1978

Note, A Dialogue on the Political Question Doctrine

Thomas B. McAffee

University of Nevada, Las Vegas – William S. Boyd School of Law

Christopher A. Johnson

Follow this and additional works at: https://scholars.law.unlv.edu/facpub

Part of the Constitutional Law Commons

Recommended Citation


https://scholars.law.unlv.edu/facpub/517

This Article is brought to you by the Scholarly Commons @ UNLV Boyd Law, an institutional repository administered by the Wiener-Rogers Law Library at the William S. Boyd School of Law. For more information, please contact youngwoo.ban@unlv.edu.
A Dialogue on the Political Question Doctrine

I. INTRODUCTION

Legal scholars have generally discussed the political question doctrine as part of the larger debate over the legitimacy of judicial review.1 Points of discordance aside, scholars have agreed that the doctrine is “a classic technique of judicial avoidance, a way of allowing a governmental decision to stand without involving the Court in support of its legitimacy.”2 Thus, debate over the objectives, legitimacy and scope of the doctrine has traditionally proceeded from the unquestioned assumption that there exists a body of law which justifies judicial abstention from deciding some types of issues.

In recent years, however, some scholars have challenged the assumption that complete abstention from deciding constitutional issues is justified either historically or logically.3 Accordingly, it has been argued that invocation of the political question doctrine is a needless step in a journey to a ruling on the merits of a case,4 an unfortunate confusion between justiciability and “want of equity,”5 or a summary—and therefore shallow—determination of the merits under the guise of a ruling on justiciability.6 Thus, the “modern”

1. See, e.g., A. BICKEL, THE LEAST DANGEROUS BRANCH 183-98 (1962) (political question doctrine as one of the “passive virtues” by which the Court avoids deciding cases); L. HAND, THE BILL OF RIGHTS 15-16 (1958) (political question doctrine as evidence that judicial review is not constitutionally mandated); Wechsler, Toward Neutral Principles of Constitutional Law, 73 HARV. L. REV. 1 (1959) (political question doctrine not inconsistent with a classical theory of judicial review).


3. Albert, supra note 2; Henkin, Is There a “Political Question” Doctrine?, 85 YALE L.J. 597 (1976); Tigar, Judicial Power, the “Political Question Doctrine,” and Foreign Relations, 17 U.C.L.A. L. REV. 1135 (1970) (“political question doctrine” set off by quotation marks to denote view “that there is, properly speaking, no such thing”).

4. Henkin, supra note 3; Tigar, supra note 3. Professor Henkin recognizes only the “guarantee clause” cases as examples of true political question rulings. See, e.g., Pacific States Tel. & Tel. Co. v. Oregon, 223 U.S. 118 (1912). Even in the “guarantee clause” cases, Henkin believes that the Court could have reached the same result without invoking the political question doctrine.

5. Henkin, supra note 3, at 617-22. Questions concerning the relationship between the political question doctrine and the discretion vested in a court of equity are beyond the scope of this Note. Professor Henkin takes the view that the Supreme Court might occasionally refuse to provide an equitable remedy on prudential grounds rather than invoke the broader ruling that an issue is a political question. Henkin, supra note 3, at 617-22. See Colegrove v. Green, 328 U.S. 549, 564-66 (1946) (Rutledge, J., concurring) (arguing that the Court should “decline to exercise its jurisdiction” because of “want of equity”).

6. Albert, supra note 2.
doctrine that would grant the Supreme Court discretion to decline to decide cases is rejected as being unfounded in history and inconsistent with the Court's role. The dialogue that follows is a discussion of the merits of these arguments and of their implications for a theory of the political question.

In Part II, discussion is framed by the argument that the great bulk of cases cited in support of a political question doctrine are merely separation-of-powers rulings about the scope of the political branches' power, rather than true examples of judicial abstention. The response, however, is that the common denominator of political question rulings is a judicial determination that an issue which might be resolved by the application of legal standards is to be left for final resolution by a non-judicial branch. The question of whether such a ruling takes place while dismissing a case for want of justiciability or as part of a ruling on the merits of the plaintiffs' claim is seen as beside the point.

Part III shifts to the argument that all political question rulings are implicit rulings on the merits, and that the Court sometimes misleadingly discusses the underlying questions as though a preliminary question is present. The response is that whether a political question ruling is preliminary or substantive is not the important question. The Court denies relief without finding that constitutional standards are met; the other branches are granted authority to apply relevant constitutional standards without judicial scrutiny. Indeed, it is concluded that at least some of the confusion in judicial opinions about the nature of political question rulings may flow from the judiciary's unwillingness to acknowledge openly that constitutional issues are left for resolution by another branch.

Having concluded that the Court has avoided deciding constitutional issues, the discussion in Part IV turns to the question of why the Court would refuse to rule on constitutional issues when it could, instead, formulate a constitutional standard that would enable it to uphold political action without relinquishing its right to decide. The dialogue thus turns to a discussion of the advantages and disadvantages of the Court's invocation of the political question doctrine.

7. For both Henkin and Tigar, the modern heresy of a broad discretionary power to refuse to decide constitutional issues is revealed most prominently in the writings of Professor Bickel and the opinions of Mr. Justice Frankfurter. Henkin, supra note 3, at 614-16, 625; Tigar, supra note 3, at 1163.

8. This Note will emphasize the use of the political question doctrine by the United States Supreme Court. It is recognized, however, that the doctrine is one which the lower federal courts have also commonly invoked.
II. "True" and "False" Political Questions

A. Non-Constitutional Law Cases

Q. I would prefer to confine our discussion of political questions to that handful of cases in which the Supreme Court has refused to decide whether the act of another branch of government has exceeded constitutional limitations. In these true political question cases, the Court, in effect, tells the litigants that although a constitutional provision may have been violated, the Court may not address the question because it is political in nature. These cases are characterized by extraordinary judicial abstention, a refusal to rule on the merits of an otherwise justiciable case and controversy. Extraordinary judicial abstention occurs either when the Court decides that a constitutional grant of authority to a political branch is "self-monitoring," or when it simply refuses to decide a case on "prudential" grounds.

These true political question cases should be distinguished from those in which the Court upholds the acts of the political branches and finds their determinations to be binding law for the Court. In these false political question cases, which include most of the cases traditionally cited in support of the notion of a political question doctrine, the Court declines to second-guess the wisdom or policy of acts of the political branches; it has sometimes explained that to do so would be to involve itself in non-legal or political questions. The classic examples of such false political question rulings are those cases in the area of foreign affairs where the Court has held that it was bound by the determination of the question by the branch which possessed authority to decide it. The Court has held, for example, that the political branches alone can recognize a foreign group of insurgents, whether as possessing belligerent status or as being the sovereign of a nation. Such decisions should not be confused with true political question decisions, since they are holdings as to the scope of the other branches' foreign affairs powers rather than refusals to decide cases. Do you agree?

9. Henkin, supra note 3, at 599.
10. Id. at 598-99; Tigar, supra note 3, at 1163.
11. Professor Henkin describes this rationale as the view that "some constitutional requirements are entrusted exclusively and finally to the political branches of government for self-monitoring." Henkin, supra note 3, at 599.
12. Id. at 605, 623-24.
13. Id. at 606, 611-16; Tigar, supra note 3, at 1155-56, 1159-62.
15. E.g., United States v. The Three Friends, 166 U.S. 1, 63 (1897).
A. I cannot agree that the political question doctrine is reflected only in those cases where the Court has refused to determine whether a political branch has acted ultra vires its powers under the Constitution. The hallmark of the political question doctrine is a judicial refusal to decide a relevant issue because it is, for some reason, not appropriate for judicial handling, even though there are legal standards which could be applied to decide the issue. Any historical case must be confronted individually to determine if this test is met, but scholars have identified political question rulings covering a broad range of issues, especially in the area of foreign affairs.

Clearly, a number of foreign affairs cases meet the test. For example, there is nothing about the textual grants of power to the political branches in the area of foreign affairs which should necessarily preclude the Court from deciding questions of international law in the course of resolving disputes between private parties. In fact, American courts have frequently applied rules of international law to cases before them, and the Supreme Court has held that article III jurisdiction requires them to apply relevant rules of law, including international law. Yet the Court has selectively declined to decide questions of international law in settings where it was felt that deference to coordinate branches was required. In these cases,

16. "In political question decisions . . . the Court refuses to apply legal principles which are relevant to the disposition of the case. . . . [T]he Court does not hold that legal rules do not apply; it holds that competence to apply them should rest with the political departments." Scharpf, supra note 2, at 560.

17. For a list of the issues which have been adjudicated as "political," see id. at 537 n.69.

18. If the President claims American sovereignty over a territory, denies the sovereignty claims of another country, or recognizes a foreign government, it does not logically follow that such pronouncements preclude the Court from making an independent determination of sovereignty or of the de jure government of a nation in the course of resolving a private dispute. Yet each of these issues has been adjudicated as political by a Court sensitive to the importance of a nation speaking with one voice on matters directly affecting its external relations. See Oetjen v. Central Leather Co., 246 U.S. 297 (1918); Williams v. Suffolk Ins. Co., 38 U.S. (13 Pet.) 415 (1839); Foster v. Neilson, 27 U.S. (2 Pet.) 253 (1829).

19. The Paquete Habana, 175 U.S. 677 (1900). See Scharpf, supra note 2, at 542-46; Tigar, supra note 3, at 1168-70. For the argument that courts lack standards with which to rule on questions related to foreign affairs, see Field, The Doctrine of Political Questions in the Federal Courts, 8 Minn. L. Rev. 485, 512 (1924). But see Scharpf, supra note 2, at 555-58.

20. Questions which were deemed political when the Court has perceived the dangers of "multifarious pronouncements," Baker v. Carr, 369 U.S. 186, 217 (1962), have been decided by the Court in instances in which there have been a complete absence of pronouncements by the political branches. Compare The Rogdai, 278 F. 294, 296 (N.D. Cal. 1920) (courts may not acknowledge existence of foreign group exercising power which has not been formally recognized by the executive) with The Ambrose Light, 25 F. 408 (S.D.N.Y. 1885) (judicial finding of belligerent status based on "long acquiescence by the United States in
the Court abstinens on the basis of a discretionary, practical judgment about the limits of judicial power, and not because of its determination of the meaning of a grant of power to another branch. 21

Q. These foreign affairs cases are more than practical judgments about the limits of judicial power; they are really rulings that the Constitution does not require the political branches to obey rules of international law in performing their foreign affairs functions. 22 For example, when the Court holds that Congress may abrogate a treaty by enacting legislation which contradicts terms of the treaty, reasoning that the decision involved is a political question, it is simply holding that the Constitution does not require Congress to uphold the nation's treaty obligations. 23 This represents not a refusal to decide, but rather an affirmative decision about the nature and scope of the other branches' foreign affairs power.

You stress that a pragmatic judgment was involved in these foreign affairs cases. Undoubtedly, these cases do involve deference to the other branches. But deference to another branch is also shown in commerce clause cases when the Court relies on the presumption of constitutionality which is accorded statutory enactments. Moreover, the comparison between these foreign affairs cases and the Court's decisions upholding commerce legislation is more apt than one might suppose at first glance. In both types of cases, the Court acknowledges that certain questions involve policy and not law, and that the political acts are the law to be applied in the case. In both

belligerent acts affecting another nation's interest” which, nonetheless, did not amount to express diplomatic recognition). See Schipke, supra note 2, at 543-44 nn.93 & 94.

In less sensitive settings, the Court has decided questions generally deemed political, even when its decision contradicted a prior determination of the same question by another branch. Compare Foster v. Neilson, 27 U.S. (2 Pet.) 253 (1829) (political interpretation of a treaty is binding on the judiciary) with Perkins v. Elg, 307 U.S. 325 (1939) (rejecting State Department treaty interpretation which would allow involuntary expatriation of American citizen). "It seems that the Court is paying much more attention to the political and legal implications of the specific case than to the logic of any theory which might derive from the constitutional grant of the treaty power." Schipke, supra note 2, at 546 n.102.

21. Compare Justice Brennan's statement:

Our [foreign affairs cases] seem invariably to show a discriminating analysis of the particular question posed, in terms of the history of its management by the political branches, of its susceptibility to judicial handling in the light of its nature and posture in the specific case, and of the possible consequences of judicial action.


23. Id. See Chinese Exclusion Case, 130 U.S. 581 (1889); Whitney v. Robertson, 124 U.S. 190 (1889).
areas, the political branches "legislate" and the Court's role is merely to apply that law.\textsuperscript{24}

A. I cannot agree with your comparison between the Court's acknowledgment of the limited scope of judicial review when it upholds commerce clause legislation and its holdings in "false" political question cases. The Constitution expressly grants Congress the power to regulate commerce, and the making of policy decisions inherent in the enactment of commerce legislation is clearly a part of that power. These types of policy decisions involve no legal issues and obviously should not be questioned by the Court.\textsuperscript{25} On the other hand, as we have seen, the foreign affairs cases you label "false" political question cases involve a judicial determination that some questions should be left to the political branches and should not be decided by the courts, even if there are legal standards which courts could apply to resolve such questions.

You resist the idea that cases in the area of foreign affairs reflected practical judgments about the limits of judicial power. Perhaps we should seek a new testing ground for our differing view of the nature of the political question doctrine. Surely, you would not contend that the traditionally cited case of \textit{Luther v. Borden}\textsuperscript{26} did not involve a refusal to decide the issue before the Court.

Q. Yes, I would. In \textit{Luther}, the trespass action turned on whether the martial law order raised as justification for a search and seizure had issued from the legal government of Rhode Island. The plaintiff contended that the charter government which issued the order had been replaced and thus was not the legal government of Rhode Island. The state courts rejected this claim. The Supreme Court agreed, but largely on a different ground. Congressional legislation, enacted pursuant to section IV of article IV of the Constitution, granted the President power to protect a state government from insurrection by sending federal troops to the state in response to a request by the governor.\textsuperscript{27} In this case, the President had as-

\textsuperscript{24} Henkin, \textit{supra} note 3, at 605 n.27; Tiger, \textit{supra} note 3, at 1156.

\textsuperscript{25} It is true that the Court has sometimes "reminded" itself that the judiciary is not to review the making of policy decisions inherent in the enactment of commerce legislation. The Court has only done so, however, because its narrow interpretations of the commerce power have frequently prompted criticism that the Court was expressing disapproval of legislative ends. \textit{See}, \textit{e.g.}, \textit{National League of Cities v. Usery}, 426 U.S. 833, 867 (1976) (Brennan, J., dissenting).

\textsuperscript{26} 48 U.S. (7 How.) 1 (1849).

\textsuperscript{27} \textit{Id.} at 43. In addition, the Court found that the Constitution granted Congress the power to recognize the governmental of a state by means of its power to seat a state's representative in Congress. \textit{Id.} at 42.
sured the governor of Rhode Island’s charter government that, if necessary, he would send federal troops to quell the insurrection.\textsuperscript{28} The Court ruled that the President’s exercise of this informal power of recognition was binding as law upon the courts. It was not up to the Court to second-guess the propriety of the decision which the President was permitted to make under the Constitution and the laws of the land.\textsuperscript{29} Having concluded that the President had acted pursuant to an actual grant of power, and that his acts had not exceeded any constitutional limitations on that power,\textsuperscript{30} the Court considered itself bound by the President’s “legislative” act.\textsuperscript{31}

This result was not necessarily mandated by the express provisions of the Constitution which the Court invoked, and the Court’s interpretation may have reflected deference to functions of the political branches that require considerable discretion.\textsuperscript{32} It was, nonetheless, a decision on the merits acknowledging a “law-making” authority of the political branches. And that is a very different thing from the federal courts’ wholesale refusal to decide cases during the Vietnam era and from the Supreme Court’s disposition of its few constitutional law political question cases.

A. You essentially ignored the issue which was deemed political in \textit{Luther v. Borden}. The issue in \textit{Luther} was whether the people of Rhode Island had exercised their sovereign right to alter their form of government by holding a constitutional convention and referendum.\textsuperscript{33} For the defendants, Daniel Webster advanced two arguments. First, in addressing the merits, he contended that the government of Rhode Island could only be changed by means of a limited number of traditional procedures.\textsuperscript{34} Second, he argued that the Court did not have jurisdiction to decide the issue because it was political in nature.\textsuperscript{35} In accepting Webster’s political question argument, the Court emphasized that although the people of Rhode Island possessed a right to change their government, it was not for the courts to determine whether they had in fact done so.\textsuperscript{36} The Court thus abstained from deciding the principal legal issue presented by the case.

\begin{itemize}
\item \textsuperscript{28} \textit{Id.}
\item \textsuperscript{29} \textit{Id. at 44.}
\item \textsuperscript{30} Henkin, \textit{supra} note 3, at 608; Tigar, \textit{supra} note 3, at 1161.
\item \textsuperscript{31} Henkin, \textit{supra} note 22, at 287.
\item \textsuperscript{32} \textit{See} Tigar, \textit{supra} note 3, at 1163.
\item \textsuperscript{34} \textit{See} 2 C. Warren, \textit{The Supreme Court in United States History} 190 (1926).
\item \textsuperscript{35} 48 U.S. at 32-33 (Report of Oral Argument, Daniel Webster).
\item \textsuperscript{36} \textit{Id. at 47.}
\end{itemize}
You emphasize the Court’s conclusion that it was bound by the political determination. You thus view the Court’s holding as a mere statement about political law-making authority, distinguishing it from what you term “extraordinary abstention” under the “true” theory of the political question. I submit that you have done little more than state a truism about the political question doctrine. If a question is not for the judiciary to decide, as the political question doctrine posits, it follows a fortiori that the political resolution of the question will be binding upon the courts.

Q. Are you saying that all political question cases are rulings on the constitutional law-making powers of the political branches?

A. I am really objecting to the dichotomy you have established between “true” and “false” political question cases. In “true” political question cases, the Court supposedly says that, although a constitutional provision may have been violated, the Court is powerless to rule on the case because it presents a political question. The Court thus seemingly abdicates its duty to decide the case. In the “false” political question cases, the Court supposedly finds that another branch merely acted within its constitutional authority. It thus appears to perform its judicial review function, but does not find that any constitutional limitation upon law-making power has been exceeded. This is not an accurate description of what the Court is doing because any political question case may be interpreted as saying that a political branch acted within its constitutional authority. In either constitutional law or foreign affairs cases, if the Court finds that the standard in question is to be applied by another branch, it is clear that the determination made by the political branch is the legally binding one, whether right or wrong.37

For example, it has recently been proposed that the political question doctrine might appropriately be applied to legal challenges of federal action on federalism grounds.38 Under the proposal, how-

37. When the Court discovers a political question, it becomes the Court’s duty “to take for a guide the decision made on [it] by the proper political powers, and, whether right or wrong . . . enforce it till duly altered.” Luther v. Borden, 48 U.S. (7 How.) 1, 56 (1849) (Grier, J., concurring and dissenting) (emphasis added). See also id. at 47.

38. Choper, The Scope of National Power Vis-à-Vis the States: The Dispensability of
ever, the Court would still review federal legislation for violations of individual rights. If the Court adopted this approach and litigants challenged a statute enacted under the commerce clause on due process and federalism grounds, it might well review the statute and rule on the merits of the fifth amendment question; nevertheless, the Court would hold that the federalism challenge raised a political question and that the political determination of that question is binding as law upon the judiciary.

In such a case, the Court’s political question ruling might well be cast in the form of an expansion of Chief Justice Marshall’s dictum that relief for abuse in this area must come in the political forum. It need not be cast as a refusal to decide the merits of the case. More important, note that under this Federalism Proposal, one can say either that the Court refused to decide whether Congress had exceeded its power or that the Court concluded that Congress has the power to determine the scope of its powers vis-a-vis the states. Similarly, in a foreign affairs case, the Court has, by calling the question political and not justiciable, effectively held that the power to make treaties includes the power to judge whether and when treaties may be abrogated, consistent with the nation’s obligations under international law. The basic ingredient of a political question decision are present in both settings, whichever way you choose to characterize the effect of the ruling. In both types of cases, the Court defers the resolution of legal questions to another branch and then finds that resolution to be binding as law on the courts.

B. Constitutional Law Cases

Q. We have not been able to agree that the only true political question cases are those in which the Court has refused to judge the constitutionality of political acts. Nevertheless, even among the constitutional law cases, I can distinguish cases in which the Court has recognized the other branches’ authority from those in which it has simply abdicated its duty to say what the law is. Coleman v. Miller is illustrative of both positions. In that case, state senators asked the Court to find that a proposed constitutional amendment had lapsed for want of ratification within a “reasonable time.”

---

Judicial Review, 86 Yale L.J. 1552 (1977). This Federalism Proposal is premised upon the assumption that the political forum is the most appropriate one for resolving the constitutional issues raised by federal action which affects federal-state relations. Id. at 1560-77.

39. Id. at 1555, 1605.
41. 307 U.S. 433 (1939).
42. Id. at 452. The argument was suggested by dictum in Dillon v. Gloss, 256 U.S. 368.
majority of the Court found that under article V Congress possessed a supervisory function over the amendment process and concluded that it was up to Congress to set a time period for ratification and to determine whether or not the period had lapsed. While the Court ruled that the issue before it was a "political question," its opinion did not imply that there are no constitutional standards governing the amendment process or that the Court could have abstained from deciding the case if a constitutional standard had been violated.

This holding is quite different from the one advocated by Justice Black in his concurring opinion. Justice Black contended that the amendment process was completely subject to Congress' supervision and that the Court was totally precluded from considering a contention that the standards of article V had been violated. Justice Black thus viewed the case as one presenting what I have called a true political question. Would you agree that the concurring opinion is the one which actually advocated extraordinary judicial abstention?

A. I would not. As I read Justice Black's concurring opinion, the essence of his objection was that the Court would acknowledge the political nature of the question and then offer an advisory opinion on the relevant factors for Congress to consider. As Justice Black points out, the majority did not reject "the conclusion arrived at in Dillion v. Gloss that the Constitution impliedly requires that a properly submitted amendment must die unless ratified within a 'reasonable time.'" In fact, the majority even agreed that there was

(1921), which held that Congress could set a reasonable time for ratification of a proposed amendment.

43. Id. at 453-54. See Albert, supra note 2, at 1166-67; Henkin, supra note 3, at 613.
44. Id. at 456 (Black, J., concurring, joined by Justices Roberts, Douglas, and Frankfurter).
45. "The process is 'political' in its entirety, from submission until an amendment becomes part of the Constitution, and is not subject to judicial guidance, control or interference at any point." Id.
46. See Henkin, supra note 3, at 614. Colegrove v. Green, 328 U.S. 549 (1946), and some of the Vietnam war cases are also examples of true political question cases. See, e.g., Luftig v. McNamara, 373 F.2d 654 (D.C. Cir.), cert. denied, 387 U.S. 945 (1967).
47. "[A]ny judicial expression amounting to more than mere acknowledgment of exclusive congressional power over the political process of amendment is a mere admonition to the Congress in the nature of an advisory opinion, given wholly without constitutional authority." Coleman v. Miller, 307 U.S. 433, at 459-60.
48. 256 U.S. 388 (1921).
49. 307 U.S. at 458. The Dillion Court stated that "the fair inference or implication from article V is that the ratification must be within some reasonable time after the proposal." 256 U.S. at 375. The Coleman majority limited this reasoning to the facts of Dillion, concluding that it was for Congress to fix the "reasonable time" period and to determine if an amendment had lapsed. 307 U.S. at 453-54.
a constitutional standard for judging whether a proposed amendment had lapsed; they concluded, however, that Congress was the branch which should apply the standard.\textsuperscript{50} This position suggests your notion of a “self-monitoring” constitutional provision.

If either opinion can be viewed as a mere holding that no relevant standard had been breached, it is the concurring one. It seems to interpret article V as giving Congress a general grant of power to supervise the ratifying process and to determine the efficacy of attempts to amend the Constitution.\textsuperscript{51} In truth, however, both opinions evidence the Court’s desire to avoid deciding the particular question raised; they are thus distinguishable only by their breadth. While the majority limited its holding to those issues actually before the Court, the concurring justices spoke to all possible issues raised by the amendment process.

Your problems with Coleman stem from your self-imposed requirement that a “true” political question decision must find a section of the Constitution to be “self-monitoring” or off-limits to judicial scrutiny. But nothing in the political question doctrine, as I understand it, requires the Court to find that a clause or section of the Constitution may not be reviewed by the judiciary. Indeed, the Court has acknowledged that the scope of the “constitutional commitment” is a question which the Court should address.\textsuperscript{52}

III. POLITICAL QUESTION RULINGS AS DE FACTO RULINGS ON THE MERITS

Q. You have worked hard to blur the distinction between true and false political questions that I have proposed. Is it possible, though, that political question decisions frequently are implicit rulings on the merits of the questions raised?

A. The fact that the political question doctrine is issue-oriented, rather than case-oriented, suggests that political question rulings are closely bound up with the merits. When a litigant challenges the constitutionality of an act of the political branches, the political question consideration necessarily entails an effort by the Court to determine if that act has violated standards which can and should be formed into a judicially enforceable rule that would pro-

\textsuperscript{50} 307 U.S. at 453-54. The majority contended that the factors which should determine whether a proposed amendment has lapsed are social and political in nature, and therefore more appropriately considered by a political branch.

\textsuperscript{51} See Scharpf, supra note 2, at 587-89.

scribe the act in question. 53 A finding that relevant norms cannot be translated into "judicially manageable standards," 54 or that they may only be applied at the discretion of a political branch, 55 sounds mysteriously similar to a holding that the plaintiff has failed to state a cause of action. 56

Q. I think that we are finding a common ground at last. It seems that political question rulings typically decide the underlying issue while discussing the supposedly preliminary question of whether the Court lacks authority to decide. For example, in Powell v. McCormack, 57 the Court was asked to decide whether Congress' power to judge the qualifications of its members 58 was limited to the right to review the qualifications outlined in article I, section 2 of the Constitution, or whether it included the right to review members' compliance with other qualifications that Congress might formulate. 59 The Court answered the question of whether the issue was "committed" to Congress for decision by deciding that Congress' power was limited to judging the qualifications outlined in the Constitution. 60 The Court's decision about the intended scope of congressional authority granted by article I, section 2 led it to the conclusion that the Court should enforce the limitation on that authority. This led one scholar to comment that the Court's treatment of the political question issue represented "a classic instance of confusion between 'jurisdiction'—the power to decide— and 'the merits'—the correctness of decision." 61 But such "confusion" was probably based on necessity since the Court, to determine if Congress' acts were immune from review, had to determine if the framers intended Congress to have power to impose additional qualifications. Another scholar has noted that "[t]he text of the Constitution does not demarcate or even suggest that areas or issues are political or beyond judicial power; an express delegation of power to Congress or the President does not support such an inference." 62

55. See Coleman v. Miller, 307 U.S. 433 (1939); note 50 supra and accompanying text.
56. See Albert, supra note 2, at 1143.
59. 395 U.S. at 520.
60. Id. at 548.
62. Albert, supra note 2, at 1164.
Similarly, isn't every political question decision thus a de facto ruling on the merits—a decision about whether there are relevant limitations upon a grant of power to a political branch and, therefore, a ruling about whether a litigant has stated a claim upon which relief may be granted?

A. No doubt every political question decision involves an examination of the substantive question raised and a judgment, based on textual or historical analysis or prudential considerations, that the discretion of another branch should not be legally circumscribed. Still, there are grounds for distinguishing a political question ruling from a typical ruling on the merits.

In a political question decision, the Court's failure to find judicially enforceable limitations does not suggest its conclusion that no constitutional standard has been violated, but rather its belief that, for some reason, a relevant standard should not be judicially enforced, regardless of whether it has been violated in the case at hand. Without deciding that a constitutional standard was not violated, the Powell Court could have decided that the issue of congressional latitude in judging its members' qualifications was a political question. Even if the Court had accepted the argument, grounded in separation of powers theory, that Congress was to be the sole judge of its members' qualifications, this would not have implied that there were no constitutional standards to guide Congress in evaluating qualifications. Similarly, the language of the impeachment clause does not logically imply that its "high crimes and misdemeanors" standard is to be applied with finality by the Senate, any more than any other textual grant of power implies that the branch to which the power is committed is to be the final arbiter of the constitutionality of the exercise of that power. Nevertheless, there are excellent historical and practical arguments that the impeachment conviction of a President should not be reviewed by the Court. But to say that a political question ruling on an impeachment conviction merely involves a finding that no prohibitions were exceeded is not to recognize that a political question ruling is actually a decision about the relevance for the Court of a given constitutional standard, rather than an affirmative decision that a branch acted in conformity to the standard in question. Sometimes it is simply difficult for us to imagine that the Court may not be the final arbiter of all constitutional questions.

63. See Scharpf, supra note 2, at 538-40; Wechsler, supra note 1, at 10-20.
Q. Yet the courts themselves have frequently failed to clarify whether they are truly abstaining or merely giving deference to another branch in their resolution of legal questions. What accounts for this confusion?

A. This confusion is partly due to the fact that the distinction between political question decisions and rulings on the merits can be a fairly subtle one. It is often easy not to carefully distinguish (1) a finding that a normative standard should not be construed to be a judicially enforceable limitation, from (2) a liberal formulation of the standard adopted so that an act may be found to be in conformity with the standard. The impetus for either ruling frequently is a perception by the Court that a political branch should have broad discretion to act in a given area. The practical effect of either one is to provide considerable leeway to the political branch.

Q. You acknowledge the difficulty in clearly articulating the distinction between a ruling on the legal relevance of a constitutional standard and a liberal formulation of the constitutional standard; but what about those cases in which abstention is purportedly justified by the lack of “judicially discoverable and manageable standards” for deciding an issue. If it were really impossible to articulate a constitutional standard that might have been breached by the act of a political branch, it would seem to follow that the challenged act must have been constitutional because it did not violate any constitutional standard. In fact, haven't some courts used the “political question” terminology when they simply could not discover a meaningful standard which might have been violated under the facts presented?

A. In my view, the Court generally refers to an absence of “judicially discoverable and manageable standards” when it believes that a standard may be more appropriately developed and applied by another branch. A standard may not be judicially manageable, for example, because of the judiciary's lack of access to information.66 A lack of “judicially discoverable and manageable standards” does not mean that the Court is cognitively incapable of “discovering” a standard which could be used.67

66. Scharpf, supra note 2, at 567-73. This view has been criticized, however, as underestimating the ability of courts to allocate the burden of going forward with the evidence and the risk of non-persuasion or to apply parol evidence rules. Tigar, supra note 3, at 1165-66. Nonetheless, judicial respect for the superior fact-finding capabilities of the political branches may be an important factor in the courts' determinations that some questions should be decided by one of the political branches.
67. Scharpf, supra note 2, at 555-58. Apportionment is the classic example of where standards were available when the Court made up its mind to rule. Id. at 556-58.
However, it is true that in the *Powell* decision, as well as in several decisions near the end of the Vietnam era, the discussion of whether there existed an applicable constitutional standard seemed to represent the end of judicial inquiry. In *Powell*, the Court’s finding of a constitutional standard seemed to lead it inevitably to the conclusion that a political question was not presented. If the finding of a constitutional standard by which an issue may be decided necessarily meant that the issue is not a political question, there would be no political question doctrine involving constitutional law issues.\(^68\)

Legal challenges to the Vietnam War in the early 1970’s are perhaps even more illustrative of the confusion the search for standards may cause. In *Orlando v. Laird*,\(^69\) for example, the Court of Appeals for the Second Circuit identified a standard which required congressional participation in the war-making decision.\(^70\) Having found that the Tonkin Gulf Resolution and various kinds of supportive legislation had manifested congressional support of the Vietnam War, the court emphasized that the form of congressional authorization was a political question.\(^71\) The court could have been saying one of two different things. First, it could have been saying that the Constitution does not require Congress to declare general war\(^72\) or even to authorize hostilities in so many words. Congress is merely required to manifest assent to presidential war-making so that a court might conclude that it had ratified executive acts; having done so, Congress and the President have conformed to all constitutional standards and have thus acted constitutionally.\(^73\) Second, it could have meant that, beyond the minimum stan-

---

\(^68\) All constitutional questions turn on whether some organ of government exceeded its specified powers. Normally, the Court decides whether these powers were exceeded and rules accordingly. The political question doctrine supposedly interrupts that process by declaring a case nonjusticiable. But by the logic of *Powell*, the doctrine can be invoked only if the Constitution committed the power to an organ of government to act as it did. . . . In short, the political question doctrine can have meaning only if under some circumstances an organ of government can venture beyond its specified powers and be immune from judicial review. But by the *Powell* Court’s reasoning, such circumstances can never exist.


\(^69\) 443 F.2d 1039 (2d Cir.), cert. denied, 404 U.S. 869 (1971).

\(^70\) The court concluded: “Judicial scrutiny of that duty . . . is not foreclosed by the political question doctrine. . . . As we see it, the test is whether there is any action by the Congress sufficient to authorize or ratify the military activity in question.” Id. at 1042.

\(^71\) The form of congressional authorization of war-making was deemed to be a political question because of the lack of “intelligible and objectively manageable standards by which to judge such action.” Id. at 1043.

\(^72\) See Bas v. Tingy, 4 U.S. (4 Dall.) 36 (1800) (Congress is not required to declare general war to authorize hostilities).

\(^73\) Advocates of this interpretation would stress the court’s statements that the form
standard of "some mutual participation," constitutional questions, including questions about whether Congress may "delegate" the war power in the broad terms of the Tonkin Gulf Resolution or whether traditional legal standards for ratification were actually met, are to be decided by debate within the political forum. One thing is evident: the court did not make it clear whether constitutional issues were being avoided or not.

Q. What would prompt a court to be less than clear about the nature of its ruling when it uses the political question terminology?

A. This lack of clarity in judicial opinions about the nature of a political question ruling may in part reflect uncertainty of judges about the proper role of the judiciary in our constitutional system.

of congressional authorization was a "political question" because of the lack of intelligible and objectively manageable standards by which to judge such actions, reasoning that the lack of standards to apply implies that no standards were violated, or that any and all cognizable standards were met.


74. 443 F.2d at 1043.


76. The court in Orlando did not discuss prior case law which suggested that congressional ratification must be express, especially in instances in which an act would otherwise be of doubtful constitutionality. See Green v. McElroy, 360 U.S. 474, 507 (1959). Under the Orlando court's approach, it would be virtually inconceivable for the United States to be involved in an extended war without Congress impliedly ratifying that war. See 433 F.2d at 1041 (appellants contended that implied ratification would allow the country to go to war while Congress abdicated its policy-making responsibility and submitted to Presidential fait accomplis). This argument not only contends against the wisdom of finding congressional authorization from supporting legislation alone, but also may suggest that the Orlando court was leaving to Congress the authority to determine the scope of its own constitutional war-making role, including whether it was to be one of policy-making or one ofabdication.

77. This interpretation renders more intelligible the court's statement that "the constitutional propriety of the means by which Congress has chosen to ratify and approve the protracted military operations in Southeast Asia is a political question." 443 F.2d at 1043 (emphasis added). Advocates of this interpretation would argue that the court's emphasis on the lack of "objectively manageable" standards reflected the court's belief that the wider responsibilities of the political branches for the "highly complex considerations of diplomacy, foreign policy and military strategy," id., which are necessarily involved in the war-making decision make the political branches an appropriate forum for resolving the constitutional question of the manner in which Congress may authorize war. Some commentators agreed that the Orlando decision was at least in part a political question ruling. Massachusetts v. Laird, 451 F.2d 29 (1st Cir. 1971); Firmahe, The War Powers and the Political Question Doctrine, 49 U. Colo. L. REV. 65, 93-95 (1977); Wallace, The War-Making Powers: A Constitutional Flaw?, 57 CORNELL L. REV. 719, 744 n.137 (1972); Note, The Indochina War Cases in the United States Court of Appeals for the Second Circuit: The Constitutional Allocation of the War Powers, 7 N.Y.U. J. INT'L L. 137, 141-43 (1974).
In cases involving civil rights, legislative apportionment, legislative exclusion, and executive privilege, the Court has bolstered the authoritativeness of its decisions by invoking an extremely broad reading of Marbury v. Madison. The Court has been appropriately criticized after Powell v. McCormack and United States v. Nixon for its failure to separate the political question issue from the merits of the actions by overbroadly asserting that the Court is the ultimate interpreter of the Constitution.

Given the broad premise that the Supreme Court is the Constitution’s ultimate arbiter, it seems that the federal courts have been reluctant to make explicit that political question rulings in constitutional law cases must imply that a constitutional question is to be raised and answered exclusively by another branch. For example, in an early case challenging the legality of American involvement in Vietnam, Luftig v. McNamara, the circuit court spoke as if a constitutional issue had not been raised. Instead, the court simply stated that under our constitutional system it is not for the courts to “oversee the conduct of foreign policy or the use and disposition of military power.” The veracity of such a statement, of course, would have been obvious if it were clear that the President was acting within the scope of his commander-in-chief power, but that issue was the very one being raised. The statement is an extremely indirect way of saying that it is also for the political branches to determine the scope and application of their war powers under the Constitution. Is it possible that the judiciary’s unwillingness to forthrightly acknowledge that it is deferring the resolution of a constitutional issue stems in part from prior judicial statements that the judiciary is the final and supreme arbiter of the Constitution?

80. Powell v. McCormack, 395 U.S. 486, 549 (1969) (“it is the responsibility of this Court to act as the ultimate interpreter of the Constitution”).
82. 5 U.S. (1 Cranch) 137 (1803).
84. 373 F.2d 664 (D.C. Cir. 1967), cert. denied, 387 U.S. 945 (1967).
85. Id. at 666.
86. Critics of Luftig and other early cases in which the courts refused to rule on the legality of the war were especially critical of the complete lack of reasoned explanations for the refusals. The courts’ failure to provide rationales for their refusals to review prompted the comment that the cases were “non-decisions leading to a non-law of justification.” Tigar, supra note 3, at 1178.
IV. Why The Political Question Doctrine?

Q. We seem to be making some progress. You have contended that a political question ruling is more than a separation of powers holding, be it explicit or implicit. Yet you admit that the distinction between political question rulings and rulings on the merits is not a clear one, given the similarity of practical results in both instances. Assuming that the distinction is not absolutely clear, we ought to consider why the Court would invoke the doctrine in a case in which it could formulate a standard which would allow it to unequivocally address the merits of the case and uphold the challenged act. At least one author has contended that when the Court determines that an executive or congressional act is within the bounds of discretion which it would grant to the political branch, the Court should explicitly validate the political act “without the beclouding imprimatur of the political question doctrine.”

If the Court believes that the political branch should have discretion to act, why does it not formulate a standard which will allow it to uphold a challenged act, rather than delegate the task of articulating and applying a standard to the political branch?

A. Your question is especially relevant to the political question cases raising constitutional law issues. The Court’s self-pronounced role as ultimate arbiter of the Constitution leads us to think of abstention as abdication of a constitutional duty. It initially seems more reasonable that the Court would articulate a liberal standard which would permit it to rule favorably on the constitutionality of a challenged act, rather than abstain from deciding whether the act was constitutional. For example, during the last thirty years the Court has essentially abdicated review of commerce clause cases by formulating a very liberal standard of review. There is no reason why it could not articulate a liberal standard of review which would permit it to uphold impeachment convictions by the Senate or avoid invoking the political question doctrine in any case.

It may well be that the “beclouding imprimatur” objected to is the essence of the political question doctrine. No doubt, there are some instances in which it is more appropriate for the Court to

---

87. Albert, supra note 2, at 1166.
88. See Scharpf, supra note 3, at 578-83.
89. See Wickard v. Filburn, 317 U.S. 111 (1942); United States v. Darby, 312 U.S. 100 (1941). Even National League of Cities v. Usery, 426 U.S. 833 (1976), does not represent a retreat from the Court’s wide-open definition of commerce because the Court based its holding in that case on the tenth amendment. 426 U.S. at 834.
formulate a liberal standard of review than to invoke the political question doctrine. 90 There are other situations, however, in which the invocation of the political question doctrine is the more appropriate response. Sometimes the Court may believe that the political branch has acted in a manner inconsistent with constitutional standards, but may nonetheless be convinced that the constitutional judgment should be made in the political forum. 91 When the Court senses that a political decision should be left unchallenged based upon an enduring element of the issue raised in the case, rather than simply upon the case’s factual or political setting, 92 it is appropriate for the Court to consider the impact that a judicial ruling on the merits will have on the ongoing debate of the constitutional issue. When the Court upholds a political act as constitutional, it legitimates the act. 93 While debate on the constitutional propriety of a challenged act may not be ended by a judicial legitimation of the act, it may well be inhibited.

The Vietnam War thus provided an excellent example of a possible advantage of judicial abstention. One may believe that American involvement in the conflict was unconstitutional 94 and yet feel that the constitutional relationship between the President and Congress in the conduct of war is a matter that should generally be decided in the political forum. Using a variety of rationales, 95 the federal courts almost universally refused to rule on the constitutionality of American participation in the war. For perhaps several reasons, 96 the courts did not feel that they should second-guess the

90. For example, in Korematsu v. United States, 323 U.S. 214 (1944), the Court showed deference to political exigencies even while applying a strict scrutiny test to the government’s action. While not abstaining in an extremely significant equal protection case, the Court fashioned a narrow holding that would enable a later Court to limit the holding to those facts.

91. A. Bickel, supra note 1, at 128-33.

92. In some cases it may be more appropriate for the Court to abstain based on one of Professor Bickel’s other “passive virtues” or to rule on the merits while using a liberal standard of review rather than to invoke the political question doctrine. See note 90 supra.

93. A. Bickel, supra note 1, at 129.

94. See authorities cited note 75 supra.

95. Standing, sovereign immunity, and the political question doctrine were all raised as barriers to justiciability. See Firmaige, supra note 77, at 90-91.

96. Professor Bickel’s formulation of the political question doctrine may indicate some of the reasons why the Court was so reluctant to rule on the constitutionality of the war: Such is the foundation, in both intellect and instinct, of the political question doctrine: the Court’s sense of lack of capacity, compounded in unequal parts of (a) the strangeness of the issue and its intractability to principled resolution; (b) the sheer momentousness of it, which tends to unbalance judicial judgment; (c) the anxiety, not so much that the judicial judgment will be ignored, as that perhaps it should but will not be; (d) finally (“in a mature democracy”), the inner vulnerability, the self-doubt of an institution which is electorally irresponsible and has no earth to draw strength from.

A. Bickel, supra note 1, at 184.
political decisions which led us to war, despite the questionable constitutionality of those decisions. Most important, the Supreme Court consistently refused to rule on the constitutionality of the war. 97

Yet the Court could have fashioned a standard—based upon the presumption of constitutionality and the political branches’ need for flexibility in the conduct of foreign affairs—which would have permitted it to let the political determinations stand. 98 What would have been the result of upholding the manner in which the United States entered the war? No doubt the war would still have been strongly opposed on many grounds, both in the halls of Congress and in the streets. But judicial validation of executive usurpation and congressional abdication of the war-making power may have substantially influenced later debate over Congress’ re-assertion of its war-making powers.

The theoretical basis of the War Powers Resolution 99 is that the “necessary and proper” clause gives Congress the power to determine the appropriate bounds of presidential and congressional war powers. 100 Among other things, the resolution declares that appropriation acts, treaty commitments, selective service laws, and joint resolutions may not serve as implicit authorizations of acts of war. Had the courts unequivocally found American involvement in Vietnam to be constitutional, the validity of the War Powers Resolution might well have been subject to question. As it was, President Nixon suggested that the Resolution was not binding upon his administration because Congress did not have the power to so define and restrict his authority as commander-in-chief. 101 Would not his argument have been strengthened if the Court had deferentially found the manner in which we entered into the war to have been constitutional? Would congressmen have hesitated to support efforts to redefine the war powers if the Court had definitely resolved the constitutional issues raised by the Vietnam War? Greater congressional responsibility for its own role may have been one of the fruits of the “beclouding imprimatur” of non-decision. I, for one,

---

97. The Supreme Court regularly denied certiorari to appeals from dismissals of legal challenges to the war. In addition, the Court affirmed the ruling in Atlee v. Laird, 347 F. Supp. 689 (E.D. Pa. 1972), aff’d, 411 U.S. 911 (1973), holding that the legality of the war was a nonjusticiable political question.

98. This is essentially what Professor Henkin advocated. Henkin, supra note 3, at 624 n.77.


believed that the war was unconstitutional, but preferred that the debate over its constitutionality be continued in the political arena rather than squelched by an affirmative ruling by the Court.

Q. Your views are similar to Professor Bickel’s theory of the political question doctrine. He argued that if the Court could not uphold a questioned act on principle, it should not validate the act by upholding its legality.\textsuperscript{102} Bickel contended that when the Court felt compelled to abstain because it could not uphold a challenged act on principle, it did not have to abandon its role as upholder of constitutional principle. He maintained that the Court might refuse to decide an issue, but yet expound upon the relevant constitutional principle in dicta, and thus continue in its role as “teacher to the citizenry.”\textsuperscript{103} Should the Court take such an approach to the adjudication of constitutional issues?

A. I agree with Professor Scharpf that it is unwise for the Court to articulate principles at large.\textsuperscript{104} Not only does such an approach have the disadvantages of the rendering of advisory opinions, including the danger of not coming to terms with the real-life dimensions of constitutional issues,\textsuperscript{105} but it also casts the Court in the role of being simply an impotent “ultimate arbiter of the Constitution.” My concern is not only that the Court not compromise principle, but that it not stifle the search for principle by expounding principles at large.

The Court is not the ultimate arbiter of every constitutional question. The assumption that it is may have an adverse effect upon the law-making process. There have been numerous instances in which congressmen have declined to make a judgment on the constitutionality of proposed legislation because they felt that the courts should make that determination.\textsuperscript{106} An article of impeachment against President Nixon was defeated by committee vote because his “good faith” claims of executive privilege had not yet been ruled upon by the courts.\textsuperscript{107} A poll of congressmen revealed that thirty-one percent of them believed that congressmen should defer to the

\textsuperscript{102} A. BICKEL, supra note 1, at 188.

\textsuperscript{103} Id.

\textsuperscript{104} Scharpf, supra note 3, at 563-65.

\textsuperscript{105} Id. at 565.


\textsuperscript{107} Gunther, supra note 83, at 35-37.
courts rather than form their own opinions about the constitutionality of legislation.\textsuperscript{108}

Q. You have pointed to the passage of the War Powers Resolution as an example of an instance in which judicial abstention possibly encouraged constitutional decision-making by Congress. Yet the Powell case has been defended on the ground that congressional leaders did not completely separate constitutional and policy questions in their debate on whether or not to seat Congressman Powell, and that they did this fully knowing that significant constitutional issues were present and that legal action was likely to follow their decision.\textsuperscript{109} It has been suggested that the Court did not defer in Powell simply because Congress did not take seriously its own duty to raise and answer constitutional issues.\textsuperscript{110} Is there any guarantee that selective judicial deference will result in more responsible constitutional decision-making by the political branches?

A. While there certainly is no guarantee of that, we have already seen that the upholding of challenged legislation tends to encourage Congress to pass more legislation of questionable constitutionality on the assumption that it might also be validated. An unequivocal statement by the Court that political question rulings imply a corresponding duty for the other branches to consider carefully the constitutionality of their actions might encourage them to engage in more responsible constitutional decision-making. The Federalism Proposal which we previously considered is premised in part on the assumption that judicial abdication on federalism questions might encourage congressmen to be more conscientious in considering constitutional issues underlying legislation which affects the rights of the states.\textsuperscript{111} In the long run, a political question ruling would more likely encourage members of the other branches to consider constitutional questions than would a deferential ruling on the merits.

Q. I think that the political question approach eliminates the "deterrence value" of judicial review. Professor Bickel's other

\textsuperscript{108} Choper, supra note 38, at 1602. Professor Choper's comments regarding the effect of a lack of congressional consideration of federalism questions is relevant generally: "[I]f the congressmen ignore constitutional considerations . . . and defer to the Court, and if the Court then upholds the statute in deference to a congressional judgment of constitutionality that has never been exercised, then judicial review is not only illusory but self-defeating." Id.


\textsuperscript{110} Id. at 190.

\textsuperscript{111} Choper, supra note 38, at 1605.
"passive virtues" at least have the advantage of simply deferring decisions to a time that is perhaps more "politically ripe." Theoretically, the political question approach eliminates the possibility of the Court's ever deciding an issue.\textsuperscript{112} If the Court makes a deferential ruling on the merits, it may at least distinguish a later case; the possibility of judicial intervention continues to hang over any future political determination of the issue. Judicial abdication, on the other hand, gives the political branches virtually unfettered discretion to act. Doesn't this concern you?

A. I have already stressed that the Court should generally be reluctant to invoke the political question doctrine because it has other ways to avoid deciding issues.\textsuperscript{113} The burden of proof should no doubt be against judicial abstention: a political question doctrine needn't imply that the Court should decide whether to decide, as Judge Hand suggested, on the basis of "how importantly the occasion demands an answer."\textsuperscript{114}

Nonetheless, the political question doctrine need not overly restrict the Court. The Court has considerable flexibility in defining the scope of a commitment to another branch, in outlining the precise limits of a question found to be political.\textsuperscript{115} Furthermore, the possibility of the Court's later reversing its decision may deter a political branch from assuming overreaching power upon having its authority to resolve an issue recognized by the judiciary.\textsuperscript{116}

Q. You have admitted that delineating the distinguishing features of political questions is difficult. The courts frequently do not openly admit that they are abstaining from deciding a constitutional question. Yet you would have them abstain to avoid the legitimating effect of a ruling that all constitutional standards have been met. What makes you assume that such decisions would be properly understood? Is not the very failure of the Court to declare a law unconstitutional perceived to be an implicit declaration of its constitutionality?

A. One can never be too confident about popular understanding of the Court's rulings. An appropriate invocation of the political question doctrine, however, may well serve to educate the American

\textsuperscript{112} Scharpf, supra note 2, at 538.
\textsuperscript{113} See A. BICKEL, supra note 1, at 111-83.
\textsuperscript{114} L. HAND, supra note 1, at 16.
\textsuperscript{115} See text accompanying note 52 supra.
\textsuperscript{116} After the decision in Colegrove v. Green, 328 U.S. 549 (1946), Illinois altered its system of apportionment because it was concerned that the Court might reverse its holding if the issue were again presented to the Court. See Choper, supra note 38, at 1610.
people and the political branches that the Court’s role is not that of an absolute and all-powerful arbiter of constitutionality. As a matter of history, Charles Warren has documented that *Luther v. Borden*\(^{117}\) was generally perceived accurately as a judicial refusal to confront the main issue raised in the case; the Court’s abstention was perceived as having been neither a validation nor a condemnation of the controversial Dorr doctrine.\(^{118}\) Many people with whom I have spoken understand that the Court’s refusals to rule in the Vietnam War cases left the question of the war’s constitutionality undecided.

In the long run, well-written political question opinions can only help to restore credibility to our concept of judicial review and to qualify overreaching assertions about the role of the Court. At the same time, invocation of the doctrine need not undermine the Court’s important role in our constitutional system.

Christopher A. Johnson  
Thomas B. McAFFEE

\(^{117}\) 48 U.S. (7 How.) 1 (1849).  
\(^{118}\) C. Warren, *supra* note 34, at 190.