion to grant or withhold relief in equity cases,¹¹⁹ or use its procedural and jurisdictional¹²⁰ techniques of avoidance. Apart, perhaps, from *Colegrove v. Green*¹²¹ and its progeny and from two *Reconstruction* cases,¹²² the political question doctrine does not seem to have been applied in situations in which the Court's disposition of the case was likely to be disobeyed.

whose proceedings could be reviewed by certiorari. See Professor Rossiter's comments upon this avoidance of the issues presented in the case, *op. cit. supra* note 115, at 29, 32, 37.

117. In *Ham Say Naim v. Naim*, 197 Va. 80, 87 S.E.2d 749 (1955), the Supreme Court of Appeals of Virginia affirmed the annulment of a marriage between a Chinese man and a white woman, rejecting on the merits a challenge to the constitutionality of Virginia's anti-miscegenation law. On appeal, the Supreme Court vacated and remanded the case in a *per curiam* opinion, on the basis of the "inadequacy of the record as to the relationship of the parties to the Commonwealth of Virginia at the time of the marriage in North Carolina and upon their return to Virginia, and the failure of the parties to bring here all questions relevant to the disposition of the case . . ." 350 U.S. 891 (1955).

On remand, the Virginia court explained that the record before the state courts had been adequate for the decision of the issues presented to them and that there was, therefore, no procedural ground for re-opening the case in order to gather additional evidence and to render a new decision. It repeated that the material facts had not been in dispute, that the parties had left Virginia to be married in North Carolina and had immediately returned to Virginia and lived there as husband and wife, and that at the time of commencement of the suit the wife had been a *bona-fide* resident of Virginia, while defendant husband was no longer a resident of the state. 197 Va. 734, 90 S.E. 849 (1956). Thereupon the Supreme Court dismissed the appeal on the ground that the Virginia decision "leaves the case without a properly presented federal question." 350 U.S. 985 (1956). Professor Wechsler has found this disposition "wholly without basis in the law." WECHSLER, *PRINCIPLES, POLITICS AND FUNDAMENTAL LAW* 47 (1961). *But see*, BICKEL, *op. cit. supra* note 108, at 71, 126.

118. See, e.g., *Ex parte Endo*, 323 U.S. 283 (1944). Miss Endo had been interned in May 1942 and, though she had successfully passed a loyalty examination, had not been able to leave the internment camp. Her petition of habeas corpus had been filed in July 1942; it was finally successful in the Supreme Court in December 1944. See also *Duncan v. Kahanamoku*, 327 U.S. 304 (1946), where convictions of civilians by military commissions in Hawaii which had occurred in August 1942 and March 1944 were overturned by the Supreme Court in February 1946.

119. See, e.g., *Giles v. Harris*, 189 U.S. 475 (1903) and Justice Rutledge's position in *MacDougall v. Green*, 335 U.S. 281, 284-87 (1948) and in *Colegrove v. Green*, 328 U.S. 549, 564-66 (1946).

120. See, e.g., *Cherokee Nation v. Georgia*, *supra* note 113, where the Court managed to avoid the more unmanageable challenge to Georgia's Indian policy on the ground that the Cherokees were not a "foreign state" within the meaning of Art. III of the Constitution, and that, therefore, the case did not come under its original jurisdiction.

121. 328 U.S. 549 (1946).

122. *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475 (1867); *Georgia v. Stanton*, 73 U.S. (6 Wall.) 50 (1867).

It should be noted, however, that both cases are not squarely based upon the political

I would raise the same objections to a possible variation of the "opportunistic" theory which would focus not upon the likelihood of the parties' disobedience, but upon the willingness of the political institutions and of the public to accept the Court's determination of a controversial issue as authoritative. However controversial the issues avoided in political question cases may have been, they cannot possibly have been more hotly disputed than the constitutional questions concerning the federal bank,¹²³ the Missouri compromise,¹²⁴ the federal income tax,¹²⁵ child labor legislation,¹²⁶ the New Deal,¹²⁷ Truman's

question doctrine and might be more satisfactorily explained on other grounds. In *Mississippi v. Johnson*, *supra*, Chief Justice Chase relied on the distinction introduced in *Marbury v. Madison* between ministerial duties and executive discretion, holding that the Court would not *restrain* and *enjoin* the President in the performance of his constitutional function to execute the laws of Congress; but he expressly reserved the Court's power to review such acts after they had been performed:

The Congress is the legislative department of the government; the President is the executive department. Neither can be restrained in its action by the judicial department; *though the acts of both, when performed, are, in proper cases, subject to its cognizance.* [*Mississippi v. Johnson*, *supra*, at 500.] [Emphasis added.]

And in *Georgia v. Stanton*, Justice Nelson refused to decide on the ground that Georgia had not asserted the kind of "private" interests which could give it standing in an equitable action:

[T]he rights for the protection of which our authority is invoked, are the rights of sovereignty, of political jurisdiction, of government, of corporate existence as a State, with all its constitutional powers and privileges. No case of private rights or private property infringed, or in danger of actual or threatened infringement, is presented by the bill, in a judicial form, for the judgment of the court. [*Georgia v. Stanton*, *supra*, at 77.]

In both cases, the implication seems to be that the constitutional issues as such could be decided by the Court in a case properly within its jurisdiction. And the Court has dealt with similarly explosive issues arising from Reconstruction. See, e.g., *White v. Hart*, 80 U.S. (13 Wall.) 646 (1871); *Texas v. White*, 74 U.S. (7 Wall.) 700 (1869); *Ex parte Garland*, 71 U.S. (4 Wall.) 333 (1867); *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277 (1866). And compare *Massachusetts v. Mellon*, 262 U.S. 447 (1923) (where the Court found a similar lack of standing), with *United States v. Butler*, 297 U.S. 1 (1936) (where substantive issues involved in the *Massachusetts* case were decided).

123. *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

124. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

125. *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429 (1895).

126. *Bailey v. Drexel Furniture Co.*, 259 U.S. 20 (1922); *Hammer v. Dagenhart*, 247 U.S. 251 (1918).

127. *Ashton v. Cameron County Dist. No. 1*, 298 U.S. 513 (1936); *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936); *Rickert Rice Mills, Inc. v. Fontenot*, 297 U.S. 110 (1936); *United States v. Butler*, 297 U.S. 1 (1936); *Hopkins Federal Savings & Loan Ass'n v. Cleary*, 296 U.S. 315 (1935); *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555 (1935); *Schechter Poultry Co. v. United States*, 295 U.S. 495 (1935); *Railroad Retirement Bd. v. Alton R.R.*, 295 U.S. 330 (1935); *Panama Ref. Co. v. Ryan*, 293 U.S. 388 (1935).

seizure of the steel mills,¹²⁸ or school segregation.¹²⁹ The Court's determinations of these controversial issues and many more, may have been right or wrong, politically wise or foolish, but surely they all touched directly upon the "hypersensitive nerve of public opinion." I submit that a Court which has weathered all these storms will not seek shelter under the political question doctrine merely because it fears that its determination of an issue might be unpopular, or even extremely unpopular. Of course, a wise Court will take account of the likely reactions of the political departments and of public opinion when it reaches its decision. As Dean Rostow has put it:

Exercising high political powers, the Court must have a high sense of strategy and tactics. Its influence on our public life depends in large part on the Court's skill in advocacy and its sensitivity to the powerful forces which from time to time, in different combinations, must resist its will.¹³⁰

At this point, it seems useful to introduce a normative distinction between two kinds of conflicts. Courts, and constitutional courts in particular, are necessarily operating in a field of tension between principle as defined by the Court, and the reality of community life, a "reality" which also includes the normative consensus of the community about the principles which ought to govern its life. The law of the Constitution can only be effective as long as the Court's interpretation will not be utterly "unrealistic," overstraining and finally disrupting this normative tension.

If such disruption should occur, if the Court should lose its sense of political, social and economic reality, and of the community consensus about what ought to be, I know of no doctrinal justification either for persistence or for avoidance. The Court would simply be wrong, and it should (and the President's use of his power to appoint the Justices usually assures that it will¹³¹) speedily correct its substantive interpretation of the Constitution. This, rather than the adoption of the political question doctrine which Finkelstein had recommended,¹³² is what happened with regard to the constitutional scope

128. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

129. *Cooper v. Aaron*, 358 U.S. 1 (1958); *Brown v. Board of Education*, 347 U.S. 483 (1954).

130. ROSTOW, *THE SOVEREIGN PREROGATIVE* 34 (1962). See generally SHAPIRO, *LAW AND POLITICS IN THE SUPREME COURT* 1-49 (1964).

131. See Dahl, *Decision Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 283-91 (1957).

132. Finkelstein, *Judicial Self-Limitation*, 37 HARV. L. REV. 338, 345, 361-64 (1924); Finkelstein, *Further Notes on Judicial Self-Limitation*, 39 HARV. L. REV. 221, 243-44 (1925).

of national and state powers to deal with social and economic problems. In such a conflict, there seems to have been no room for the doctrine, and I am not aware that it has ever taken the place of an unpopular and unrealistic line of prior decisions.¹³³

Theoretically the "opportunistic" theory might come into play in conflicts where the Court's position is unpopular but nevertheless "right," or at least not utterly unrealistic, and where its constitutional rule would continue to express the "sober second thought of the community" against the majorities of the day. Such situations may, indeed, call for "a high sense of strategy and tactics"—but these are also the occasions when the Court may and does avail itself of its numerous substantive and procedural devices for avoiding decisions on the merits, with a view to the broader, prudential purposes which Professor Bickel has described. In the martial-law cases arising from the Civil War and

133. One might argue that the cases dealing with the immunity of foreign state owned or state operated ships will not fit into this general pattern. In this area, the Court, after some hedging, had adopted the broad doctrine that such vessels, even if used for purely commercial purposes, are not subject to *in rem* procedures based upon a creditor's maritime lien. *Berizzi Bros. Co. v. S.S. Pesaro*, 271 U.S. 562 (1926). This extensive grant of immunity, which was in conflict with the prior position taken by the State Department (see, e.g., the Department's submission in an earlier case involving the same Italian vessel: *The Pesaro*, 277 Fed. 473, 479-80 (S.D.N.Y. 1921)) was widely criticized as undesirable because it deprived private creditors of their only practical remedy against foreign debtor states, and because it tended to favor states which had nationalized sea transportation over states respecting private enterprise. See, e.g., Hervey, *The Immunity of Foreign States When Engaged in Commercial Enterprises: A Proposed Solution*, 27 MICH. L. REV. 751 (1929); Fairman, *Some Disputed Applications of the Principle of State Immunity*, 22 A.M. J. INT'L L. 566 (1928). See also: Lauterpacht, *The Problem of Jurisdictional Immunities of Foreign States*, 28 BRIT. YB. INT'L L. 220, 232-36 (1951); Comment, *The Jurisdictional Immunities of Foreign Sovereigns*, 63 YALE L.J. 1148, 1149 (1954); Setser, *The Immunities of the State and Government Economic Activities*, 24 LAW & CONTEMP. PROB. 291, 292 (1959); McDUGAL & BURKE, *THE PUBLIC ORDER OF THE OCEANS* 137-55 (1962).

But in spite of this criticism, the State Department, upon the recommendation of the Attorney General did in fact adjust its own policy of issuing or denying "suggestions of immunity" to the rule announced by the Court. 2 HACKWORTH, *DIGEST OF INTERNATIONAL LAW* 429, 437, 446-47 (1941). Thus, while the Court was urged to reconsider its substantive rule, there was no conflict at all with the political departments by the time the political question doctrine was finally introduced to this field. *Compania Espanola De Navegacion Maritime, S.A. v. The Navemar*, 303 U.S. 68, 74 (1938) (dictum); *Ex parte Peru*, 318 U.S. 578 (1943); *Mexico v. Hoffman*, 324 U.S. 30 (1945). The *Hoffman* case, which held that the Court would always accede to a suggestion of immunity issued by the State Department, and that it would not grant immunity on grounds which the Department had not previously recognized, led to a paradoxical situation in which the Department continued to follow the Court's *Pesaro* doctrine, while the Court itself was waiting for the Department's "adoption of any guiding policy." It was not until the Tate Letter of 1952 that the Department assumed this responsibility for the formulation of the law of immunity which the Court had forced upon it. *Changed Policy Concerning the Granting of Sovereign Immunity to Foreign Governments*, 26 DEPT. STATE BULL. 984 (1952).

from World War II, the Court managed to postpone a vindication of the Constitution until after the war was won;¹³⁴ and in *The Japanese Relocation Cases* which were decided during the war,¹³⁵ the Court chose to define the issues so narrowly that a sweeping legitimization of this program was avoided, without provoking an unmanageable conflict with either the military or public opinion.

As long as the Court is not ready to abandon its responsibility for the formulation and vindication of principle, it will usually find ways to sidestep, postpone, limit, or in some other way make manageable potential clashes with the political institutions and with public opinion without having to resort to complete abdication. An opportunistic theory, I submit, cannot satisfactorily explain the Court's actual use of the political question doctrine.

2. A "Cognitive" Theory of the Political Question?

If political controversy about an issue and the dangers of a clash with the political institutions will not, by themselves, account for the Court's use of the doctrine, it might seem useful to extend the search to an analysis of the legal nature of the issues which the Court has avoided.¹³⁶ Thus, Mr. Field has tried to explain all political question cases in terms of "a lack of legal principles to apply to the questions presented."¹³⁷ And more broadly:

Whatever may be the difficulties in definitively describing the differences between the judicial and the legislative department it seems settled and clear that the court must have some rule to follow before it can operate. Where no rules exist the court is powerless to act. From this it follows that the courts cannot enter into questions of statecraft and policy.¹³⁸

Coming from an American jurist, even in 1924, this is a surprising statement. I am at a loss to see how either the Common Law or Ameri-

134. *Duncan v. Kahanamoku*, 327 U.S. 304 (1946); *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866).

135. *Korematsu v. United States*, 323 U.S. 214 (1944); *Hirabayashi v. United States*, 320 U.S. 81 (1943).

136. Even Mr. Finkelstein seems to have suggested as much when he advocated an extension of the doctrine to the constitutional questions of economic and social legislation because "the legislative industrial policy of a state or nation can hardly even be stated in classical legal terminology." *Judicial Self-Limitation*, 37 HARV. L. REV. 338, 363 (1924). See also Miss Strum's thesis, *op. cit. supra* note 110.

137. Field, *The Doctrine of Political Questions in the Federal Courts*, 8 MINN. L. REV. 485, 512 (1924).

138. *Id.* at 511.

can constitutional law could have grown and flourished if the courts had been unable or unwilling to perform the creative functions which this cognitive theory so categorically disavows for them.

Furthermore, this theory would clearly not apply to a number of political-question areas. For instance, in the cases dealing with legislative procedure, there was no doubt about the "legal principles" that would have applied: only bills which were in fact voted upon by Congress, and only bills passed in the presence of a quorum have the force of law, and Senate amendments to a revenue bill must be "germane" to its subject matter.¹³⁹ Similarly, by the time the Court decided to treat the immunity of foreign ships as a political question, there existed a body of immunity law which the Court itself had created and in which the executive department had long since acquiesced.¹⁴⁰

It is true that, in *Baker v. Carr*,¹⁴¹ Justice Frankfurter attempted to show that a lack of "standards meet for judicial judgment" was one of the dominant factors for the political question; and he insisted that the issues of malapportionment should also be treated as political because "there is not—as there has never been—a standard by which the place of equality as a factor in apportionment can be measured."¹⁴² And Justice Brennan's majority opinion, disagreeing with Frankfurter's thesis without fully meeting its thrust,¹⁴³ also cited "a lack of judicially discoverable and manageable standards" as "one of the analytical threads that make up the political question doctrine."¹⁴⁴

I find it difficult to accept this analysis on cognitive grounds. There was surely no dearth of possible standards for reapportionment. The Court could have chosen a "minimum rationality test," either in the

139. See note 106 *supra*.

140. See note 133 *supra*.

141. 369 U.S. 186 (1962).

142. *Id.* at 289, 322-23.

143. Brennan conceded that if appellants had relied on the guarantee clause their claim would have been non-justiciable because of a "lack of standards," but added that "because any reliance on the Guaranty Clause could not have succeeded it does not follow that appellants may not be heard on the equal protection claim which in fact they tender." *Id.* at 227.

This is, of course, wholly unresponsive to Frankfurter's argument. He had not claimed that these voters should fail because they *also* could have raised a claim under the guarantee clause, but because the question of the "reasonableness" of apportionment under the equal protection clause was *itself* a question of the "theoretic base of representation in an acceptably republican state," so that the equal protection claim was "in effect, a Guaranty Clause claim masquerading under a different label." *Id.* at 297. This analysis seems absolutely compelling, but of the members of the majority only Justice Douglas seemed willing to answer it by suggesting that not all guarantee clause issues should be treated as non-justiciable. *Id.* at 242, n.2.

144. 369 U.S. at 211, 217.

extreme form advocated by Justice Harlan, who found "a classic legislative judgment" underlying (and justifying) even fifty-one years of legislative inaction,¹⁴⁵ or in the qualified form, requiring a minimum of consistency, which was expressed in Justice Clark's "crazy quilt test."¹⁴⁶ Or the Court could have, as it now has,¹⁴⁷ adopted an (almost) unqualified standard of numerical equality. While this "absolute" test will not solve all constitutional problems of apportionment,¹⁴⁸ it seems to me most securely rooted in principle,¹⁴⁹ and, surely, it is the one standard which, given the Court's workload and the efficiency of its fact-finding processes, would appear most manageable. But even if the members of the majority had not had in mind one of these "easy" solutions when they decided *Baker v. Carr* without reaching the merits, I would find Frankfurter's case for judicial agnosticism less than compelling. Even if one were to concede that, in the light of American

145. *Id.* at 336. Accordingly, Justice Harlan would have dismissed the complaint for failure to state a federal cause of action, rather than on political question grounds.

146. 369 U.S. at 254, 258.

147. *Lucas v. Colorado Gen. Assembly*, 377 U.S. 713 (1964); *Roman v. Sincok*, 377 U.S. 695 (1964); *Davis v. Mann*, 377 U.S. 678 (1964); *Maryland Committee for Fair Representation v. Tawes*, 377 U.S. 656 (1964); *WMCA, Inc., v. Lomenzo*, 377 U.S. 633 (1964); *Reynolds v. Sims*, 377 U.S. 533 (1964); *Wesberry v. Sanders*, 376 U.S. 1 (1964); *Gray v. Sanders*, 372 U.S. 368 (1963).

148. Of course, even where the districts are numerically equal, plurality elections in single-member districts (and even more in the multi-member districts which the Court considered permissible in *Reynolds v. Sims*, *supra* note 147) can be drastically influenced by the drawing of district lines. I doubt that the Court can indefinitely avoid such issues, as it did in *Wright v. Rockefeller*, 376 U.S. 52 (1964), and I expect that it will then have to supplement its one-man-one-vote standard with a qualified rationality (or due process) test. I do not see, however, how these additional difficulties, which can be met if and when they arise, should in any way undercut the validity of the one-man-one-vote rule.

149. My own reaction is probably influenced by a background where democracy has been, and is, more immediately and more obviously competing against other traditional and modern theories of government. If it is the burden of political theory to explain why governmental power should be accepted as legitimate and should be obeyed (and, by the same token, to define the situations where government becomes an illegitimate exercise of naked power) it would seem that democratic theory, basing government on the consent of the governed, could not give less weight to one citizen's consent than to that of another without destroying its own foundation.

Of course, political science tells us that, regardless of the weight of our votes, our scores on the power scale will vary as widely as they do with regard to wealth, enlightenment, skill, and the other Lasswellian value categories. But there is wisdom, I believe, in not being sophisticated about the fundamentals of the Faith, and in insisting that when we go to the polls to elect the government that rules us, we must all be equal. Surely, there is enough room for the sophisticated accommodation and balancing of interests and values other than equality in geographical districting, in requirements for qualified legislative majorities for certain decisions, in the system of checks and balances among political institutions, and, most important, in the patterns and practices of group politics, so that we need not tamper with democratic tenets in order to allay the unlikely specter of tyranny by single-minded urban majorities.

history, numerical equality should not be the only relevant standard for apportionment, it would nonetheless seem possible to identify and define whatever other purposes and values should be considered as legitimately relevant to the shaping of the electoral process. In the absence of a compelling absolute standard, surely reasonable and fair-minded (and well-informed) men ought to be able to agree whether and to what extent a given apportionment scheme *legitimately* reflects those

considerations of geography, demography, electoral convenience, economic and social cohesions or divergencies among particular local groups, communications, the practical effects of political institutions like the lobby and the city machine, ancient traditions and ties of settled usage, respect for proven incumbents of long experience and senior status, mathematical mechanics, censuses compiling relevant data, and a host of others¹⁵⁰

which Frankfurter mentioned to show that the job could not be done. The job would have been difficult, but not because the standards of a "legitimacy test" could not be rationally discussed and determined.¹⁵¹ It would have been difficult because the only test which Frankfurter was willing to consider would have required the courts to obtain an accurate and detailed map of the political landscape in every state before they could arrive at any responsible judgment. Rather than a "lack of standards," the problem at the bottom of Justice Frankfurter's dissent may well have been the inadequacy of judicial fact-finding processes for the administration of one particularly fact-oriented substantive standard. I may be quite misguided in this, but the idea that, after almost one hundred eighty years of constitutional history based upon a much longer tradition of political theory, the Supreme Court should find itself without any guidelines in principle on one of the most basic constitutional issues strikes me as particularly unpersuasive. And if it were so, I might add, then I fail to see why the Court should not have upheld malapportionment as "not unconstitutional."

3. *A "Normative" Theory of the Political Question?*

In a recent article, Professor Jaffe has restated the question of standards in normative, rather than cognitive, terms:

150. 369 U.S. at 323.

151. It seems to me that the editors of the YALE LAW JOURNAL have gone a long way in proving the feasibility of such an undertaking: Comment, *Baker v. Carr and Legislative Apportionments: A Problem of Standards*, 72 YALE L.J. 968 (1963).

We have seen that the Constitution grants to the President certain powers which imply certain further auxiliary powers. But there may be something about the nature of these powers which, in addition to their constitutional assignment, marks them as "political." Many of the questions that arise are of the sort for which we do not choose, or have not been able as yet to establish, strongly guiding rules. *We may believe that the job is better done without rules, or that even though there are applicable rules, these rules should be only among the numerous relevant considerations.*¹⁵²

The first of these alternative rationales, "that the job is done better without rules," appears to be the less persuasive one. If we are sure that certain congressional or presidential decisions should not be governed by legal principles, then I fail to see why the Court should not make that clear by ruling on the merits that these decisions are valid (because not unlawful).¹⁵³

In political question decisions, by contrast, the Court refuses to apply legal principles which are relevant to the disposition of the case: whether a statute was passed in accordance with the constitutionally prescribed procedure,¹⁵⁴ whether an amendment proposed by Congress thirteen years ago had lost its vitality,¹⁵⁵ whether initiative and referendum are compatible with a republican form of government,¹⁵⁶ whether a particular state of facts justified a call-up of the militia,¹⁵⁷ or a blockade of southern ports which, under international law, had to be respected by neutral ships,¹⁵⁸ whether a certain territory had come under the sovereignty of the United States,¹⁵⁹ whether a treaty had been validly concluded,¹⁶⁰ or whether it was still in force¹⁶¹—all these were questions to which, in the Court's opinion, the law provided an answer. This appears to be true even with regard to the recognition of foreign sovereignty,¹⁶² and the unilateral derogation of treaties by

152. Jaffe, *Standing to Secure Judicial Review: Public Actions*, 74 HARV. L. REV. 1265, 1303 (1961). (Emphasis added.)

153. This seems also to be Professor Bickel's view. See BICKEL, *THE LEAST DANGEROUS BRANCH* 186 (1962).

154. See cases cited *supra* note 106.

155. *Coleman v. Miller*, 307 U.S. 433 (1939).

156. *Kiernan v. Portland, Ore.*, 223 U.S. 151 (1912); *Pacific Tel. Co. v. Oregon*, 223 U.S. 118 (1912).

157. *Martin v. Mott*, 25 U.S. (12 Wheat.) 19 (1827).

158. *The Prize Cases*, 67 U.S. (2 Black) 635 (1863).

159. See cases cited *supra* note 89.

160. See cases cited *supra* note 97.

161. See cases cited *supra* notes 98-101.

162. See, e.g., *Williams v. Suffolk Insurance Co.*, 38 U.S. (13 Pet.) 357 (1839), where the question whether the government of Buenos Aires could lawfully exclude American sealers from the Falkland Islands, or whether its proclamations were no more valid than

act of Congress.¹⁶³ In these last instances, the problem was not one of constitutional law (which probably does not prescribe substantive rules governing recognition or derogation of treaties) but of international law (under which the United States might have recognized the wrong power, and renounced its treaty obligations without justification). As long as the Court regards international law as part of the body of prescriptions which it will apply,¹⁶⁴ questions of international law, like questions of constitutional law, are questions of law which the Court could theoretically decide. In a political question decision, the Court does not hold that legal rules do not apply; it holds that competence to apply them should rest with the political departments.

This objection seems to be met by the alternative explanation offered by Mr. Jaffe, "that even though there are applicable rules, these rules should be only among the numerous relevant considerations." In this form, in which it has become the foundation of Professor Bickel's theory of the political question,¹⁶⁵ the thesis appears extremely persuasive: if the Court does regard legal principles as relevant for particular decisions, but still refuses to apply and to enforce them, then one might plausibly interpret this result as a (perhaps unarticulated) concession to the relevance of extra-legal factors. This thesis offers an explanation of political question decisions which cannot be disestablished by merely citing a series of cases which would not fit into the postulated pattern.

Furthermore, as Professor Bickel has shown,¹⁶⁶ it is entirely possible to interpret Justice Frankfurter's position in *Colegrove* and *Baker* in terms of this normative judgment, rather than in the cognitive terms which I have discussed above. If Professor Bickel's interpretation is correct, however, Justice Frankfurter might still have been able to decide these cases on the merits, taking into account the relevance

the "idle threat of any individual who might assume to exercise power," *id.* at 362, was clearly one to be answered under international law. See also Chief Justice Fuller's somewhat inept but very revealing handling of a similar question in *Pearcy v. Stranahan*, 205 U.S. 257 (1907), where he proceeded at length to interpret the Spanish American treaty of peace of 1898 in order to determine whether the Isle of Pines had been ceded to the United States, before he finally referred to the official American recognition of Cuba's *de facto* sovereignty over the island as a conclusive determination of the issue.

163. See especially *Taylor v. Morton*, 23 Fed. Cas. 784 (No. 13799) (C.C. Mass. 1855), in which Justice Curtis discussed at length whether Russia's conduct might have justified, under international law, the abrogation of a most-favored-nation treaty by a later tariff act. See also *The Chinese Exclusion Case*, 130 U.S. 581, 602 (1889) (dictum).

164. See *The Paquete Habana*, 175 U.S. 677, 700 (1900).

165. BICKEL, *op. cit. supra* note 153, at 185-97.

166. *Id.* at 191.

(and legitimacy), for apportionment, of factors other than numerical equality.¹⁶⁷

My objection can be stated more broadly: where the Court was persuaded that the political departments ought to be able to act with a view to non-legal factors—economic, political, military, international—and expediency, it has usually been willing to allow for this freedom of action through its substantive interpretation of the scope of constitutional power and discretion, and its flexible definition of constitutional limitations, varying with the necessities of the situation. This permissive approach is familiar enough in the field of the taxing power, in the post-1937 commerce and due process cases, and in the decisions concerning the protection of individuals against exercises of the war power,¹⁶⁸ culminating in *The Japanese Relocation Cases*.¹⁶⁹ If even the need to accommodate non-legal factors could be met by decisions on the merits, then Mr. Jaffe's second formula does not seem to establish a compelling necessity for the Court's reliance on the political question doctrine.

This objection is, of course, premised upon a preference for decisions on the merits, and for that reason it is not responsive to the thesis which Professor Bickel has built upon Jaffe's formula. The important thing for Bickel is not that the Court decide at all, but that it decide correctly, that is in conformity with principle:

The role of the Court and its *raison d'être* are to evolve "to pre-

167. This is shown by *McDougall v. Green*, 335 U.S. 281 (1948), a decision on the merits which, though not written by Justice Frankfurter, was at least accepted by him.

168. See, e.g., *Cummings v. Deutsche Bank*, 300 U.S. 115, 121 (1937) (holding that confiscation of enemy assets was an exercise of the war power untrammelled by the due process and just compensation clauses); *Miller v. United States*, 78 U.S. (11 Wall.) 268, 305 (1870). See also *Bowles v. Willingham*, 321 U.S. 503 (1944) (applying an extremely permissive variation of "substantive due process" to economic regulations under the war power); *Jacob Ruppert v. Caffey*, 251 U.S. 264 (1920). It should also be emphasized that the "clear and present danger test" as formulated by Justice Holmes in *Schenck v. United States*, 249 U.S. 47, 52 (1919) and in *Abrams v. United States*, 250 U.S. 616, 628 (1919) (dissenting opinion), was intended to vary with the necessity for repression of speech. This willingness to accommodate a (proven) military necessity was also evident in the cases dealing with the requisitioning of citizens' assets. *United States v. Russell*, 80 U.S. (13 Wall.) 623 (1871); *Mitchell v. Harmony*, 54 U.S. (13 How.) 115, 134-35 (1851). Cf. *United States v. Caltex Inc.*, 344 U.S. 149 (1952). Even the "open court rule" announced in *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 127 (1866), must be understood as a generalized and abstract attempt to accommodate both constitutional rights of the individual and military necessity. And in *Duncan v. Kahanamoku*, 327 U.S. 304 (1946), the members of the majority and the dissenters were agreed that if the trial of civilians by military commission on Hawaii had indeed been required by military necessity it would, by the same token, have been constitutional.

169. *Supra* note 135.

serve, protect and defend" principle. If the political institutions at last insist upon a course of action that cannot be accommodated to principle, it is no part of the function of the Court to bless it, however double-negatively.¹⁷⁰

Thus, Professor Bickel would regard *The Japanese Relocation Cases* as proving, rather than contradicting, his thesis.¹⁷¹ Instead of finally, even if hesitatingly and narrowly, legitimating the removal of citizens of Japanese descent from the West Coast, the Court would have done better—if it could not bring itself to intervene—to invoke the political question doctrine as Justice Jackson had urged it to do.¹⁷² Professor Bickel's theory of the political question follows from his understanding of the Court's role. As a theory about what the Court ought to do, it seems immune from criticism on purely empirical grounds. It should be discussed, and I am very much aware of the temerity of my undertaking, in terms of its desirability as a rule for the Court.

My first doubts concern the expansion of the list of issues which the Court may, or should, avoid that this theory seems to imply. One need not subscribe to Schumpeter's understanding of political decisions in a democracy as mere by-products of the competition for power,¹⁷³ to recognize that they are rarely if ever pure implementations of principle. Legislative and executive decisions are surely subjected to, and occasioned by, manifold compulsions, pressures and temptations of economic, social, political (domestic and international) and military necessity, expediency or opportunity—extra-legal factors, that is, the relevance of which for the political departments is obvious, and which the Court also may not completely disregard in its determinations of the validity of such decisions. If such extra-legal factors may call for the application of the political question doctrine, one may well ask whether there will ever be circumstances which would permit judicial intervention on grounds of principle.

Of course, for Messrs. Jaffe and Bickel this raises a normative question. The answer would depend on the degree to which either principle or these non-legal considerations *ought* to determine governmental action in any given situation.¹⁷⁴ But with what doubts will

170. BICKEL, *op. cit. supra* note 153, at 188.

171. See *id.* at 139.

172. *Korematsu v. United States*, 323 U.S. 214, 242-48 (Jackson, J., dissenting) (1944).

173. SCHUMPETER, *CAPITALISM, SOCIALISM, AND DEMOCRACY* 269-73 (2d ed. 1947).

174. For instance, Professor Bickel maintains that "apportionment is necessarily a very high percentage of politics with a very small admixture of definable principle" while "in race relations the proportions are reversed." *Op. cit. supra* note 153, at 193. I think it would, at least in 1954, have been hard to verify this thesis by any empirical

such a judgment be infected once the Court has conceded that, for certain decisions, and for certain situations which will differ only in degree from the "normal" characteristics of any constitutional case, the authority of the Constitution must give way to the relevance of other factors? The Court would have to explain and justify, not abstention as it now does, but the exercise of judicial review; it would have to face anew in each instance Judge Hand's pregnant question of "how importunately the situation demands an answer."¹⁷⁵

For Professor Bickel, these implications might well be acceptable because, in his view, even an abstention on political question grounds need not prevent the Court from exercising its true function:

Even when it is ultimately constrained to yield to necessity, however—to yield, this is to say, to the judgment of the political institutions—the Court can exert immense influence. It may be unable to wield its ultimate power as an organ of government charged with translating principle into positive law; but it need not abandon its concomitant role of "teacher to the citizenry." The power to which Marshall successfully laid claim is not the full measure of the Court's authority in our day. And the Court's arguments need not be compulsory in order to be compelling. Many of the devices of not doing engage the Court, as I have shown, in colloquies with the political institutions. By their very nature, with hardly a word spoken in further explanation, vagueness and delegation, for example, ask for a legislative affirmation of just what it is that necessity demands. But the Court can at the same time do more. It can see to it that the political judgment of necessity is undertaken with awareness of the principle on which it impinges. In American life, the Court is second only to the presidency in having effectively at its disposal the resources of rhetoric. Hence . . . the Court can explain the principle that is in play and praise it, and thus also guard its integrity. It can do so even when no device is available for authoritatively drawing the political institutions into a colloquy near the bench. For the Court can speak over their heads to the nation.¹⁷⁶

I have quoted at some length because this passage, wholly apart from the empirical question of whether the political question doctrine has often been employed in this exhortatory fashion, seems to state the most problematical aspect of Mr. Bickel's thesis. Where concessions to necessity and expediency cannot be avoided, Bickel would have the Court rely on its resources of rhetoric to explain and praise pure

test—say, a public opinion poll. It seems meaningful mainly as a statement of normative preference.

175. HAND, *THE BILL OF RIGHTS* 15 (1958).

176. BICKEL, *op. cit. supra* note 153, at 187-88.

principle; but in following this advice, the Court might well jeopardize the responsibility of constitutional interpretation and the effectiveness of principle, whose integrity it should guard.

Justice Jackson's dissenting opinion in *Korematsu v. United States*¹⁷⁷ illustrates my point. The majority of the Court had, on doubtful evidence perhaps, upheld the evacuation from the West Coast of citizens of Japanese descent as a reasonably necessary, and therefore constitutional, exercise of the war power. Applying the same test, Justice Murphy dissented because he found no "reasonable relation to an 'immediate, imminent and impending' public danger" that would have justified such measures.¹⁷⁸ Justice Jackson alone advocated recourse to the political question. In his opinion the courts should neither convict violators of the evacuation orders nor intercede against the evacuation and detention programs on applications of habeas corpus or otherwise.

He granted that, as a practical matter, "defense measures will not, and often should not, be held within the limits that bind civil authority in peace." But unlike the other members of the Court, Jackson was not willing to make allowances for the exigencies of war in his interpretation of the Constitution:

I cannot say, from any evidence before me, that the orders of General DeWitt were not reasonably expedient military precautions, nor could I say that they were. But even if they were permissible military procedures, I deny that it follows that they are constitutional.¹⁷⁹

For Jackson, the "reasonableness" of these measures at the time when they were adopted was irrelevant; they were unconstitutional because similar measures in time of peace would have been clearly unconstitutional. Disregarding Justice Frankfurter's admonition that the war power is as much a part of the Constitution as the Bill of Rights,¹⁸⁰ and disregarding the whole weight of prior decisions which had consistently defined the protection of individuals against the war power as varying with the necessities of the situation,¹⁸¹ Jackson now postu-

177. Note 172 *supra*. Professor Bickel quotes approvingly some of the pertinent passages of this dissent. *Op. cit. supra* note 153, at 131.

178. 323 U.S. at 235.

Mr. Justice Roberts dissented on the ground that defendant had been subjected to conflicting orders. 323 U.S. at 225-33. But otherwise he would also have applied the reasonableness test. *Id.* at 231 n.8.

179. 323 U.S. at 245.

180. 323 U.S. at 224-25.

181. See cases cited *supra* note 168. Of course, the cases differed with regard to (a) the

lated the absolute immutability of constitutional guarantees—a constitutional theory which he could not possibly have proclaimed, had he not at the same time disclaimed every intention ever to enforce it. Such a decision, I submit, does not even have the relevance of an advisory opinion which, while not binding, is expected to provide practicable answers to questions of law arising out of a concrete situation. Jackson's interpretation of the Constitution is, in the context of this dissent, no more than the proclamation of an admittedly unworkable moral ideal.

This temptation would lure the Court if it were permitted to explain and praise principle without taking even the intellectual responsibility for the realization of its postulated goals. Ultimately, such a practice would destroy even the Court's usefulness as a "teacher to the citizenry" on which Professor Bickel places so much emphasis. What would be the persuasiveness of an interpretation of the Constitution which the interpreter himself could not wish to see put into practice? From what revelation should the Court derive authority to proclaim moral postulates—or have its judgments any legitimacy beyond that of an intellectual honesty disciplined by its responsibility for the disposition of the concrete case?

Like Justice Jackson, Professor Bickel urges the Court not to distort the Constitution in order to accommodate unprincipled, but overpowering, reality. But the remedy which he has prescribed against "Plessy v. Ferguson's Error," named "after the case that legitimated segregation in 1896,"¹⁸² may be worse than the danger. It would sacrifice that realism of constitutional interpretation which is the necessary condition of its effectiveness. Interpretation which would no longer be answerable to the real conditions and exigencies of community life would transform constitutional law into a collection of programmatic postulates to be worshipped on the Fourth of July; and the easier it would be for the Court to retreat from conflicts in the real world into the ideal realm of pure principle, the less ready and able would it be to protect the community against transgression of its fundamental code.

degree of necessity which the Court will regard as sufficient to justify an invasion of individual rights (and here the importance of the right at stake, and its "absolute" or flexible definition in the Constitution may be the decisive variable) and (b) the extent to which the Court will re-examine a political or military judgment that such a degree of necessity in fact existed (for which the time of decision, during or after the war, seems to be not altogether irrelevant). But not even in its most "activist" decisions has the Court ever suggested that the exigencies of emergency should be totally disregarded in defining the scope of constitutional guarantees vis-à-vis the war power.

182. BICKEL, *op. cit. supra* note 153, at 197.

Unlike Mark Antony, Mr. Bickel's Court would come to praise the Constitution. But I doubt that this would make it any less a funeral oration.

V. A FUNCTIONAL THEORY OF THE POLITICAL QUESTION

My own understanding of the political question begins with the conclusions which I have tried to establish above: The cases cannot be satisfactorily explained in terms of a consistent interpretation of the constitutional grants of power. The Court has available such a wide variety of procedural and substantive devices for not deciding, and it has in fact decided such a long list of explosive issues, that it appears rather unpersuasive to explain the political question doctrine purely in terms of an opportunistic retreat from "prickly" cases or issues. Nor can one justify the political question cases on the grounds that the Court was convinced that it could not define, or that there were no, applicable legal standards. On the contrary, the doctrine presupposes the relevance of such standards. Finally, the Court is generally willing and able to define realistic and flexible substantive standards which will accommodate the legitimate demands of economic, social, political and military practice. The Court, therefore, need not use the political question doctrine to assure the political departments of broad discretion.

I am of course aware that I have overemphasized the objections that can be raised against each of the theories which have been discussed. Undeniably, these theories all have relevance for some situations and they may even offer the most persuasive explanation for certain cases, or at least come closest to the rationales expressed in some opinions of the Court. Their major weakness, I submit, lies in their intended generality which does not account for the narrowly circumscribed, exceptional character of the political question cases. They are, therefore, at odds with the empirical finding that the Supreme Court will decide on the merits the overwhelming majority of all cases which it accepts for decision, and that it does in fact claim the tasks of finding, interpreting and applying the law as its own "province and duty." A theory which would realistically explain why the Court should delegate this function for a very limited number of issues to the political departments would have to be of a correspondingly limited scope.

I am persuaded that much, if not all, of the Court's political question practice should, like the procedural and jurisdictional techniques of avoidance, be explained in functional terms, as the Court's acknowledgment of the limitations of the American judicial process. But

the difficulties encountered by the broader theories should serve as a reminder of the pitfalls of all generalization in this field. A satisfactory explanation of the political question doctrine is necessarily tied to the specifics of individual cases. Short of an exhaustive analysis of the case law, which is beyond the scope of this article, it is possible only to point out and discuss some of the functional factors and considerations which, in various combinations, may persuade the Court that in deciding a particular issue it would overreach the limits of its own responsibility.

1. *Difficulties of Access to Information*

Judicial competence to decide may be doubtful if the Court is not assured of full clarification of all relevant questions of fact and law. When a lack of information affects the individual case only, it may bring into play the procedural or jurisdictional requirements of "standing to raise the issue," "ripeness" or "adversariness." When resolution of the issue as such would require information which is generally difficult to obtain, the Court may redefine the substantive standards in the "absolute" or "abstract" terms of an unqualified grant of power or of an unqualified limitation upon power, whichever appears more desirable to the Court. But this non-realistic solution is possible only in areas with which the Court is sufficiently familiar to assume that an "absolute" standard, though not responsive to the variables of individual cases, can provide for a tenable and workable accommodation of the broader interests at stake. When an absolute solution is not acceptable, an information problem which is inherent in an issue may justify the application of the political question doctrine.

This function of the doctrine is most obvious in the cases touching upon foreign relations where the Court has generally been hesitant to trust its own understanding of the broader situation. To the extent that a decision would depend upon the evaluation of a fact-situation abroad, the Court's means of gathering the relevant data would seem to be much inferior to those of the executive, particularly when such questions arise, as they often do, in suits between domestic private parties. It does not seem unreasonable, therefore, that the Court often accepts without further investigation the official determinations of the President or the State Department, presumably based upon information supplied by the foreign service or by other intelligence-gathering agencies. If the government is a party, or if the validity of a governmental decision should depend upon such data, the problem for the Court may be somewhat different, although no more manageable. With regard to the President's participation in licensing of international air transpor-

tation, Justice Jackson expressed the sense of the full Court in these terms:

The President, both as Commander-in-Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports are not and ought not to be published to the world. It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret. Nor can courts sit *in camera* in order to be taken into executive confidences.¹⁸³

Thus, if the Court is unable to force the disclosure of information underlying a political decision, it may be forced not only to accept statements of fact as true, but also to accept the decision as valid.

This information problem by itself might go far towards explaining the political question cases in which the validity of a treaty depended upon the constitutional authority of the partner,¹⁸⁴ or upon the continuing existence of the partner state.¹⁸⁵ It may also help to explain the cases concerning the territorial boundaries of foreign states,¹⁸⁶ and the existence of foreign states, governments, belligerents and insurgents.¹⁸⁷ That the problem in these "recognition" cases was often no more than one of information seems to follow from those decisions which either treated the existence of a foreign *de facto* government as a matter of judicial notice or found evidence for it in official declarations which were not intended as a "recognition."¹⁸⁸

The case for basing the political question doctrine on the information problem seems weaker when the Court is faced with purely domestic issues. But even here the rationale of inadequate information has obtained some significance for the decisions concerning the ratification

183. *Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948). Justices Douglas, Black, Reed, and Rutledge dissented only on the issue of whether those parts of the challenged order of the Civil Aeronautics Board which were not modified by the President should also be immune from judicial review. Their position seems difficult to maintain because the President might (for international or political reasons) have approved of the order as it stood, and because the dissenters apparently did not assume that the Court could compel the President to explain the reasons for his approval. For these reasons, I am also unpersuaded by the criticisms of this decision advanced by Professor John P. Frank and by Professor Jaffe. Frank, *Political Questions*, in *SUPREME COURT AND SUPREME LAW* 36 (Cahn, ed. 1954); Jaffe, *The Right to Judicial Review II*, 71 *HARV. L. REV.* 769, 779-81 (1958). See also Hochman, *Judicial Review of Administrative Processes in Which the President Participates*, 74 *HARV. L. REV.* 684, 691 (1961).

184. *Doe v. Braden*, 57 U.S. (16 How.) 635 (1853).

185. *Clark v. Allen*, 331 U.S. 503 (1947); *Terlinden v. Ames*, 184 U.S. 270 (1902).

186. *Williams v. Suffolk Ins. Co.*, 38 U.S. (13 Pet.) 414 (1839).

187. See cases cited note 93 *supra*.

188. See cases cited note 94 *supra*.

of constitutional amendments, legislative enactments and the duration of the Civil War.

In *Coleman v. Miller*,¹⁸⁹ the Court was asked to determine whether Kansas had, in 1937, validly ratified the Child Labor Amendment which Congress had proposed thirteen years earlier. Petitioners, members of the Kansas legislature who had voted against ratification, asserted, among other objections, that the proposed amendment had lost its vitality because it had not been ratified within a "reasonable time" by the requisite number of states. For this contention they relied upon an earlier decision¹⁹⁰ in which the Court, upholding a seven-year limit upon ratification imposed by Congress, had rather persuasively explained that there was a fair implication in Article V of the Constitution that ratification must be sufficiently contemporaneous in order to reflect the will of the people in all sections of the country at relatively the same time. While petitioners were unsuccessful on all grounds, the members of the majority of the Court disagreed on the reasons for their disposition of the case. Chief Justice Hughes, writing an "opinion of the Court" which was supported by only two other justices, accepted the constitutional standard invoked by petitioners as relevant. But he went on to explain that the determination of what was a "reasonable time" for ratification could not be based exclusively upon the prior practice of relatively speedy ratification:

[T]here are additional matters to be examined and weighed. When a proposed amendment springs from a conception of economic needs, it would be necessary, in determining whether a reasonable time had elapsed since its submission, to consider the economic conditions prevailing in the country, whether these had so far changed since the submission as to make the proposal no longer responsive to the conception which inspired it or whether conditions were such as to intensify the feeling of need and the appropriateness of the proposed remedial action. In short, the question of a reasonable time in many cases would involve, as in this case it does involve, an appraisal of a great variety of relevant conditions, political, social and economic, which can hardly be said to be within the appropriate range of evidence receivable in a court of justice and as to which it would be an extravagant extension of judicial authority to assert judicial notice as the basis of deciding a controversy with respect to the validity of an amendment actually ratified. On the other hand, these conditions are appropriate for the consideration of the political departments of the Government. The questions they involve are essentially polit-

189. 307 U.S. 433 (1939).

190. *Dillon v. Gloss*, 256 U.S. 368 (1921).

ical and not justiciable. They can be decided by Congress with the full knowledge and appreciation ascribed to the national legislature of the political, social and economic conditions which have prevailed during the period since the submission of the amendment.¹⁹¹

By redefining "reasonable time" as referring not only to a sufficiently contemporaneous expression of the will of the *pouvoir constituant* (which might have justified the announcement of a rigid time limit), but also to the continuing economic need for the amendment, the Chief Justice adopted a substantive standard for whose application the Court's access to information was inadequate. Of course, the Chief Justice could have chosen another substantive standard which would not have presented these difficulties (just as Justice Frankfurter could have chosen different standards for reapportionment in *Baker v. Carr*¹⁹²), but once he had committed himself to this fact-oriented definition of reasonable time, the application of the political question doctrine appears as a defensible acknowledgment of Congress' superior institutional capacity to ascertain these "legislative facts."

There also was a problem of information in the cases in which the validity of a statute depended upon the identity of the text which was promulgated with the text which had been passed by Congress, upon the presence of a quorum at the time of passage, or upon the origin of a revenue clause in the House.¹⁹³ Here, too, the official declarations of the Speaker of the House, the President of the Senate and the President, presumably based upon an intimate and direct knowledge of the legislative process, may have been accepted as conclusive because of their closer and more reliable access to the relevant data. By itself, however, this rationale would not appear altogether compelling, and in a few of these cases the Court did indeed ("for the sake of argument") take a look at the legislative journals to show that the challenges had no basis in fact.¹⁹⁴ It seems more important that the Court was here faced

191. 307 U.S. at 453-54.

192. See text following note 151 *supra*.

It is interesting to note that Hughes, who had just defined the criteria, went on to obscure the information problem by his reference to the "lack of satisfactory criteria for judicial determination," citing Field's article which had postulated the "cognitive theory of the political question," 307 U.S. 454-55, a pattern which was again followed by Frankfurter in *Baker v. Carr*.

193. See cases cited note 106 *supra*.

194. This was done in *United States v. Ballin*, *Joseph & Co.*, *Lyons v. Woods*, *Flint v. Stone Tracy Co.*, and *Rainey v. United States*, note 106 *supra*. The possibility of a further challenge to the correctness of the journals was, however, categorically denied in the *Ballin*, *Joseph* case. 144 U.S. at 4.

with the "clear mistake" dilemma¹⁹⁵ in which any examination of the facts of enactment would have had to proceed on the assumption that the highest legislative and executive officers might have conspired to violate the clearest of duties. Furthermore, the issues of fact in these cases were so easy for any member of the legislature to determine, that the Court may very well have regarded the inaction of the majorities in Congress, which would have been the only injured parties and which, at the same time, would have been fully competent to correct any abuse of trust or unintentional mistakes, as conclusive proof that no such mistakes had in fact occurred.

The information problem also played a part in the decisions which treated the dates of duration of the Civil War as a political question.¹⁹⁶

195. It has always seemed to me that the "rule of the clear mistake," in which courts and commentators alike have found a measure of protection for judicial review as well as a justification for judicial self-restraint, is not only vulnerable on analytical grounds (see, e.g., BICKEL, *op. cit. supra* note 153, at 35-46) but actually misleading. If, for once, the courts were really faced with a very clear mistake,—“so clear that it is not open to rational question,” as James Bradley Thayer has put it—they would, by the same token, also be faced with an intentional violation of the Constitution and, in its most extreme form, with a revolutionary act. And it seems rather unlikely that, if the political departments had decided to commit a “clear mistake,” they would be stopped by a judicial decision explaining what must have been obvious all the time.

Of course, much may depend upon who committed the “mistake”—the states, inferior federal officers, or Congress and the President acting in conjunction. But at least when Congress or the President are involved, one might say almost by way of definition that judicial review will be most effective precisely for doubtful questions, when reasonable men might differ about the meaning of the Constitution so that each side cannot honestly be absolutely certain of the rightness of its position and, therefore, may be open to persuasion or at least willing to see the need for an authoritative settlement of the issue.

196. See *Adger v. Alston*, 82 U.S. (15 Wall.) 555 (1873); *Freeborn v. The Protector*, 79 U.S. (12 Wall.) 700 (1871).

To explain the Court's broader practice in this area, it is necessary to introduce the following analytical distinction:

(1) Where the existence of a state of war in the international sense is directly relevant to the decision of a case, as it is for the law of prize, the Court will of course be bound by the declaration of war and by the official termination of war in a treaty of peace or by a joint resolution of Congress or, for the Civil War, by a Presidential proclamation (but the Court may have to decide which of these modes of termination is decisive): *Herrera v. United States*, 222 U.S. 558 (1912); *Hijo v. United States*, 194 U.S. 315 (1904); *The Panama*, 176 U.S. 535 (1900); *The Buena Ventura*, 175 U.S. 384 (1899); *The Pedro*, 175 U.S. 354 (1899).

(2) The duration of war is also directly relevant to the application of the procedural rules that alien enemies cannot sue, and that the statutes of limitation will not run for or against them, during the existence of a state of war. This was the issue in the Civil War cases, *supra*, and in numerous cases decided during and after the First and Second World Wars. I have the impression that the Court's reference to the termination of war by some “official act,” rather than to the re-establishment of “peace-in-fact,” is often occasioned more by considerations of notice to the parties than by any logical necessity

But, again, there were additional considerations. Even if the Court had obtained all available information about unrest, incidents, skirmishes and military operations, it would have been extremely difficult to determine the points in time between which the situation was to be qualified as a state of war. On the other hand, the President was responsible for the peace and security of the nation and thus necessarily had to determine when, and for how long, specifically military action was required.

to follow the official determinations. See, e.g., *Watts, Watts & Co. v. Unione Austriaca di Navigazione*, 248 U.S. 9, 22-3 (1918), and especially *First Nat'l Bank of Pittsburgh v. Anglo-Oesterreichische Bank*, 37 F.2d 564 (3d Cir. 1930), where the Court held that the statute of limitations had begun to run again on November 17, 1921, even though the Presidential proclamation of that date had declared that the war with Austria had ended by virtue of the Joint Resolution of July 2, 1921. What was decisive was not the termination itself, but the date on which the parties had clear notice of the termination.

(3) The duration of war may further be relevant for the constitutional issue of whether a given situation justifies regulations based upon the war power. Of course, certain aspects of the war power, such as the power to raise and support armies, may be exercised at any time, and may become the basis for further implied powers even in time of peace. See, e.g., *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 326-28 (1936). But given the broad scope of the "power to wage war successfully," its precedence over all considerations of federalism, and its potential impact upon individual rights, it seems necessary to limit the occasions in which the full measure of the power should be available.

However, the duration of the war in a technical (international) sense would not appear to be a rational constitutional criterion. It might be too restrictive, denying Congress the power to deal with problems created by war and continuing during a post-war period. *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138, 144-45 (1948); *Fleming v. Mohawk Wrecking & Lumber Co.*, 331 U.S. 111, 116 (1947); *Hamilton v. Kentucky Warehouse Distilleries Co.*, 251 U.S. 146, 161 (1919); *Stewart v. Kahn*, 78 U.S. (11 Wall.) 493, 506-07 (1871). Or it might be too permissive under modern conditions where treaties of peace or even joint resolutions terminating the state of war will not necessarily follow closely upon the termination of hostilities.

The constitutional problem of the duration of the war power appears, therefore, to be quite similar to the question of whether a given situation justifies exceptional exertions of the police power of the states or of the District of Columbia. *Chastleton Corp. v. Sinclair*, 264 U.S. 543 (1924); *Marcus Brown Holding Co. v. Feldman*, 256 U.S. 170 (1921); *Block v. Hirsh*, 256 U.S. 135 (1921).

The political question doctrine has been applied to this constitutional issue only when an exercise of the war power against *alien enemies* was challenged. *Ludecke v. Watkins*, 335 U.S. 160, 167-70 & n.12 (1948); *Commercial Trust Co. v. Miller*, 262 U.S. 51, 57 (1923). In all "domestic" cases, the Court has usually upheld the regulation while insisting upon its ultimate power to decide this constitutional issue.

(4) Finally, the duration of war may present itself as a question of statutory interpretation if an act of Congress, by its terms, applies for the duration, or does not apply "in time of peace." Unless the constitutional problem discussed under (3) above is relevant, this question would seem to be answered by a reference to the intent of Congress (for which the time of enactment, before or during the shooting war, or after the cessation of hostilities, might be an important indication), rather than by an *a priori* reliance on any "political act" of termination. *Lee v. Madigan*, 358 U.S. 228 (1959). But see *Ludecke v. Watkins*, *supra*.

With no other compelling criteria to rely upon, the Court here accepted not only official determinations of fact but also the political decision qualifying these facts as either war or peace.¹⁹⁷

2. *The Need for Uniformity of Decision*

The information problem as such throws doubt only upon the Court's ability to arrive at a correct determination of the facts upon which its legal evaluation would have to be based. The duration of war cases, however, point to an additional aspect of the political question—the Court's deference to the prior decisions of another department within the latter's sphere of specific responsibility. On somewhat narrower grounds the political question doctrine will often, especially in the "recognition" cases, be justified by the practical need for "uniformity at home for dealing abroad":

If this were not the rule, cases might often arise in which, on the most important questions of foreign jurisdiction, there would be an irreconcilable difference between the executive and judicial departments. By one of these departments a foreign island or country might be considered as at peace with the United States; whilst the other would consider it in a state of war. No well regulated government has ever sanctioned a principle so unwise, and so destructive of national character.¹⁹⁸

By itself, this rationale might seem wholly persuasive only in situations where the correctness of the political decision is undisputed, in which case there would be no need for the political question. But where, as in the cases concerning the extent of American territorial sovereignty,¹⁹⁹ the validity of this political assertion is the very question in issue, it appears at least problematical if the Court defers without examination to a possibly unlawful political determination. At least in the Court's normal constitutional practice, the desire for unity among the departments must give way to the demand for lawfulness of governmental action.

For international law questions, however, this preference seems less clearly established in the decisions of the Court.²⁰⁰ Admittedly, inter-

197. Of course, in the Civil War cases these political decisions were themselves ambiguous, and the Court had to choose between a number of Presidential acts and proclamations to determine the duration of war. Similarly, in the cases concerning the Spanish-American War, the Court had to decide whether war in the international sense had been terminated by Presidential proclamation or by the later ratification of the treaty of peace. *Hijo v. United States*, note 196 *supra*.

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

199. See note 89 *supra*.

200. For a recent re-examination of the broader problem in terms of the existence or

national law is part of the law which the Court will apply; the cases dealing with the validity of treaties after a war between the United States and its partner state,²⁰¹ or applying the international law of prize,²⁰² are familiar proof of this rule. But at the same time, these decisions do not seem to establish the proposition that the Court will defend the international legal order against American acts of government in the same way in which it defends the constitutional order against such acts. It seems significant that in the early prize cases decided against the government, the Court refused to consider the question whether the seizure of ships or enemy assets was valid under international law and decided the cases on the constitutional theory that the executive department could not act without legislative authorization.²⁰³ In the Civil War, the Court was forced to abandon this constitutional rule and to recognize an independent war power of the President. This result then forced the Court to determine the validity of executive decisions under international law,²⁰⁴ and in the celebrated *Paquete Habana* decision, the Court did

absence of a significant consensus among major nations, see FALK, *THE ROLE OF DOMESTIC COURTS IN THE INTERNATIONAL LEGAL ORDER* (1964). Professor Falk's call for judicial activism, rather than deference to national policy, in those areas where an international consensus should exist, does not seem to remove the functional difficulties in those instances where the Court is faced with a prior commitment of the United States in an international dispute.

201. See note 101 *supra*.

202. See, e.g., *The Paquete Habana*, 175 U.S. 677 (1900); *The Hampton*, 72 U.S. (5 Wall.) 372 (1867).

203. See, e.g., *Brown v. United States*, 12 U.S. (8 Cranch) 110 (1814); *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804). In the former case, Chief Justice Marshall asserted that the rules of international law governing the seizure of enemy assets are "a guide which the sovereign follows or abandons at will," but that the decision whether the United States should seize such assets was for Congress to make. 12 U.S. at 128-29. See also *In re Cooper*, 143 U.S. 472 (1892). The case dealt with the seizure of a British sealer 59 miles off the Alaskan coast under a statute for the protection of seal fisheries within "all the dominion of the United States in the Waters of Behring Sea." The issue, which the Court managed to avoid on procedural grounds, was whether this "dominion of the United States" was to be defined with reference to the Three Mile rule of international law, or with reference to the claims which had been asserted by Russia before the cession of Alaska, and which were presently asserted by the executive department in its negotiations with Britain. The Court expressed some doubts about the legitimacy of applying the political question doctrine to this issue, but made it quite clear that it would be bound by an express Congressional assertion of the American territorial claims, or by a clear Congressional authorization of the President to determine this question.

204. See, e.g., *The Hampton*, 72 U.S. (5 Wall.) 372 (1867) (holding that even after the enactment of the Confiscation Acts of 1861 which contained some safeguards for the property of loyal Southerners, the President could proceed under the international law of prize); *The Prize Cases*, 7 U.S. (2 Black) 635 (1863) (upholding as justified by international law the seizure of blockade runners at a time when Congress had not yet had any opportunity to deal with Lincoln's blockade proclamations).

indeed hold that the seizure of small fishing vessels in the Spanish-American War was contrary to international law and therefore invalid.²⁰⁵ But it must be remembered that the Court took pains to emphasize that the officer responsible for the seizure had acted without specific authorization of the Navy Department and that the President himself had proclaimed the American intention to conduct the war according to the rules and customs of international law.²⁰⁶

If these qualifications were not controlling, the *Paquete Habana* would not be typical of the Court's normal practice of decision. As I have pointed out above, the Court has usually decided the *constitutional* questions concerning international agreements and territorial boundaries, but has, as a rule, treated the corresponding questions of *international law* as "political."²⁰⁷ The reason which the Court gave in a territorial boundaries case for its reluctance to apply international law against the American government seems to have more general relevance:

A question of disputed boundary between two sovereign independent nations, is, indeed, much more properly a subject for diplomatic discussion, and of treaty, than of judicial investigation.²⁰⁸

The international order has its own processes for the settlement of disputes between nations, and in these processes the American position must be defined, presented and defended by the political departments of the government. Of course, the Court will not lightly assume that Congress or the Executive has chosen to disregard its international duties, and therefore it will whenever possible interpret statutes so that they will not conflict with international law²⁰⁹ or with treaty obliga-

205. 175 U.S. 677 (1900).

206. *Id.* at 712-13.

Even the passage which is usually quoted from the opinion does not seem to assume that rules of customary international law should take precedence over legislative enactments or presidential orders:

International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations. . . .

Id. at 700. (Emphasis supplied.)

207. See cases cited notes 86-91 *supra*.

208. Here the Court managed to avoid the problem by deciding the case on other grounds. *De La Croix v. Chamberlain*, 25 U.S. (12 Wheat.) 599, 600 (1827).

209. See, e.g., *Lauritzen v. Larsen*, 345 U.S. 571, 578 (1953); *The Charming Betsy*, 6 U.S. (2 Cranch.) 65, 118 (1804). See also *United States v. Percheman*, 32 U.S. (7 Pet.) 51, 87-8 (1833); *United States v. Arredondo*, 31 U.S. (6 Pet.) 691, 741 (1832), overruling *Foster*

tions;²¹⁰ and the Court will intervene against violations of international law which can be attributed to officers acting without clear Presidential authorization. But when Congress, in a statute like the Chinese Exclusion Act,²¹¹ has clearly expressed its will to disregard a treaty obligation, or when the President himself has so acted, international responsibility has been assumed by those departments which under constitutional and international law are authorized to commit the nation. In such a situation, the international conflict could not be resolved before a domestic court, if only because the foreign party to the dispute is not subject to its jurisdiction. As the Court pointed out as early as 1796:

If we are to declare, whether Great Britain or the United States, have violated a treaty we ought to have some way of bringing the parties before us.²¹²

If the ultimate determination of the international dispute must be left to the processes of settlement provided by the international order, then the Court's opinion would be provisional, rather than final, with respect to the international issue in dispute, and it might prejudice the American position for the formulation and presentation of which the political departments must assume full responsibility. As an unfailing support for the rightness of American claims (which might be tactically motivated and which might change) would jeopardize the integrity of the judicial process, the political question doctrine is a legitimate means for the Court to delimit its responsibility in international conflicts to which the United States is a party.

Uniformity, as a rationale for the political question, however, is fully persuasive only for international issues on which the political departments have in fact committed the United States. When there is no such prior political determination, the Court may justifiably decide even questions that might give rise to an international dispute, as it did in the cases concerning the continuing validity of treaties after an

v. Neilson, 27 U.S. (2 Pet.) 253, 312-14 (1829), on a point of interpretation of the Spanish-American treaty of 1819 by which Florida had been acquired. The interpretation finally adopted relied on the Spanish, rather than the American, text of the treaty, and conflicted with the interpretation which the political departments seemed to have accepted. In the *Percheman* case, Chief Justice Marshall explained that the new interpretation was to be preferred because it was in harmony with the rule of international law that vested rights should not be affected by a change of sovereignty.

210. See, e.g., *Lem Moon Sing v. United States*, 158 U.S. 538, 549 (1895); *United States v. Forty-three Gallons of Whiskey*, 108 U.S. 491, 496 (1883).

211. 25 Stat. 504 (1888). See *The Chinese Exclusion Case*, 130 U.S. 581, 602 (1889).

212. *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 261 (1796).

intervening war between the United States and its partner state.²¹³ The case for independent judicial determination appears even stronger in fields of law where the claims of foreign states are specifically addressed to the judicial power of the United States, and where the Courts, rather than the political departments, are the institutions with primary responsibility for formulating and applying the American response to these claims. In such situations, the postulated "need for uniformity" might well cut the other way and oblige the State Department to accept, and defend against complaining foreign governments, the American position as defined by the courts. In my opinion, this is particularly true for the immunity from suit of foreign government-owned or government-operated vessels,²¹⁴ and it may also be true (but I am unwilling to enter the fray over *Sabbatino*) for the question of what effect should be given to the acts of foreign governments, whether recognized or unrecognized.²¹⁵ The fact that the Court has applied the political question doctrine to the issues of sovereign immunity and the recognition of foreign governmental acts cannot be satisfactorily explained by the rationale which I have outlined above. And the Court has, in fact, attempted to support these cases by the much farther-reaching thesis that it should avoid any possibility of "embarrassing" the conduct of foreign affairs.²¹⁶

213. See note 101 *supra*.

214. See note 133 *supra*.

The State Department seems to have been quite willing to leave this responsibility to the courts. See, e.g., its communication in *The Pesaro*, 277 Fed. 473, 479-80 n.3 (S.D.N.Y. 1921):

In cases of private litigation in American ports involving merchant vessels owned by foreign governments, the Department has made it a practice carefully to refrain from taking any action which might constitute an interference by the authorities of this government in such litigation.

The extreme reluctance of the Department to take an unambiguous position on such issues was also evident in *Sullivan v. State of Sao Paulo*, 122 F.2d 355 (2d Cir. 1941). And even the Tate Letter continued to assume "that a shift in policy by the executive cannot control the courts." 26 DEP'T STATE BULL. 984, 985 (1952).

215. See notes 95-96 *supra*.

216. Similar apprehensions had earlier contributed to the adoption of the extensive doctrine granting immunity regardless of the commercial character of the ship. See especially, *The Maipo*, 259 Fed. 367, 368 (S.D.N.Y. 1919):

If the Republic of Chile considers it a governmental function to go into the carrying trade . . . that is the business of the Republic of Chile; and if we do not approve of it . . . then we must say so through diplomatic channels and not through the judiciary. Otherwise, the judiciary are really contributing to what might become, under conceivable circumstances, a *casus belli*.

This is, of course, very similar to the *Sabbatino* rationale for the act of state doctrine, and subject to similar objections.

3. *The Deference to the Wider Responsibilities of the Political Departments*

Embarrassment, as a rationale for the political question appears particularly problematical because it reaches beyond international law and would remove questions of domestic law from judicial competence without any easily conceivable limits to its thrust. In *Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.*, the Court refused to review the grant to a domestic company of a license for international air transportation which had been modified and approved by the President. Plaintiff, a domestic competitor, had attacked the validity of the license on grounds with which the President had not been concerned, alleging that the Civil Aeronautics Board had disregarded minimum statutory requirements for issuing a license. Justice Jackson, speaking for the majority, held that the Court could not even review the validity of the underlying Board decision because this might embarrass or interfere with the effective exercise of the President's power to approve or disapprove such licenses with a view to the requirements of foreign policy or defense:

[T]he very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. They are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.²¹⁷

But of course one may with some justification describe many if not most political decisions as "delicate" and "complex," and to varying degrees they will all rest upon not entirely verifiable prognoses of the future. Stated so broadly, this rationale might undermine judicial review as effectively as the theory which would base the political question upon the relevance of extra-legal factors. It is therefore important to examine the cases relying upon "embarrassment" in order to identify the criteria which justify and limit this rationale.

Of particular interest are the cases which seem most difficult to reconcile with the Court's function "to say what the law is," the decisions concerning the constitutionality of exclusions and deportations.²¹⁸

217. *Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948).

218. (1) Exclusion: *The Chinese Exclusion Case*, 130 U.S. 581 (1889), established two

The majority of these cases were decided on their merits for the government; the infrequent exceptions concerned violations of procedural due process in deportation proceedings and would not have frustrated

propositions: (a) whether Congress in passing an exclusion act contrary to the terms of a treaty has violated the international obligations of the United States, is a political question which will not be examined by the Court; (b) the power to exclude foreigners is "an incident of sovereignty" which as such must be free from any *substantive* limitations. See also *Turner v. Williams*, 194 U.S. 279 (1904) (the First Amendment does not stand in the way of a statute excluding anarchists) and Justice Jackson's dissenting opinion in *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 at 222-24 (1953), where he conceded to the majority the inapplicability of the standards of *substantive due process*.

While the rule that there are no *substantive* constitutional limitations upon the power to exclude aliens was applied consistently, the question whether a minimum of *procedural due process* should apply even to exclusion decisions has given the Court more trouble and has ultimately brought into play the political question doctrine. The point of departure is marked by decisions like *Nishimura Ekiu v. United States*, 142 U.S. 651 (1892) and *Lem Moon Sing v. United States*, 158 U.S. 538 (1895), holding that the decision of the immigration authorities, barring an alien who claimed that under the terms of the immigration laws he should be permitted to enter, was final, and that the courts (upon a petition of habeas corpus) could neither review the correctness of the administrator's findings, nor the fairness of the procedure by which the decision was reached. As to an alien seeking entry, any procedure authorized by Congress was due process. Shortly thereafter, however, the Court began to insist upon a minimum of procedural due process for the decision to *deport* an alien who had entered in violation of the immigration laws and had been apprehended only four days after her entry: *Yamataya v. Fisher*, 189 U.S. 86 (1903). While this was technically a deportation case, these rules were immediately applied to exclusion decisions where the person excluded claimed to be a native-born citizen: *Chin Yow v. United States*, 208 U.S. 8 (1908); *Tang Tun v. Edsell*, 223 U.S. 673 (1912); *Kwock Jan Fat v. White*, 253 U.S. 454 (1920); *Quon Quon Poy v. Johnson*, 273 U.S. 352 (1927). And in *Gegiow v. Uhl*, 239 U.S. 3 (1915), the Court ordered the admission of an alien who had been excluded on the basis of an erroneous interpretation of the immigration laws, holding that such an exclusion was no more valid "than a decision without a fair hearing which has been held to be bad," citing *Chin Yow*, *supra*, and two deportation cases.

Thus, while most cases continued to go for the government on their merits, the Court seems to have assumed from there on that the Fifth Amendment required a minimum of procedural due process even for the exclusion decision, and that to this extent judicial review was available to the alien: Cf. *United States ex rel. Johnson v. Shaughnessy*, 336 U.S. 806 (1949); *Lloyd Sabaudo Societa Anonima Per Azioni v. Elting*, 287 U.S. 329, 335-36 (1932). In view of this development, it seems to me that the Court's return to its original position that "whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned" must be understood as an application of the political question doctrine. *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 544 (1950); *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953); *Leng May Ma v. Barber*, 357 U.S. 185 (1958); *Rogers v. Quan*, 357 U.S. 193 (1958). *But see*: *United States ex rel. Paktorovics v. Murff*, 260 F.2d 610 (2d Cir. 1958). This political-question character seems to me most obvious in the *Mezei* case where petitioner, after twenty-five years of residence, had left the United States for a visit abroad and, upon his return, was denied entry "for security reasons" which were never disclosed to him and, of course, without a hearing. As both he and the State Department had failed to get him admitted into any other country, the Court's dismissal of his petition of habeas corpus (which had been

the government's policies to any significant degree. The political question doctrine was applied only in a handful of cases in which the measures challenged were so hair-raising that an affirmation on the

successful below) meant that his detention at Ellis Island would continue indefinitely. As Justice Jackson, dissenting, pointed out, it was impossible to hold that, as a matter of constitutional law, the government could decide to indefinitely incarcerate a person without any procedural safeguards whatever. The majority position becomes tenable only if understood as a decision to accept without examination the Congressional determination of the Fifth-Amendment issue.

(2) Deportation: After a sweeping assertion of the political-question character of the deportation decision in *Fong Yue Ting v. United States*, 149 U.S. 698 (1893), the Court soon recognized the applicability of minimal standards of *procedural due process* in the *Yamataya* case, *supra*, and has since then consistently adhered to this position. See, e.g., *Low Wah Suey v. Backus*, 225 U.S. 460 (1912); *Zakonaite v. Wolf*, 226 U.S. 272 (1912); *Mahler v. Eby*, 264 U.S. 32 (1924); *United States ex rel. Tisi v. Tod*, 264 U.S. 131 (1924); *United States ex rel. Vatjauer v. Commissioner*, 273 U.S. 103 (1927); *Bridges v. Wixon*, 326 U.S. 135 (1945); *Wong Yang Sung v. McGrath*, 339 U.S. 33 (1950); *Kwong Hai Chew v. Colding*, 344 U.S. 590 (1953). But see *Ludecke v. Watkins*, 335 U.S. 160 (1948), where the decision to deport an *alien enemy* was held to be immune to all judicial scrutiny.

While permitting judicial review of the *procedural* fairness of a deportation decision, the Court has consistently refused to enforce any *substantive* limitations upon the power of Congress to order the "deportation of aliens whose presence in this country it deems hurtful." However, as Siegfried Hesse has shown, this rule was developed in cases where constitutional objections were either not raised at all, or where any substantive due process claim would have been quite insubstantial because the deportees had either entered the country unlawfully or had, soon after entry, engaged in activities from which it could be inferred that, at the time of entry, they had belonged to the class of immigrants who were to be excluded. Hesse, *The Constitutional Status of the Lawfully Admitted Permanent Resident Alien: The Pre-1917 Cases*, 68 YALE L.J. 1578 (1959); Hesse, *The Constitutional Status of the Lawfully Admitted Permanent Resident Alien: The Inherent Limits of the Power to Expel*, 69 YALE L.J. 262 (1959). In addition to the cases cited above, see *Costanzo v. Tillinghast*, 287 U.S. 341 (1932); *Ng Fung Ho v. White*, 259 U.S. 276 (1922); *Bugajewitz v. Adams*, 228 U.S. 585 (1913).

The unambiguous assertion that a lawfully admitted permanent resident alien could be deported for reasons which arose long after entry appeared first in a dictum in *Carlson v. Landon*, 342 U.S. 524, 534-37 (1952), and became the basis of the decisions in *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952), and *Galvan v. Press*, 347 U.S. 522 (1954). While the Court in both cases emphasized the peculiarly "political" nature of the power to deport and its close relationship to the conduct of foreign affairs over which the Court disclaimed any pretensions of control, the opinions also relied heavily on the language of the earlier cases which were (permissive) constitutional decisions on the merits. Again, I read *Harisiades* and *Galvan* as political-question cases because they appear to me indefensible as determinations of the constitutional issues raised. Granted the wide sweep of the foreign-relations and war powers, their exercise is still subject to the due-process requirement of a minimal rational relationship to a proper governmental purpose if severe deprivations are to be inflicted upon an individual. See, e.g., *Aptheker v. Secretary of State*, 378 U.S. 500 (1964); *Schneider v. Rusk*, 377 U.S. 163 (1964); *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963); *Woods v. Miller Co.*, 333 U.S. 138 (1948); *Chastleton Corp. v. Sinclair*, 264 U.S. 543 (1924). If this is the constitutional standard, it seems impossible to conclude that there should be nothing wrong with deporting (to their non-Communist

merits seemed indefensible, while any intervention in favor of the petitioners would have considerably limited the government's freedom of action. Again it was Justice Jackson who attempted to justify these results on functional grounds. A more humane treatment of aliens, here and abroad, might be most desirable; however,

It should not be initiated by judicial decision which can only deprive our own Government of a power of defense and reprisal without obtaining for American citizens abroad reciprocal privileges or immunities. Reform in this field must be entrusted to the branches of the Government in control of our international relations and treaty making powers.²¹⁹

The decision to deport an alien is here seen as part of an international context of interaction of which only one segment, the actions and reactions of the American government, could potentially be controlled by the Court's choice of policy. By determining only this partial aspect of the problem, the Court might prevent or make more difficult an appropriate inclusive solution.²²⁰

The more limited rationale which emerges from these cases is that the Court will hesitate to limit the freedom of action of those departments which have a responsibility for dealing with the broader context beyond the limits of the Court's power to shape and to control.²²¹ Just

countries of origin) aliens who had lived in the United States since their early youth, whose spouses and children were native-born citizens, and whose association with the Communist Party had ended long ago and had been lawful at the time, or who had been unaware of the Party's objectives at the time of their membership in a "front organization." Rather than holding that these deportations were reasonably related to proper foreign relations or war power purposes, the cases decided that it was for Congress, rather than for the Court, to make this constitutional judgment. See also Bullitt, *Deportation as a Denial of Substantive Due Process*, 28 WASH. L. REV. 205 (1953); Note, *Deportation and Due Process*, 5 STAN. L. REV. 722 (1953); Comment, *Deportation and Exclusion: A Continuing Dialogue Between Congress and the Courts*, 71 YALE L.J. 760 (1962); Note, *Resident Aliens and Due Process: Anatomy of a Deportation*, 8 VILL. L. REV. 566 (1963).

219. *Harisiades v. Shaughnessy*, 342 U.S. 580, 591 (1952).

220. In the *Sabbatino* case, Justice Harlan pointed to a somewhat similar problem, explaining that judicial determination of the validity of foreign expropriations could only have an occasional impact, depending upon the fortuitous circumstance of the property in question being brought into the United States. On those occasions, however, they might seriously interfere with negotiations carried on by the Executive Department for the purpose of obtaining general redress for all claimants. 376 U.S. 393, 431-32 (1964).

221. A similar rationale has been suggested by Professor Jaffe:

We might conclude that it is not the subject matter as such which is political (though foreign affairs might appear to suggest the contrary). It is rather that the question is one for the decision of which there are no well-developed principles, or the issue is felt to be so closely related to a complex of decisions not within the

as in *Mississippi v. Johnson*²²² the Court would not enjoin the President from enforcing the Reconstruction Acts because it could not have protected him against the threat of impeachment if he had obeyed the Court's order, the Court will also exercise restraint in situations where its decision might frustrate or embarrass the government's conduct of foreign affairs.

Of course, it is easy to overstate the dangers of embarrassment abroad, and I am convinced that the Court has in numerous instances misjudged and overestimated these implications. In the deportation case for which Justice Jackson has formulated this rationale, it is quite difficult to see how the expulsion of permanent resident aliens who for over thirty years had lived in the United States, because of their former membership in the Communist party, could be regarded as the exercise of a "power of defense and reprisal" against their non-Communist states of origin, or how the recognition of a substantive due process claim with a view to the extraordinary equities of these cases could have interfered with the evolution of international standards for the protection of aliens. Equally vulnerable are the sovereign immunity cases, which the Court has explained on the ground that "every judicial action exercising or relinquishing jurisdiction over the vessels of a foreign government has its effect upon our relations with that government" and that therefore "the courts should not so act as to embarrass the executive arm in its conduct of foreign affairs."²²³ This contention has been persuasively answered by the suggestion, which has now found support in the *Sabbatino* case,²²⁴ that the State Department may be much more embarrassed by the necessity to take a stand on questions of this nature than by the need to explain the decisions of American courts to a foreign government.²²⁵ And it seems even less

court's jurisdiction that its resolution by the court would either be poor in itself or would jeopardize sound decisions in the larger complex.

Jaffe, *Standing to Secure Judicial Review: Public Actions*, 74 HARV. L. REV. 1265, 1304 (1961).

222. 71 U.S. (4 Wall.) 475, 501 (1867).

223. *Mexico v. Hoffman*, 324 U.S. 30, 35 (1945).

224. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 436 (1964). Justice Harlan dealt here with a suggested extension of the *Bernstein* exception which would have limited the application of the act-of-state doctrine to those cases in which the State Department has expressly stipulated that it does not wish the courts to pass on the validity of foreign acts. If such a doctrine "would work serious inroads on the maximum effectiveness of United States diplomacy," it is hard to see why the similar involvement of the Department in immunity cases should have the opposite effect of preventing "embarrassment" for American diplomacy.

225. This objection seems to have been first raised in Note, *Judicial Deference to the State Department on International Legal Issues*, 97 U. PA. L. REV. 79, 91 (1948). See also

persuasive that Justice Jackson, dissenting in the *Vermilya-Brown* case,²²⁶ would have deferred to the State Department's remonstrance on the question whether the Fair Labor Standards Act of 1939 should be construed as applying to American employers and employees working on United States bases in the Bermudas which had been leased from Great Britain. There was no doubt that Congress could govern the conduct of American citizens abroad, and it was made quite clear by the majority that the application of the Act would not be based on the assumption that the United States exercised international sovereignty on the Bermudas. Still, the State Department was concerned that Britain might somehow misunderstand the decision and take offense, and Jackson would have regarded that concern as controlling.

But after all this has been said, there remains for certain situations a legitimate concern that the Court might interfere with the broader responsibilities of the political departments. Thus, in *United States v. Pink*,²²⁷ the Court found it necessary to accept the "policy of recognition" implied in the Litvinov Assignment as controlling for the question of the validity of Soviet expropriations in order to avoid any interference with the President's attempt to deal with the problem of Russian debts as a political prerequisite for recognition.²²⁸

4. *Normative Limitations of the Political Question*

Foreign affairs is surely not the only field in which the Court is faced with problems of information and responsibility; at the very least the cases which dealt with military measures in war or, more generally, with measures taken in the interest of national security, would seem to have presented functional difficulties of a very similar order. But in spite of these similarities, the political question doctrine has found only very limited application in the war and security cases. I am persuaded that this difference can be explained by the prevalence of constitutional issues in this area.

In the great majority of these cases, the Court has upheld challenged measures as not unconstitutional; the case went against the government

MCDUGAL & BURKE, *THE PUBLIC ORDER OF THE OCEANS* 154 (1962); Lauterpacht, *The Problem of Jurisdictional Immunities of Foreign States*, 28 BRIT. YB. INT'L L. 220, 240 (1951).

226. *Vermilya-Brown Co. v. Connell*, 335 U.S. 377, 390-409 (1948).

227. 315 U.S. 203 (1942). See also note 95 *supra*.

228. Similar considerations may also explain the conflicting decisions concerning the constitutional time limits for the exercise of the war power, which the Court has usually regarded as a justiciable issue, applying the political question doctrine only in cases affecting alien enemies. See note 196 (3) *supra*.

in only a few celebrated decisions concerning violations of important constitutional rights,²²⁹ which decisions were often announced after the emergency that gave rise to the violation had passed. And even in the field of foreign affairs, where the functional grounds for abstention are strongest, the Court has, at least in one line of cases,²³⁰ enforced the standards of the Bill of Rights without any deference to the international responsibilities of the government. It seems, therefore, that the Court is limiting the thrust of the functional rationales for the political question by a normative qualification: where important individual rights are at stake, the doctrine will not be applied. Apart from the exclusion and deportation cases in which the Court, not altogether persuasively, found the due-process issue overshadowed by the question of American policies towards the alien's state of origin, there seem to be very few exceptions²³¹ to the general rule that the Court will not apply the doctrine to the guarantees of the Bill of Rights. This does not mean, of course, that the Court has always been a very "activist" defender of individual rights. It may avoid such issues on procedural or jurisdictional grounds, it may delay decisions until the war is won, or it may uphold military measures on the narrowest possible grounds. But it seems that the Court is quite unwilling to abdicate its responsibility for ultimately (which has often meant: in the post-war period and with a view to influencing governmental conduct in future crises) striking the balance between military power and individual rights. The very fact that it has sometimes, particularly with regard to Japanese relocation and martial rule on Hawaii,²³² disregarded considerable functional doubts about its capacity to arrive at realistic and responsible decisions seems to show that the Court finds the determination of such issues so central to its function that it is willing to pay a very high price in order to avoid a general delegation of this task to the political or military authorities. And now that the Court has chosen to remove the political-question cloud from malapportionment by defining the issue in terms of individual rights violated, the empirical argument for this normative limitation of the political question doctrine appears even stronger.

229. See, e.g., *Aptheker v. Secretary of State*, 378 U.S. 500 (1964); *Duncan v. Kahanamoku*, 327 U.S. 304 (1946); *United States v. L. Cohen Grocery Co.*, 255 U.S. 81 (1921); *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866); *Mitchell v. Harmony*, 54 U.S. (13 How.) 115 (1851).

230. *McElroy v. United States ex rel. Guagliardo*, 361 U.S. 281 (1960); *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234 (1960); *Reid v. Covert*, 354 U.S. 1 (1957).

231. The clearest of these exceptions, *Moyer v. Peabody*, 212 U.S. 78 (1909), was all but overruled by *Sterling v. Constantin*, 287 U.S. 378 (1932).

232. *Duncan v. Kahanamoku*, 327 U.S. 304 (1946).

The political question also has had no place when the Court was presented with conflicting claims of competence among the departments of the federal government, or between the federal government and the states. Such issues were decided on their merits even in the field of the foreign affairs power,²³³ and *The Steel Seizure Case*²³⁴ and *The Pocket Veto Case*²³⁵ confirm this rule for the allocation of competence in the fields of the emergency power and of legislative power. Of these, at least *The Steel-Seizure Case* raised serious functional problems of information and responsibility.²³⁶ However, if the Court had deferred to the claims asserted by one of the conflicting departments, such a decision would have delegated to that department general competence to allocate competence under the Constitution, and would have been a constitutional decision of much greater import than a decision on the merits.²³⁷

While the application of the political question to conflicts among the departments of the federal government appears theoretically impossible—to which of these co-equal branches of the government should the Court have delegated the power to settle their dispute?—this is not quite as categorically true for conflicts between the federal government and the states. It is at least conceivable that the political question doctrine, rather than the permissive interpretation of enumerated federal powers, might have been employed to give the federal government *plein pouvoir* with respect to the states. But here, too, the Court has refused to abdicate its responsibility for the authoritative determination of questions of competence.

The only instances in which the doctrine was clearly applied²³⁸ to a

233. See cases cited notes 86, 88 *supra*.

234. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

235. 279 U.S. 655 (1929). The Court has also decided that a two-thirds majority of the members present (provided they constitute a quorum), rather than two-thirds of all members of both Houses, was sufficient to override a presidential veto. *Missouri Pac. Ry. v. Kansas*, 248 U.S. 276 (1919).

236. It has been suggested that a shortage of ammunitions in Korea resulted from the strike which the decision made possible. See HART & WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 1211 (1953).

237. *Field v. Clark*, 143 U.S. 649 (1892), and the other political question cases concerning legislative procedure, cases cited note 106 *supra*, are not in conflict with this rule. Of course, they dealt with questions of competence in the context of the legislative process. But, as I pointed out above, there were no *conflicting claims of competence* involved. The legislative majorities which allegedly had been deceived would have been in an optimal position to ascertain the true facts and to prevent or correct any inroads upon their power to decide. Their acquiescence was, therefore, conclusive evidence that no such infringements had in fact occurred.

238. I do not regard *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475 (1867), *Georgia v. Stanton*, 73 U.S. (6 Wall.) 50 (1867), and *Massachusetts v. Mellon*, 262 U.S. 447 (1923), as

constitutional question of federal power are the cases dealing with the status of Indian tribes.²³⁹ As long as the objects of federal regulation were Indians in the racial and cultural sense,²⁴⁰ and as long as their numbers in the territory to which the regulation applied had not become totally insignificant,²⁴¹ the Court would defer to the federal government on the constitutional issue of whether the process of their assimilation had reached a stage in which the exercise of a special protective power of the federal government was no longer justified. To the extent that such federal regulations displaced the general governmental powers of the states within which these Indians resided, the federal government was in fact invested with a limited competence to allocate competence. This result conflicts with the normative limitation of the political question which I have suggested; it appears that the Court was persuaded of the hostility of the states against the Indians,²⁴² and therefore sought to maximize the scope of federal protection.²⁴³

clear exceptions to this rule. While in all these opinions there are political question overtones, it seems to me that the results are very closely tied to the jurisdictional and procedural constellations of the concrete cases, turning on the nature of the interest asserted by the parties plaintiff, or on the nature of the remedy sought against a particular defendant, without categorically putting the issues themselves beyond the Court's competence to decide, as a political question decision would have done. See *supra* note 122. The same is, of course, true for *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831). See note 120 *supra*. It is true that Chief Justice Marshall expressed doubts about the Court's competence to decide even if the Cherokees had been a "foreign state" within the meaning of Art. III. But these doubts concerned the propriety of enjoining the legislature of Georgia and of restraining its physical force, not the Court's competence to decide the issue as such "in a proper case, with proper parties." *Id.* at 20.

239. See, e.g., *United States v. Nice*, 241 U.S. 591 (1916); *United States v. Sandoval*, 231 U.S. 28, 46 (1913); *United States v. Rickert*, 188 U.S. 432 (1903); *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903); *United States v. Holliday*, 70 U.S. (3 Wall.) 407, 419 (1866).

240. *United States v. Sandoval*, *supra* note 239, at 46:

Of course, it is not meant by this that Congress may bring a community or body of people within the range of this power by arbitrarily calling them an Indian tribe, but only that in respect of distinctly Indian communities the questions whether, to what extent, and for what time they shall be recognized and dealt with as dependent tribes requiring the guardianship and protection of the United States are to be determined by Congress, and not by the courts.

This case overruled *United States v. Joseph*, 94 U.S. 614 (1877), on the question of whether the Pueblos were subject to the federal power over Indians.

241. *Perrin v. United States*, 232 U.S. 478 (1914), *Johnson v. Gealds*, 234 U.S. 422, 447 (1914).

242. See, e.g., *United States v. Kagama*, 118 U.S. 375, 383-84 (1886):

These Indian tribes are the wards of the nation. They are communities dependent on the United States. . . . Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power.

243. See POST, THE SUPREME COURT AND POLITICAL QUESTIONS 112-18 (1936).

5. *Additional Factors of the Political Question*

I have so far tried to show that the Court may apply the political question doctrine when its access to relevant information is insufficient to assure the correct determination of particular issues, when the Court would have to question the position taken by the government in an international dispute, or when an independent determination by the Court would interfere with the specific responsibilities of another department for dealing with a wider context which itself would be beyond the Court's reach. But even though one or more of these factors may be present, the Court will not usually apply the doctrine to the constitutional guarantees of individual rights and to conflicts of competence among the departments of the federal government and between the federal government and the states. These factors would seem to explain the patterns of decisions in the fields of the foreign relations and war powers and of legislative procedure. The only political question cases that cannot readily be explained by the functional considerations outlined above are the cases arising under the guarantee clause. In addition, the position taken by Justice Black in his concurring opinion in *Coleman v. Miller*²⁴⁴ points to an important, though unique, functional factor for the political question which merits further discussion.

As was pointed out above, in the *Coleman* case the Court refused to review the validity of Kansas' ratification of the Child Labor Amendment which had been proposed by Congress in order to overcome the effect of the Court's constitutional holding in *Hammer v. Dagenhart*.²⁴⁵ The Chief Justice and two other members of the majority in *Coleman* held that it was for Congress to determine whether the proposed amendment had lost its vitality because more than a "reasonable time" had elapsed since its proposal. Justice Black, in an opinion which was joined by Justices Roberts, Frankfurter, and Douglas, would have given the political question doctrine a much wider sweep. In his view, Article V granted "power over the amending of the Constitution to Congress alone." This power was "complete" and "exclusive," and the amending process itself was "'political' in its entirety, from submission until an amendment becomes part of the Constitution, and . . . not subject to judicial guidance, control or interference at any point."²⁴⁶ Accordingly, the Chief Justice was wrong in retaining for the Court the task of constitutional interpretation, leaving to Congress only the application of Court-defined standards to the facts deter-

244. 307 U.S. 433, 459 (1939).

245. 247 U.S. 251 (1918).

246. 307 U.S. at 459.

mined by Congress. If Congressional power was exclusive, the Court was "wholly without constitutional authority" to express any opinion on the proper interpretation of Article V. Justice Black did not explain why this should be so, and he chose not to discuss the precedents which were against him.²⁴⁷ I am inclined, however, to accept the wisdom of his conclusions as a recognition of the inherent limits of the power of judicial review in a democratic polity.

Whether judicial review of legislation is expressly established by the Constitution, as it is in West Germany, or whether the power has been seized by the Court in the absence of a compellingly clear textual authorization, its exercise will necessarily exist in tension with the democratic principle of majority rule. The more it becomes obvious that constitutional interpretation is not the exercise in pure logic for which Chief Justice John Marshall tried to pass it off in *Marbury v. Madison*, that it requires the Court to choose among alternative policies and among conflicting values, and that reasonable men might reasonably differ about many of these choices, the more obvious and the more important is the need for relating judicial review to democratic principle. It is very well to assert that this is a society deeply committed to the rule of principle, and that judicial review is no more than the expression of the "sober second thought of the community," but it is surely no longer enough merely to postulate the identity of the Court's interpretation with this community consensus, or to refer to it in the purely fictitious sense in which Hamilton referred to the "people" in No. 78 of the *Federalist*. The reference must have a core of realism, and there may be no better way of assuring its continuing realism than the processes by which the community, if upon second thought it should still disagree with the Court, is able to override its vetoes. The Court's own sensitivity to the community consensus is part of these processes, as is the President's strategic employment of his power to appoint the mem-

247. The Court had consistently decided on their merits all constitutional questions arising from the amending process, but it should also be noted that all these decisions had gone against the challengers: *Hollingsworth v. Virginia*, 3 U.S. (3 Dall.) 378, 381 (1798) (the President does not participate in the proposal of an amendment); *Hawke v. Smith* No. 1, 253 U.S. 221 (1920) (the states may not submit the ratification decision to a popular referendum); *National Prohibition Cases*, 253 U.S. 250, 386 (1920) (proposal by two thirds of both Houses of Congress requires only the assent of two thirds of the members present as long as these constitute a quorum to do business); *Leser v. Garnett*, 258 U.S. 130 (1922) (the states cannot exclude or restrict the power of their legislatures to ratify amendments to the federal constitution); *United States v. Sprague*, 282 U.S. 716 (1931) (Congress may choose ratification by state legislatures rather than by conventions, even if the amendment should enlarge federal powers at the expense of "powers reserved to the people" by the Tenth Amendment).

bers of the Court. Congressional power to regulate and to withdraw the Court's appellate jurisdiction may be used as an emergency brake with the undesirable consequences which the simile suggests. But it is surely the most direct, the most weighty and the most legitimate manifestation of the democratic principle if the community undertakes to go through the cumbersome deliberative process of constitutional amendment in order to express its consensus about what ought to be. It is one thing for the Court to strike down the Child Labor Law as incompatible with its choice of constitutional values, and it is difficult enough to square this with democratic principle, but it would seem to be quite a different matter if the Court could, by a narrow interpretation of the amendment procedures, prevent the ratification of the amendment which was intended to overrule *Hammer v. Dagenhart*.²⁴⁸ Of course, the amendment process is itself governed by the Constitution, and it is by no means inconceivable that an amendment might be unconstitutional. But this seems to be one instance in which the Court cannot assume responsibility for saying "what the law is" without, at the same time, undermining the legitimacy of its power to say so. I do not find it paradoxical to insist that judicial review in a democracy remains defensible only to the extent that the Court itself will be defenseless against the processes through which the community may assert and enforce its own considered understanding of its basic code.

It is much more difficult to find a functional explanation for all of the guarantee-clause cases. At the outset, it seems necessary to distinguish between two different problem situations: those involving the recognition of a state government, and those involving challenges to individual state measures as violative of the standards of republican government. In *Luther v. Borden*,²⁴⁹ the Court was directly faced with the need to decide which of two competing groups, the "Charter" government or the Dorr government elected under the "People's Constitution," had been the lawful government of Rhode Island during a period of revolutionary unrest in 1842. Chief Justice Taney explained that this was primarily a question of state law which the state courts had decided in favor of the Charter government. And to the extent that the federal government had any constitutional warrant for interfering with such contests, Article IV § 4 of the Constitution²⁵⁰ had delegated this power to the political departments:

248. *Supra* note 245.

249. 48 U.S. (7 How.) 1 (1849).

250. The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on

Under this article of the Constitution 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. . . .²⁵¹

Congress, however, had had no opportunity to seat members from Rhode Island during the period of unrest, and so the Court turned to the President's statutory authority to enforce the guarantee against domestic violence as another source of federal power to recognize state governments. While the President had not in fact called out the militia, he had promised to support the Charter government if the necessity should arise, and this commitment had been decisive for the outcome of the revolutionary struggle. The Court held that this commitment was conclusive in the same way in which the President's recognition of a foreign government would bind the judiciary.²⁵²

This analogy to the Court's acceptance of the recognition of foreign governments seems quite persuasive in this situation. In both instances, there is a problem of information insofar as the result would depend on whether one or the other of the competing groups had in fact established an effective government in the state. To the extent that the decision would also turn on whether the established *de facto* government was the lawful authority in the state, the Court found that the President had committed the federal government in the exercise of his specific responsibility for maintaining domestic peace. As the Court would be as unable to control and direct the outcome of a civil war as it is unable to direct the conduct of foreign powers, it would seem to follow that it should neither interfere during the struggle, nor express a belated disapproval of the President's choice.

The actual holding of the case appears to be quite unproblematical, and as far as the dicta quoted above are concerned, which would have treated a Congressional determination that the state government was "republican" as conclusive upon the courts, it should be remembered

Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

251. 48 U.S. (7 How.) at 1, 42 (1849). (Footnote omitted.)

252. *Id.* at 43-4.

that they appear in a "recognition" case and that they had the purpose of establishing a Congressional power to determine which of two competing groups was the lawful government of the state.

The Court relied upon these dicta for the same purpose in two later recognition cases. *Texas v. White*²⁵³ held that only Congress had power to reestablish and to recognize governments in the rebel states. In view of the fact, however, that in the Reconstruction Acts Congress had expressly declared the existing Texan government to be illegal and unrepresentative and had not seated Congressmen from the state, the Court's ability to find an implied recognition of this government in these same statutes seems evidence for a degree of judicial independence which was not quite compatible with the postulated "political" character of recognition.²⁵⁴ The political question doctrine was again applied in a "recognition" case²⁵⁵ in which the Court had been asked to determine which of two candidates had been elected Governor of Kentucky. Insofar as the candidate ousted by the legislature of the state under rather dubious circumstances had relied on the guarantee clause, the Court cited *Luther v. Borden* for the rule that "enforcement of this guarantee belonged to the political department."²⁵⁶

It seems important, however, that even in the exercise of its guarantee powers Congress is not immune to all judicial scrutiny. Thus in one case²⁵⁷ the Court found the contract clause violated by a provision of Georgia's reconstruction constitution the adoption of which had been required by Congress as a condition for recognizing the state's government as lawful and representative. And in a later case,²⁵⁸ the Court invalidated a provision in the Oklahoma Enabling Act which pro-

253. 74 U.S. (7 Wall.) 700, 730 (1869).

254. *Id.* at 730-31. See also Justice Grier's dissenting opinion, *id.* at 737, 738.

Mr. Field tried to explain the case by the theory that "a state does not need to have a representative government in order to maintain suit in the Supreme Court." Field, *The Doctrine of Political Questions in the Federal Courts*, 8 MINN. L. REV. 485, 503 (1924). But that would not be enough. The Court would also have had to hold that a state does not need to have a *de jure* government in order to sue, which, in view of the cases denying the right to sue to foreign *de facto* governments, would have been quite difficult to maintain. See also Post, *THE SUPREME COURT AND POLITICAL QUESTIONS 25-7* (1936).

255. *Taylor v. Beckham*, 178 U.S. 548 (1900).

256. *Id.* at 578.

257. *White v. Hart*, 80 U.S. (13 Wall.) 646 (1872).

258. *Coyote v. Smith*, 221 U.S. 559, 566, 567 (1911). See also *Reynolds v. Sims*, 377 U.S. 533 (1964), in which Chief Justice Warren rejected the argument that Congress, in admitting new states whose legislatures were not elected under a one-man-one-vote system of apportionment, had conclusively determined the constitutionality of malapportionment in the exercise of its guarantee power. Even in the exercise of this competence, the Chief Justice asserted, "Congress simply lacks the constitutional power to insulate States from attack with respect to alleged deprivations of individual constitutional rights." *Id.* at 582.

hibited for a certain time a change of the state capital, explaining that even under its guarantee power Congress could not admit a new state under restrictions which would deprive it of equality with other members of the Union.

If the Congressional power to establish, or to recognize, state governments is not free from judicial control, there would seem to be even less reason for judicial abstention in situations which do not involve this political recognition at all. This at least seems to have been the Court's assumption in a number of cases which challenged state statutes as being repugnant to the standards of republican government.²⁵⁹ While the Court usually upheld these statutes, it seems to have had no doubt that the guarantee clause imposed some substantive limitations on the states, and that the Court was capable of defining and applying these standards.

This evolution of the constitutional law of republican government was suddenly reversed in *Pacific States Tel. Co. v. Oregon*.²⁶⁰ Oregon had, in 1902, adopted a constitutional amendment introducing initiative and referendum procedures, and it had enacted through initiative a special tax on the gross revenues of telephone and telegraph companies. Defendant company had failed to pay this tax, claiming that the initiative procedures by which it had been adopted were a form of direct democracy incompatible with the standards of republican government. In a unanimous opinion written by Chief Justice White, the Supreme Court dismissed the writ of error for want of jurisdiction, relying on *Luther v. Borden* as the "leading and absolutely controlling case."

Why *Luther* should have been relevant at all becomes clear in the following passage:

Before immediately considering the text of § 4 of Art. IV . . . let us briefly fix the inconceivable expansion of the judicial power and the ruinous destruction of legislative authority in matters purely political which would necessarily be occasioned by giving sanction to the doctrine which underlies and would be necessarily involved in sustaining the propositions contended for. First.

259. See, e.g., Attorney General of Michigan *ex rel. Kies v. Lowry*, 199 U.S. 233 (1905) (republican government not violated by legislative creation and alteration of school districts); *Forsyth v. City of Hammond*, 166 U.S. 506 (1897) (republican government is not violated by delegation of power to a court to determine municipal boundaries); *Minor v. Happersett*, 88 U.S. (21 Wall.) 162 (1875) (republican government does not require women suffrage). See also the attempts to define the essential elements of a republican government found in *The Collector v. Day*, 78 U.S. (11 Wall.) 113 (1871); *In re Duncan*, 139 U.S. 449, 461, 462 (1891).

260. 223 U.S. 118 (1912).

That however perfect and absolute may be the establishment and dominion in fact of a state government, however complete may be its participation in and enjoyment of all its powers and rights as a member of the national Government, and however all the departments of that Government may recognize such state government, nevertheless every citizen of such State or person subject to taxation therein, or owing any duty to the established government, may be heard, for the purpose of defeating the payment of such taxes or avoiding the discharge of such duty, to assail in a court of justice *the rightful existence of the State*. Second. As a result, it becomes the duty of the courts of the United States, where such a claim is made, to examine as a justiciable issue the *contention as to the illegal existence of a State* and if such contention be thought well founded *to disregard the existence in fact of the State, of its recognition by all of the departments of the Federal Government*, and practically award a decree *absolving from all obligation to contribute to the support of or obey the laws of such established state government*. And as a consequence of the existence of such judicial authority a power in the judiciary must be implied, unless it be that anarchy is to ensue, to build by judicial action upon the ruins of the previously established government a new one, a right which by its very terms also implies the *power to control the legislative department of the Government of the United States in the recognition of such new government and the admission of representatives therefrom*, as well as to strip the executive department of that government of its otherwise lawful and discretionary authority.²⁶¹

After this parade of horrors the ensuing question whether the guarantee clause should bring about "these strange, far-reaching and injurious results"²⁶² was, of course, purely rhetorical. But so, it seems to me, are the horrors themselves. All this verbiage can be reduced to two propositions. If the Court should decide the case on its merits, and if it should hold for defendants, this decision would destroy the validity of all acts of the state government, freeing the state's citizens from all duty to obey state law and to pay state taxes, and it would force the Court into a direct conflict with the recognition powers of Congress and of the President. Why this should be so is explained only by the postulate that "it cannot be assumed . . . that there is at one and the same time one and the same government which is republican in form and not of that character."²⁶³

This is conceptualism in its least attractive form, and *prima facie* no more persuasive than the theory that the whole state government

261. *Id.* at 141-42. (Emphasis added.)

262. *Id.* at 142.

263. *Id.* at 141.

should be unconstitutional if some aspect of the state's criminal procedure is found wanting under the due process clause. I am unable to see why the guarantee clause must be read as permitting only one indivisible characterization of the indivisible legality of the state's government as such, and why it should be impossible to differentiate and specify the constitutional implications of republican government, and to hold that individual state measures are, or are not, in conflict with specific aspects of this constitutional standard.

It is true that in *Luther v. Borden* Chief Justice Taney had paraded similar horrors.²⁶⁴ But there they had some reality because plaintiff had to argue that the Charter government itself was unlawful and *therefore* could not validly authorize the defendant militiamen to break into his house. Thus, in *Luther* the unlawfulness of the concrete measure complained of would have had to follow from the illegality of the whole government, while here the challenge to a tax allegedly adopted by an unconstitutional procedure could only by semantic extrapolation be construed as an attack "on the State as a State."²⁶⁵

Furthermore, in *Luther* one of the political departments had in fact committed the federal government to the recognition of the Charter government, while here not even Chief Justice White was willing to assert that Congress had at all concerned itself with the constitutionality of Oregon's initiative and referendum amendments, or that the admission of Representatives and Senators from Oregon could in any realistic fashion be construed as an actual political determination of this issue.

Of course, a decision for defendant in this case would, by implication, have denied the validity of all laws which had been adopted by initiative, and depending on their number and importance, this might indeed have produced some substantial disorder and problems of adjustment.²⁶⁶ Furthermore, it is not altogether inconceivable that initiative and referendum might have been sufficiently important to catch the attention of Congress and to bring about a political determination of their legitimacy.

264. 48 U.S. (7 How.) 1, 38-9 (1849).

265. 223 U.S. at 150.

266. If it should have held for defendant on the merits (which seems unlikely), the Court might have lessened the impact of its decision by applying it prospectively to the statutes adopted by initiative and referendum, relying on the effectiveness of acts of a *de facto* government for such a result. See cases cited note 96 *supra* and *Mauran v. Insurance Co.*, 73 U.S. (6 Wall.) 1 (1868); *United States v. Insurance Cos.*, 89 U.S. (22 Wall.) 99 (1875), applying the *de facto* doctrine to acts of the rebel governments. See also *Lyons v. Woods*, 153 U.S. 649, 669 (1894) and *Baker v. Carr*, 369 U.S. 186, 250 n.5 (1962) for the effectiveness of statutes passed by an improperly elected legislature.

But if the *Pacific States* decision might find some functional justification as a deference to a *potential* political determination by Congress, the same can surely not be asserted with regard to many of the later cases which applied the political question doctrine to all claims raised under the guarantee clause. The chances are more than remote that Congress would consistently concern itself with questions such as whether Nebraska may delegate to an inferior court the power to organize and manage drainage districts,²⁶⁷ or whether Virginia could delegate to its Milk Commission the power to fix prices for cream,²⁶⁸ or even whether Ohio could require the concurrence of all but one of the judges of its Supreme Court for invalidating a statute.²⁶⁹ These and similar applications of the *Pacific States* rule,²⁷⁰ can be explained neither by the magnitude of the problems which a decision on the merits would have entailed, nor by the superior fitness of a political decision. They seem to be based on the mechanical invocation of a rule which had little functional justification even in the case in which it was first announced.

Of course, in *Baker v. Carr*, both Justice Brennan²⁷¹ and Justice Frankfurter²⁷² attempted to explain these holdings by the "lack of criteria by which a court could determine which form of government was republican." I find this "cognitive" theory as unconvincing here as it is elsewhere. By the time of the *Pacific States* decision, the Court had only begun the task of defining republican government, and it seemed that its definition would, on the whole, be rather permissive. Now that the process has been interrupted, it is of course true that the present contours of the guarantee clause are vague and indefinite. But how "justiciable" would First-Amendment issues appear today if the process of interpretation and application had been halted in 1912? However this may be, if Justice Frankfurter was right in asserting in *Baker v. Carr* that "the present case involves all the elements that have made the Guarantee Clause cases non-justiciable. It is, in effect, a Guarantee Clause claim masquerading under a different label,"²⁷³ then the Court's recent apportionment decisions effectively undermine whatever justifi-

267. *O'Neill v. Leamer*, 239 U.S. 244, 248 (1915).

268. *Highland Farms Dairy, Inc. v. Agnew*, 300 U.S. 608, 612 (1937).

269. *Ohio ex rel. Bryant v. Akron Park Dist.*, 281 U.S. 74, 79-80 (1930).

270. And see cases discussed in Bonfield, *The Guarantee Clause of Article IV, Section 4: A Study in Constitutional Desuetude*, 46 MINN. L. REV. 513, 556-58 (1962).

271. 369 U.S. 186, 222-24 (1962).

272. *Id.* at 289-97.

273. *Id.* at 297.

cation there might have been for the later guarantee clause cases. And I am fully persuaded that Justice Frankfurter was right on this point.²⁷⁴

* * * *

If I have not been able to see the sense of all political question cases, one must presume that the fault is entirely mine. But whatever sense I have been able to find seems to point toward an understanding of the doctrine, which, while perhaps not unimportant, is quite limited in its scope of actual and potential relevance, and the doctrinal implications of which appear to be much more modest than those of any of the theories of political questions which have been discussed.

The emphasis of the political question is on the "foreign relations law," and within this field on questions of international and domestic law which immediately concern the political or military interactions of the United States with foreign states. In this field, the Court is confronted with a wider context in which domestic courts may not be sure of their grasp of all relevant data and in which they cannot even potentially determine the conduct of all important participants in the process of interaction. Deference to those departments of the government which have a specific responsibility for the actions and reactions of the United States in the external arena would appear to be no more than the realistic acknowledgment of the functional limitations of the judicial process.

Beyond this, the doctrine has been restricted to a few, narrowly circumscribed issues of constitutional law. The rationale of the political question decisions concerning the power over Indians, the amendment process, and some questions of the legislative process, appears to be limited to these specific issues, and the potentially most far-reaching expansion of the doctrine into the field of reapportionment has been reversed on grounds which may well militate against the further vitality of the political question even for questions arising under the guarantee clause. And it is important that, with very few exceptions, the doctrine has not been permitted to gain a permanent foothold at the core of the Court's constitutional responsibility for the protection of individual rights and for the determination of conflicts of competence.

The major part, at least, of the Court's practice of decision would seem to need for its justification no more than the acknowledgment that judicial review, while occasioned in the American system by ordinary

274. See Auerbach, *The Reapportionment Cases: One Vote, One Value*, 1964 SUP. CR. REV. 1, 84-7; Bonfield, *Baker v. Carr: New Light on the Constitutional Guarantee of Republican Government*, 50 CALIF. L. REV. 245 (1962).

litigation, has an impact which reaches far beyond the interests of the parties litigant in the outcome of their lawsuit, and that the overriding importance of its authority "to say what the law is" will force the Court to examine with care its functional capacity to responsibly perform this broader task with respect to any particular issue that is presented for its determination. I fail to see why such an acknowledgment should not even coexist with the premises of the classical theory of judicial review. Even though I am unable to accept the contention that the political question doctrine itself should be regarded as the result of an interpretation of the Constitution,²⁷⁵ it appears to me that a recognition of functional limitations upon the Court's responsibility will not undercut the legitimacy of judicial review. Nor do I think that this recognition will provide the basis for any sweeping theories of judicial self-limitation. In my understanding of the political question, the doctrine cannot be regarded as a test for the validity of the competing theories of judicial review to which I have referred at the beginning of this article.

275. It would, of course, be theoretically possible to elevate the functional factors which in my opinion explain the Court's political question practice to the dignity of constitutional imperatives. But even if it were clearly understood that this assertion would be no more than a conclusionary label attached to considerations which focus upon the limitations of the American judicial process, rather than upon the constitutional grants of power to the political departments of the government, I would regard such an "escalation" as undesirable. With the possible exception of questions regarding the ratification of constitutional amendments, the considerations which I regard as legitimately relevant depend upon an assessment of highly variable circumstances. An information problem may be entirely the product of a particularly fact-oriented definition of substantive standards, or its seriousness may be alleviated by changes in the quantity and quality of communications or by improvements in the Court's fact-finding processes. The problem of embarrassment may be of widely differing significance even for issues which seem very similar, and even where it is serious it may have to be tolerated when the vindication of important values is at stake. If the Court's judgment that a particular question under the particular circumstances should be regarded as "political" is expressed in terms of a constitutional command, this statement will almost inevitably obscure the need for a close functional analysis in the next case dealing with a seemingly similar question. The Court has often demonstrated its readiness to use the political question label uncritically in situations where the functional reasons for avoidance were far from compelling, and it appears to me that the exceptional character as well as the flexibility of the political question is better described and better maintained if it is not characterized as a constitutional rule.

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