

THE POLITICAL QUESTION DOCTRINES

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Much that is said about the political question doctrine is wrong. The doctrine as the Supreme Court has developed it is not a limit on the subject matter jurisdiction of the federal courts. It is, however, a limit on judicial power in its relations with political power. The doctrine has two branches. In one, courts treat certain legal decisions by political actors as conclusive. The leading example is recognition of states and governments, as to which the courts are bound by non-judicial decisions. In the other branch, the mandatory remedies that courts may give are limited in the extent to which they may direct political actors with respect to highly sensitive discretionary decisions, mainly those involving military and security matters. The doctrine's rationale is that in some unusual circumstances the law commits final decision of a legal question to a non-judicial decision maker, as with Senate impeachment trials, and that the distinction between judicial and political power implies some limits on the extent to which the courts can command the exercise of the latter. A substantial number of lower court decisions have seriously misunderstood the doctrine by treating it as a limit on subject matter jurisdiction. In the name of the political question doctrine, lower courts have refused to reach the merits of claims on grounds that have no foundation in the Court's cases or Article III.

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INTRODUCTION

To bring order out of chaos is the work of deity. To bring chaos out of order requires some other hand. The Supreme Court's cases decided on the basis of the political question doctrine are orderly. They reflect a coherent account of the difference between judicial and political power, and the limits on judicial decision making that result from that difference. Those cases do not treat the doctrine as a limit on the federal courts' jurisdiction. Commentators, lower federal courts, and the Court itself in its dicta, have often lost sight of that order. As a result, the lower courts, in the name of the political question doctrine, have found limits on their own jurisdiction that are not founded in the Court's decisions or Article III of the Constitution.

This Article's title is in the plural because it describes what the Supreme Court's political question doctrine is, what it was, and what it is not. It also discusses the political question doctrine of many lower federal courts, explaining what it is but should not be, because it is contrary to the Supreme Court's cases and Article III.

Part I describes what the Supreme Court's political question doctrine is. The Court has relied on the doctrine in two contexts. Most of its cases under that rubric assign to a non-judicial actor the final authority to apply legal rules to particular facts. In the second context, the doctrine limits the courts' ability to give mandatory prospective relief that would control political actors' decisions concerning military and national security matters. Contrary to commentators, lower courts, and the Court's dicta, the doctrine is not a limit on the jurisdiction of Article III courts. It applies in three configurations, none of which involves constitutional limits on subject matter jurisdiction. Part I concludes by explaining the principles underlying the Court's decisions, and the derivation of those principles from the separation of judicial and political power.

Part II describes what the political question doctrine once was, explaining that the canonical political question case of *Georgia v. Stanton*¹ would today be understood as turning on standing. The Court still takes the position that certain political rights may not be vindicated by the federal courts, but now does so under the rubric of standing.

Part III deals with what the political question doctrine is in the lower courts, but should not be because that is not what it is in the Supreme Court or the Constitution. A substantial number of lower courts have found that the political question doctrine deprives them of jurisdiction under Article III to resolve cases involving liability, including the personal monetary liability of federal officials, arising from the foreign relations and national security operations of the United States. Those decisions rest on a misunderstanding of the political question doctrine, and in particular the Court's discussion of it in *Baker v. Carr*,² and are not justified under Article III.

I. WHAT THE DOCTRINE IS

This Part begins by describing the content of the Supreme Court's political question doctrine. It then shows that the Court's cases that rely on the doctrine do not treat it as a limit on the jurisdiction of the

1. 73 U.S. (6 Wall.) 50 (1868).

2. 369 U.S. 186 (1962).

Article III courts. Part I concludes by explaining how the doctrine is derived from the relationship between judicial and political power under the Constitution.

A. *The Substance of the Political Question Doctrine*

The Court's political question cases fall into two categories.³ In most of the cases, some political actor's decision applying law to fact is accorded the finality that the courts' judgments enjoy. The Court has also found that the doctrine limits courts' power to give prospective remedies that control political discretion with respect to military matters.⁴

1. *Non-judicial finality*

"We have said that 'In determining whether a question falls within [the political question] category, the appropriateness under our system of government of attributing finality to the action of the political departments and also the lack of satisfactory criteria for a judicial determination are dominant considerations.'"⁵ The Court has attributed finality to political actors' application of law to fact in three circumstances: (1) when questions of sovereignty and relations among sovereigns are at stake; (2) when the case involves the process of legal enactment; and (3) when the Constitution explicitly designates a house of Congress as judge, either of its own members' elections or of impeachments in the Senate.

3. In *Vieth v. Jubelirer*, 541 U.S. 267, 277, 306 (2004), a plurality of the Court found that Equal Protection challenges to partisan gerrymandering present nonjusticiable political questions because of the substance of judgments that the courts must make when assessing such issues. An opinion of the Court to that effect would have resulted in a third branch of the political question doctrine, which, like the other two, would not be a limit on the courts' jurisdiction.

4. For a brief discussion of the political question doctrine that identifies these two branches, see John Harrison, *The Relation Between Limitations on and Requirements of Article III Jurisdiction*, 95 CALIF. L. REV. 1367, 1372–75 (2007). Professor Tara Grove has recently explored the political question doctrine as a principle of non-judicial finality. Tara Leigh Grove, *The Lost History of the Political Question Doctrine*, 90 N.Y.U. L. REV. 1908 (2015). Professor Grove maintains that in the nineteenth century the doctrine functioned that way, but that the modern version differs substantially from the earlier version. *Id.* at 1913–14. As I will explain, the Court's decisions continue to treat the political question doctrine as a source of non-judicial finality. Some dicta characterize the doctrine as a limitation on the Article III jurisdiction of the federal courts, but the Court has in fact never held that it is. As I will also explain, so to hold would be inconsistent with Article III.

5. *Baker*, 369 U.S. at 210 (quoting *Coleman v. Miller*, 307 U.S. 433, 454–55 (1939)).

a. Recognition of sovereignty and sovereign relations

Many of the Court's political question cases treat a decision made by the political branches concerning sovereignty, sovereign power, and sovereign relations as conclusive. The existence of states, governments, and quasi-sovereigns, such as Indian tribes, and the relations of war and peace among sovereigns, are questions the courts will not decide for themselves when an authoritative political actor has answered the question.⁶

At the head of this doctrinal line is *Luther v. Borden*,⁷ in which the Court said that the judiciary should take as dispositive the political branches' resolution of a disputed question and decide the merits on the basis of that resolution.⁸ *Luther* was a trespass action in the federal diversity jurisdiction in which, as Chief Justice Taney dryly put it, the questions before the Court were "not such as commonly arise in an action of trespass."⁹ Those uncommon questions concerned the identity of the lawful government of Rhode Island.¹⁰

Luther arose out of the political disturbances in Rhode Island in 1841 and 1842, now known as the Dorr Rebellion.¹¹ Dissatisfied with their state's constitutional system, which rested on its original colonial Charter, a group of Rhode Islanders, led by Thomas Dorr, sought to change Rhode Island's Constitution through a direct act of popular sovereignty.¹² Without the legislature's authorization, they convened a constitutional convention, drafted a constitution, and submitted it to a vote that they claimed was a referendum of the people.¹³ When that

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Recognition is a sovereign's official acceptance of a status under international law. A sovereign might recognize a foreign entity as a state, a regime as the other state's government, a place as part of the other state's territory, rebel forces in the other state as a belligerent power, and so on.

Zivotofsky v. Kerry, 135 S. Ct. 2076, 2118 (2015) (Scalia, J., dissenting) (citing 2 MARJORIE M. WHITEMAN, DIGEST OF INTERNATIONAL LAW § 1 (1963)); see also *Baker*, 369 U.S. at 215–17; *Luther v. Borden*, 48 U.S. (7 How.) 1, 35–37 (1849).

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

8. *Id.* at 47.

9. *Id.* at 35.

10. *Id.* at 35, 38–39.

11. *Id.* at 37.

12. *Id.* at 35, 37.

13. *Id.* at 36.

referendum approved the new constitution, the insurgents formed a government under it, electing Thomas Dorr as Governor.¹⁴

As far as the government under the Charter was concerned, these proceedings were illegal and void, and the Dorr government's organization of a militia was an act of rebellion.¹⁵ When Governor King of the Charter government sought aid from the federal government, President Tyler responded that although he did not think that the Dorrites' conduct to that point had amounted to actual insurrection, should an insurrection commence, he would authorize the use of federal force under the statutes concerning civil disturbances in the states.¹⁶ The Charter legislature proclaimed martial law and a militia force, under Luther Borden, broke into the house of Martin Luther, a Dorr supporter.¹⁷ Eventually, peace was restored, and a new constitution with a broader franchise was drafted and approved by a referendum arranged by the Charter legislature. That constitution went into effect in 1843.¹⁸

Also in 1843, Luther, now a citizen of Massachusetts, sued Borden for trespass in federal diversity jurisdiction.¹⁹ At trial, Borden justified breaking into Luther's house on the grounds that he had acted lawfully as a member of the militia under martial law.²⁰ Luther replied that the Charter government was not lawful, having been replaced by the people with the Dorr government, so it could not authorize Borden's

14. WILLIAM M. WIECEK, *THE GUARANTEE CLAUSE OF THE U.S. CONSTITUTION* 91, 95 (1972); *see also Luther*, 48 U.S. (7 How.) at 35–37.

15. *Luther*, 48 U.S. (7 How.) at 36–37.

16. WIECEK, *supra* note 14, at 104; *see also Luther*, 48 U.S. (7 How.) at 44.

17. *Luther*, 48 U.S. (7 How.) at 34. *Compare Luther*, 48 U.S. (7 How.) at 33–34 (providing that Borden claimed to be looking for Luther himself), *with WIECEK, supra* note 14, at 113–14 (explaining that Borden and his fellow militia members were looking for incriminating evidence).

18. *Luther*, 48 U.S. (7 How.) at 37.

19. *Id.* at 1; WIECEK, *supra* note 14, at 114.

20. WIECEK, *supra* note 14, at 114–15.

acts.²¹ The circuit court directed the jury that Borden's plea of official privilege was good and entered judgment for the defendant.²²

The Supreme Court affirmed the circuit court's disposition on the merits.²³ The Court did not, however, decide for itself whether the Charter government had been the lawful government of Rhode Island. Chief Justice Taney, speaking for the Court, concluded that the identity of the lawful government of a state was a political question to be decided by the political branches of the federal government, whose decision would bind the courts.²⁴ He maintained that under the Guarantee Clause of Article IV, "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."²⁵ From the beginning, Congress had admitted Senators and Representatives elected from Rhode Island under the Charter government. "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."²⁶ Although "Congress was not called upon to decide the controversy" because the Dorr government

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The plaintiff contends that the charter government was displaced, and ceased to have any lawful power, after the organization, in May, 1842, of the government which he supported, and although that government never was able to exercise any authority in the State, nor to command obedience to its laws or to its officers, yet he insists that it was the lawful and established government, upon the ground that it was ratified by a large majority of the male people of the State of the age of twenty-one and upwards, and also by a majority of those who were entitled to vote for general officers under the then existing laws of the State.

Luther, 48 U.S. (7 How.) at 38; see also WIECEK, *supra* note 14, at 115.

22. *Luther*, 48 U.S. (7 How.) at 38.

23. *Id.* at 38, 47 (upholding the defendant's plea of justification and affirming the decision of the Circuit Court on the merits of the case).

24. *Id.* at 47 ("[W]hether they have changed [the form of government] or not by abolishing an old government, and establishing a new one in its place, is a question to be settled by the political power. And when that power has decided, the courts are bound to take notice of its decision, and to follow it.").

25. *Id.* at 42.

26. *Id.*

did not last long enough to elect Senators and Representatives, “the right to decide is placed there, and not in the courts.”²⁷

By statute, Congress had authorized the President to call out the militia to suppress insurrection.²⁸ That too implied finality in a political actor. “He is to act upon the application of the legislature or of the executive, and consequently he must determine what body of men constitute the legislature, and who is the governor, before he can act.”²⁹ President Tyler had stated that if necessary he would call out the militia in support of Governor King and the Charter government.³⁰ That determination bound the courts.³¹

When the President recognizes a foreign government or the government of a state, he makes a legal judgment concerning specific facts. Indeed, the Chief Justice noted that Congress could have required the judiciary rather than the President to decide whether an insurrection had occurred, and in the process to determine which organization was the rightful government of a state.³² Congress had not done so, but the possibility that the function could have been assigned to the judiciary shows that it is one a court can in principle perform.

The Chief Justice agreed with the Dorr rebels that the people of a state may change their government at their pleasure.

But whether they have changed it or not by abolishing an old government, and establishing a new one in its place, is a question to be settled by the political power. And when that power has decided, the courts are bound to take notice of its decision, and to follow it.³³

27. *Id.*

28. *Id.* at 43.

29. *Id.*

30. *Id.* at 44.

31.

For certainly no court of the United States, with a knowledge of this decision, would have been justified in recognizing the opposing party as the lawful government; or in treating as wrongdoers or insurgents the officers of the government which the President had recognized In the case of foreign nations, the government acknowledged by the President is always recognized in the courts of justice.

Id.

32. *Id.* at 43 (“They might, if they had deemed it most advisable to do so, have placed it in the power of a court to decide when the contingency [of insurrection] had happened which required the federal government to interfere. But Congress thought otherwise, and no doubt wisely . . .”).

33. *Id.* at 47.

Accepting the political branches' answer to that question, the Court then rejected the plaintiffs' argument that martial law had been improperly imposed and affirmed the decision below.³⁴

Because of *Luther*, federal recognition of state governments has become linked with the United States' obligation under Article IV to guarantee every state a republican form of government. Chief Justice Taney said that when Congress admits the senators and representatives of a state, the republican form of its government is conclusively established.³⁵ The connection was manifest in the dispute over the Military Reconstruction Acts. In those statutes, Congress stated that no legal state governments existed in ten ex-Confederate states, and that military supervision was needed until "loyal and republican" state governments could be established.³⁶ Supporters of military reconstruction maintained that under *Luther*, congressional recognition of the new governments to be created under congressional direction would be binding on the courts.³⁷ The Supreme Court never resolved the issue in the nineteenth century, but *Luther* did figure centrally in an early twentieth century case concerning the Guarantee Clause and direct democracy.

In *Pacific States Telephone and Telegraph Co. v. Oregon*,³⁸ Oregon imposed a tax on corporations, including the Pacific States Telephone

34. *Id.* at 45–47. Justice Woodbury agreed that the identity of the lawful government was a political question, as to which courts were bound by the decisions of political actors.

[W]e cannot rightfully settle those grave political questions which, in this case, have been discussed in connection with the new constitution; and, as judges, our duty is to take for a guide the decision made on them by the proper political powers, and, whether right or wrong according to our private opinions, enforce it till duly altered.

Id. at 56 (Woodbury, J., dissenting). Justice Woodbury differed from the majority on the question of martial law, which he thought had been improperly invoked by the Charter government. *Id.* at 63–64.

35. *Id.* at 42. In the public debate over the Dorr Rebellion, some supporters of Dorr argued that the Charter government was un-republican under Article IV. WIECEK, *supra* note 14, at 90. Professor Grove maintains that the Court's discussion of the Guarantee Clause was a dictum, saying that the plaintiffs did not rely on that argument. GROVE, *supra* note 4, at 1927–28. The question was relevant to the outcome: the Court could have concluded that the Charter government was unlawful because it was un-republican. Had the parties raised the issue, the Court would have properly addressed it.

36. Act to Provide for the More Efficient Government of the Rebel States, ch. 153, 14 Stat. 428 (1867).

37. See John Harrison, *The Lawfulness of the Reconstruction Amendments*, 68 U. CHI. L. REV. 375, 414–18 (2001).

38. 223 U.S. 118 (1912).

Company, via the initiative process.³⁹ In a collection action brought by the state, the company argued that the tax was invalid because direct democracy is unrepresentative.⁴⁰ Chief Justice White, speaking for the Court, regarded the company's argument as

based upon the single contention that the creation by a State of the power to legislate by the initiative and referendum [process] causes the prior lawful state government to be bereft of its lawful character as the result of the provisions of § 4 of Art. IV of the Constitution.⁴¹

The Chief Justice concluded, however, that only the political branches could determine that a state's government had become unrepresentative, and that, until they did so, the courts could not "disregard the existence in fact of the State [and] of its recognition by all of the departments of the Federal Government."⁴² He relied for that proposition on "the leading and absolutely controlling case," *Luther*.⁴³ That case, he said, recognized the

necessity for the existence somewhere in the Constitution of a tribunal, upon which the people of a State could rely, to protect them from the wrongful continuance against their will of a government not representative in form, proceeded to inquire whether a tribunal existed and its character. In doing this it pointed out that owing to the inherent political character of such a question its decision was not by the Constitution vested in the judicial department of the Government, but was on the contrary exclusively committed to the legislative department by whose action on such subject the judiciary were absolutely controlled.⁴⁴

39. *Id.* at 134. Under the initiative process, "a stated number of voters were given the right at any time to secure a submission to popular vote for approval of any matter which it was desired to have enacted into law." *Id.*

40. See Transcript of Record at 8, *Pac. States Tel.*, 223 U.S. 118 (No. 36) (relying on Article IV and several other provisions to maintain that the U.S. Constitution requires that "the government of the several states shall be representative in form and that the several states shall create and maintain representative legislative assemblies"). The initiative process was a form of direct democracy because it empowered voters to create legislation by allowing them to submit laws to a popular vote rather than wait for their elected representatives to pass the desired law. *Id.* at 137-41. The Supreme Court of Oregon rejected the constitutional defense, and the company appealed to the Supreme Court of the United States on writ of error. *Pac. States Tel.*, 223 U.S. at 136.

41. *Pac. States Tel.*, 223 U.S. at 137.

42. *Id.* at 142.

43. *Id.* at 143.

44. *Id.* at 146.

Having found that only Congress could determine that a state government is unrepresentative, and that Congress had not done so, the Court dismissed the writ of error for want of jurisdiction.⁴⁵

Chief Justice White's choice of words shows that he regarded the courts as conclusively bound by Congress's decision to recognize the existing government of Oregon, with that decision's implication that that government was representative. He said that the judiciary was "absolutely controlled" by the legislative department, which he described as a "tribunal."⁴⁶ Three times in one paragraph the Chief Justice referred to recognition of a state by Congress.⁴⁷ His Court had recently reaffirmed, and soon would reiterate, the principle that recognition of a government is a political decision that is binding on the courts.⁴⁸ In the next paragraph, Chief Justice White asked whether the provisions of Article IV "authorize[d] the judiciary to substitute its judgment as to a matter purely political for the judgment of Congress on a subject committed to it."⁴⁹ Describing Congress's action as a "judgment" indicated that it had acted like a court, applying legal principles to specific facts.

45. *Id.* at 151; *see infra* notes 190–94 and accompanying text (explaining the lack of jurisdiction was statutory, not constitutional).

46. *Pac. States Tel.*, 223 U.S. at 146.

47. *Id.* at 141–42.

48. In *Underhill v. Hernandez*, 168 U.S. 250 (1897), the Court was called on to decide whether the acts of General Hernandez, a military commander during a civil war in Venezuela, were those of the government of Venezuela or those of "banditti or mere mobs." *Id.* at 253. The Court found:

The acts complained of were the acts of a military commander representing the authority of the revolutionary party as a government, which afterwards succeeded and was recognized by the United States. We think the Circuit Court of Appeals was justified in concluding "that the acts of the defendant were the acts of the government of Venezuela, and as such are not properly the subject of adjudication in the courts of another government."

Id. at 254. A few years after *Pacific States Telephone*, in *Oetjen v. Central Leather Co.*, 246 U.S. 297 (1918), the Court had before it a purported expropriation by a rebel government of Mexico, a government that was later recognized by the United States. *Id.* at 299–301. The Court treated the expropriation as a sovereign act of Mexico.

It has been specifically decided that "Who is the sovereign, *de jure* or *de facto*, of a territory is not a judicial, but is a political question, the determination of which by the legislative and executive departments of any government conclusively binds the judges, as well as all other officers, citizens and subjects of that government. This principle has always been upheld by this court, and has been affirmed under a great variety of circumstances."

Id. at 302 (quoting *Jones v. United States*, 137 U.S. 202, 212 (1890)).

49. *Pac. States Tel.*, 223 U.S. at 142.

Pacific States Telephone was decided on grounds of non-judicial finality: Congress's recognition of a state government conclusively determines that the state's government is republican in form. The Court had said that in *Luther*. Whether that statement was a holding is not clear, but if it was a dictum in the nineteenth century, the statement became a holding in the twentieth.⁵⁰

A binding determination by a political actor may resolve a case only in part. *Luther*, for example, turned not only on the lawfulness of the Charter government, but also on its imposition of martial law. Only once the Court had concluded that a lawful government had lawfully imposed martial law was it able to conclude that the defense of official privilege was available and give judgment for the defendant.⁵¹ When a court attributes finality to the legal judgment of a non-judicial actor, the court often goes on to decide the case on the merits, assuming that the non-judicial decision was correct. *Luther* rested on political branch finality concerning questions of sovereignty and relations among sovereigns.

Recognition of foreign governments is one example of that category. As Justice Brennan pointed out in *Baker*, the courts often give final authority to political branch conclusions regarding another fundamental question of relations among sovereigns: war and peace.⁵² The courts regularly regard themselves as bound by political decisions concerning the existence and duration of hostilities and resolve the cases before them on the basis of those decisions.

b. The process of legal enactment

Congress may pass statutes only through the process set out in Article I, Section 7. The Constitution may be amended only through the process set out in Article V. The Court has found non-judicial finality with respect to aspects of those enactment processes.

i. Federal statutes

When bills are submitted to the President for signature or veto, they bear the statement of the Speaker of the House and President (or President Pro Tempore) of the Senate that the House and Senate

50. *Baker v. Carr*, 369 U.S. 186, 224–25 (1962). Whether the courts are absolutely bound by a political determination that an existing state government is un-republican is not clear. *Baker* says that Congress's determination that a government is un-republican is binding, *id.*, but no such determination was before the Court in that case.

51. *Luther v. Borden*, 48 U.S. (7 How.) 1, 47–48 (1849).

52. *Baker*, 369 U.S. at 213–14.

passed the bill.⁵³ Under the Supreme Court's enrolled bill doctrine, courts take as conclusive the certification that a particular text was passed by the requisite majority in Congress.⁵⁴

In *Field v. Clark*,⁵⁵ a taxpayer argued that a statute levying a tax was invalid because the text of the document signed by the President pursuant to congressional certification and promulgated by the Secretary of State pursuant to statute was not the text that had been agreed to by both houses of Congress.⁵⁶ The taxpayer offered to prove that claim with citations to the Journals of the two houses, but the Court refused to look behind the certifications and attempt to correct them by examining the records of congressional proceedings.⁵⁷ The certification by the Speaker and Vice President, Justice Harlan explained, "carries, on its face, a solemn assurance by the legislative and executive departments of the government, charged, respectively, with the duty of enacting and executing the laws, that it was passed by Congress."⁵⁸ That assurance reflects Congress's judgment in applying the legal rules found in Article I, Section 7 and the procedures of each house to the particular facts of the votes on specific bills. Whether a purported vote in the House of Representatives constituted passage of a bill, and if so what the content of the bill was, are legal judgments. Although it is part of the legislative process, certification that a bill was adopted resembles adjudication in that it involves legal judgment but no policy choice. The enrolled bill doctrine gives conclusive effect in court to that judgment.

ii. Constitutional amendments

Like *Field* and the enrolled bill doctrine, the Court's leading case on the constitutional amendment process, *Coleman v. Miller*,⁵⁹ also rests on non-judicial finality under the political question rubric. In *Coleman*, a majority of Justices attributed some degree of finality to congressional decisions regarding the adoption of amendments, and derived from

53. 1 U.S.C. § 106a (2012).

54. *Baker*, 369 U.S. at 214 (characterizing this rule as part of the political question doctrine).

55. 143 U.S. 649 (1892).

56. *Id.* at 667–69.

57. *Id.* at 668–69, 671 (noting appellant's argument that a section that both houses had agreed upon had been erroneously omitted from the certified bill and, although that section was inapplicable to *Field*, because of the error, the President never signed into law a bill that passed Congress, so no law was made).

58. *Id.* at 672.

59. 307 U.S. 433 (1939).

Congress's decisional authority a limit on the remedies courts may afford. A majority of the Court, however, did not agree on the extent of congressional authority, so there was no majority opinion concerning the political question doctrine. None of the Justices who relied on a political question rationale thought the Court lacked jurisdiction because of the political question involved.

The events leading to *Coleman* began in 1924, when Congress submitted to the state legislatures a proposed constitutional amendment that would give Congress "power to limit, regulate, and prohibit the labor of persons under eighteen years of age."⁶⁰ Unlike the then-recent Eighteenth Amendment, which imposed Prohibition, the Child Labor Amendment did not itself specify a time during which it had to be ratified to be effective.⁶¹ The amendment proved very controversial among the States and was not ratified in the 1920s.⁶² In that decade, a number of states ratified the Amendment, some voted on the Amendment but did not ratify it, and some affirmatively voted to reject the Amendment.⁶³ Kansas was one of the latter.⁶⁴

In 1937, President Franklin Roosevelt urged ratification of the Child Labor Amendment.⁶⁵ Later that year, the Kansas legislature once again deliberated on ratification.⁶⁶ A resolution of ratification originated in the state Senate, in which the Lieutenant Governor cast a purported tie-breaking vote in favor of ratification.⁶⁷ The Kansas House of Representatives then approved the resolution.⁶⁸ At that point a number of state senators and representatives who had voted against

60. *Id.* at 435 n.1.

61. Compare U.S. CONST. amend. XVIII, § 3 (repealed 1933) (providing that the Amendment would be inoperative if the states failed to ratify it within seven years of submission), with *Child-Labor Amendment to the Constitution: Hearing on S.J. Res. 224 Before the S. Comm. on the Judiciary*, 67th Cong. 2 (1923) (providing that the Amendment would be valid "when ratified by the legislatures of three-fourths of the several States").

62. *Coleman*, 307 U.S. at 451 (explaining that states met the Amendment with adverse sentiment and that by the end of 1925, sixteen state legislatures had voted to reject ratification and four states supported ratification).

63. See DAVID E. KYVIG, *EXPLICIT AND AUTHENTIC ACTS: AMENDING THE U.S. CONSTITUTION, 1776-1995* 259-61 (1996) (tracking various states' processes for ratification, rejection, and failure to vote from 1924 through 1929).

64. *Coleman*, 307 U.S. at 435 (citing Kansas's rejection of the amendment in 1925).

65. On January 7, 1937, President Roosevelt wrote to a number of governors and governors-elect urging them to support ratification in their states. FRANKLIN DELANO ROOSEVELT, *THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT* 657-58 (1938).

66. *Coleman v. Miller*, 71 P.2d 518, 519 (Kan. 1937).

67. *Id.*

68. *Id.*

ratification brought an action against Miller, the Secretary of the Kansas Senate, and other Kansas officials, in the Supreme Court of Kansas.⁶⁹ The plaintiffs sought a writ of mandamus directing Secretary Miller to erase the endorsement he had put on the resolution declaring it to have passed the Kansas Senate, and replace it with an endorsement reading, “was not passed.”⁷⁰ They also sought orders against Miller and the other defendants restraining them from signing the resolution and presenting it to the Governor of Kansas.⁷¹

On the merits, the plaintiffs argued that the Lieutenant Governor had no authority to cast a vote on a constitutional amendment, and that as a result the resolution had failed on an equally divided vote in the Kansas Senate.⁷² They also argued that Kansas’s earlier vote of rejection barred any further action by that state and that the amendment was no longer open to ratification because a reasonable time for ratification had passed.⁷³ On the last point, the plaintiffs relied on statements by the Supreme Court of the United States in a case concerning the Eighteenth Amendment, where the Court held that Article V implicitly limits the amendment process to a reasonable time from proposal.⁷⁴

The Supreme Court of Kansas denied the requested relief and the Supreme Court of the United States affirmed. The Kansas court considered and rejected the petitioners’ arguments concerning Article V.⁷⁵ In the Supreme Court of the United States, Chief Justice Hughes

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.* at 527 (citing *Dillon v. Gloss*, 256 U.S. 368, 374, 376 (1921)) (holding that Congress has the power to fix a definite period for the ratification of an amendment to the Constitution). *Dillon* involved a challenge to the validity of the Eighteenth Amendment, Section 3 of which provided that the Amendment shall be inoperative if it has not been ratified within seven years of proposal. 256 U.S. at 370–71. The opponents of the Amendment argued that Congress did not have the power to impose such a time limit. *Id.* at 371. The Court rejected that challenge, reasoning that the Constitution itself requires that amendments be ratified within a reasonable time. *Id.* at 374. Because the Constitution permits ratification only within a reasonable time, Congress could set such a time in the amendment itself. *Id.* at 376.

75. In response to petitioners’ arguments, the Kansas Supreme Court concluded that the Lieutenant Governor of Kansas could cast a tie-breaking vote on a constitutional amendment, *Coleman*, 71 P.2d at 524, that a State may reject and then subsequently validly ratify a constitutional amendment, *id.* at 526, and that ratification of the Child Labor Amendment remained timely, *id.* at 526–27.

wrote an opinion styled as that of the Court that did not command a majority of the Justices on all the issues it addressed. The Chief Justice dealt first with “the jurisdiction of this Court,” which had been challenged on the grounds that the Kansas legislators had “no standing to seek to have the judgment of the state court reviewed,” and that the writ of certiorari therefore should be dismissed.⁷⁶ In a decision that remains important with respect to so-called “legislator standing,” the Court concluded that it had jurisdiction, even though the plaintiffs did not allege private damage.⁷⁷ On that question the Chief Justice was joined by Justices Stone, Reed, Butler, and McReynolds, and so spoke for a majority of the Court.⁷⁸

A different majority concluded that the Supreme Court of Kansas was correct in denying relief.⁷⁹ Seven Justices agreed on that disposition and characterized ratification of constitutional amendments as at least in part a political question for Congress to resolve.⁸⁰ Those seven divided into blocs of three and four that differed in their reasoning, so there was no opinion for a majority on that issue.⁸¹ All seven understood the political question doctrine as producing a form of non-judicial finality.

Chief Justice Hughes, speaking for himself and Justices Stone and Reed, found that Congress had the final authority to decide whether a constitutional amendment had been ratified in a timely fashion, and that the congressional decision would be conclusive for the courts. He asserted that “[t]he decision by the Congress, in its control of the action of the Secretary of State, of the question whether the amendment had been adopted within a reasonable time would not be

76. *Coleman v. Miller*, 307 U.S. 433, 437 (1939).

77. *Id.* at 445 (discussing the argument that the plaintiffs lacked standing, as the legislators bringing suit could not show an individual and particularized injury).

78. Justice Frankfurter, in an opinion joined by Justices Roberts, Black, and Douglas, maintained that the petitioners lacked standing. *Id.* at 460.

79. The Court did not address the objection to the Lieutenant Governor’s tie-breaking vote, being evenly divided as to whether that was a nonjusticiable political question. *Id.* at 446–47.

80. *Id.* at 435, 456–57. Justices Hughes, Stone, and Reed for the Court and Justices Black, Roberts, Frankfurter, and Douglas in concurrence. *Id.* at 435, 456.

81. *Id.* at 451–52, 459–60. Justices Hughes, Stone, and Reed addressed the question regarding limits of Congress’s power to determine what constitutes a reasonable timeframe for ratification, ultimately finding that the proper frame was for Congress alone to determine; Justices Black, Roberts, Frankfurter, and Douglas found it improper for the Court to even address the question of reasonableness as the rules of ratification are the exclusive domain of Congress and require no pronouncements of validity by the court. *Id.*

subject to review by the courts.”⁸² Describing his Court’s prior decisions “as to the class of questions deemed to be political and not justiciable,” he then explained that “[i]n determining whether a question falls within that category, the appropriateness under our system of government of attributing finality to the action of the political departments and also the lack of satisfactory criteria for a judicial determination are dominant considerations.”⁸³

The Chief Justice was quite explicit in saying that political actors’ resolution of political questions can provide the courts with rules of decision that they then can apply. Less explicit was his derivation of the result in *Coleman* from that principle. He rejected a challenge to his Court’s jurisdiction and affirmed the Supreme Court of Kansas’s decision to deny relief, but he did not address the substance of petitioners’ arguments under Article V. How could Chief Justice Hughes have thought it proper to exercise jurisdiction and affirm without fully resolving the merits?

Although the Chief Justice did not explain that point in depth, his opinion indicates that affirmance was appropriate because judgment for the plaintiffs would have interfered with Congress’s decisional process. In the Kansas court, the plaintiffs had sought orders that would prevent the transmission to the national government of a certification that Kansas had ratified. Judicial relief of that kind would have intercepted Kansas’s certification, and kept Congress from passing on its validity. Chief Justice Hughes believed that Congress was to decide on the validity of that purported act. After explaining that the reasonableness of time for ratification presents political and not judicial questions, he said that “[t]hey can be decided by the Congress with the full knowledge and appreciation . . . of the political, social[,] and economic conditions which have prevailed during the period

82. *Id.* at 454. In referring to Congress’s control of the action of the Secretary of State, the Chief Justice apparently had the circumstances surrounding the promulgation of the Fourteenth Amendment in mind. In response to the Secretary of State’s doubts as to whether the Amendment had been ratified, Congress in 1868 declared that it had been ratified and directed the Secretary to promulgate it. *Id.* at 448–49. According to Chief Justice Hughes, “This decision by the political departments of the Government as to the validity of the adoption of the Fourteenth Amendment has been accepted.” *Id.* at 449–50. Of all the amendments to the Constitution, only the Fourteenth was promulgated in response to specific congressional direction. Chief Justice Hughes did not base his argument about congressional power on the text of Article V, which makes no reference to any congressional role in promulgation.

83. *Id.* at 454–55.

since the submission of the amendment.”⁸⁴ The question of reasonable time would be “an open one for the consideration of the Congress when, in the presence of certified ratifications by three-fourths of the States, the time arrives for the promulgation of the adoption of the amendment.”⁸⁵ That time can arrive only if certifications of ratification are before Congress, which they will not be if the relevant state officers are blocked from submitting them by court order.

In the opinion’s penultimate paragraph, the Chief Justice repeated that Congress “has the final determination of the question” regarding lapse of time, and that therefore “[t]he state officials should not be restrained from certifying to the Secretary of State the adoption by the legislature of Kansas of the resolution of ratification.”⁸⁶ A judicial order restraining certification would keep Congress from resolving the question, while denial of relief would give the national legislature an opportunity to make a final determination. The implication is that when the final decision is for Congress to make, the courts should not give remedies that keep from the legislature the official records that it needs to perform its quasi-judicial function.

Justice Black, speaking for himself and Justices Roberts, Frankfurter, and Douglas, was equally clear that the political question doctrine gave Congress authority conclusively to resolve a contested question of law and fact. Ratification of constitutional amendments is a political question, and “decision of a ‘political question’ by the ‘political department’ to which the Constitution has committed it ‘conclusively binds the judges, as well as other officials, citizens[,] and subjects of . . . government.’”⁸⁷ Proclamation of an amendment under the authority of Congress “will carry with it a solemn assurance by the Congress that ratification has taken place as the Constitution commands,” and when that assurance is given, “a proclaimed amendment must be accepted as part of the Constitution, leaving to the judiciary its traditional authority of interpretation.”⁸⁸ That is non-judicial finality.

84. *Id.* at 454.

85. *Id.*

86. *Id.* at 456.

87. *Id.* at 457 (Black, J., concurring) (quoting *Jones v. United States*, 137 U.S. 202, 212 (1890)).

88. *Id.* at 457–58. Like the Chief Justice, Justice Black did not explain how promulgation by the Secretary of State pursuant to a general statutory directive to promulgate validly ratified amendments could constitute a determination or assurance by Congress that any particular amendment had been ratified.

Justice Black declined to join the Chief Justice's reasoning, because Chief Justice Hughes's understanding of congressional finality was too limited for him. Justice Black thought that the Chief Justice understated "Congress[']s . . . sole and complete control over the amending process, subject to no judicial review."⁸⁹ Although he treated ratification as a political question, the Chief Justice had cited the Court's earlier statement that amendments must be ratified within a reasonable time.⁹⁰ In Justice Black's view, the Court should have said nothing about the rules governing ratification, other than to disapprove its earlier statements on the subject, because "Congress . . . cannot be bound by and is under no duty to accept the pronouncements upon [its] exclusive power by this Court or the Kansas courts," and any judicial discussion of the topic "is a mere admonition to the Congress in the nature of an advisory opinion."⁹¹

Like Chief Justice Hughes, Justice Black thought that congressional finality on political question grounds meant that the Supreme Court of Kansas had been right to withhold relief. Justice Black did not propose to vacate the Kansas court's judgment or reverse with instructions to dismiss for want of jurisdiction.⁹² He said that

judicial review of or pronouncements upon a supposed limitation of a "reasonable time" within which Congress may accept ratification . . . and kindred questions, are all consistent only with an ultimate control over the amending process in the courts. And this must inevitably embarrass the course of amendment by subjecting to judicial interference matters that we believe were intrusted by the Constitution solely to the political branch of government.⁹³

Justice Black's reference to judicial control and interference, in addition to judicial pronouncements, indicates that a decree that would prevent a certification from reaching Congress was as impermissible as any judicial statements about Article V. A decree like the mandamus that Coleman requested from the Kansas court would interfere with congressional decision making by limiting the official records on which Congress could base its decision. But according to Justice Black, "[t]he [amendment] process itself is 'political' in its

89. *Id.* at 459.

90. *Dillon v. Gloss*, 256 U.S. 368, 375 (1921).

91. *Coleman*, 307 U.S. at 459–60 (Black, J., concurring).

92. *Id.* at 469–70 (writing that he would have dismissed the writ for want of jurisdiction in the Supreme Court of the United States, but not indicating that the restrictions on his Court's authority translated to a similar want of jurisdiction in the Kansas court).

93. *Id.* at 458.

entirety, from submission until an amendment becomes part of the Constitution, and is not subject to judicial guidance, control[,] or interference at any point.”⁹⁴ In his view, that was why the Supreme Court of Kansas was right to deny mandamus, though he believed it was wrong to have discussed the substance of Article V in its reasoning.

Coleman thus turned on non-judicial finality. It differed from *Luther* and *Field v. Clark* because the relevant political actor had not yet supplied the courts with a decision that they could treat as conclusive. The Court was not being asked to respect a congressional action promulgating the Child Labor Amendment. Nor was *Coleman* a case in which a court could make a provisional decision subject to later correction by a conclusive political act. Had the courts granted the relief requested, the federal government would not have received notification from Kansas that the state had ratified. If thirty-five other states had notified the Secretary of State of their ratification, but Kansas had not done so, Congress would not have been in a position to decide if Kansas had validly ratified and if the amendment had therefore become part of the Constitution.⁹⁵ That feature of the case, combined with all seven Justices’ concern that the courts not interfere with congressional resolution of the timeliness issue, suggest that seven Justices concluded that the courts may not prejudice political resolution of a political question by issuing an order that affects the process through which that resolution takes place.

This aspect of the political question doctrine, like the aspect concerning recognition of sovereign relations, accords conclusive force to non-judicial decisions that apply legal rules to specific facts.

b. Congressional adjudicative authority

Some provisions of the Constitution assign adjudicative authority to a house of Congress. Article II, Section 4 provides that “[t]he President, Vice President and all civil Officers of the United States shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.”⁹⁶ Article I, Section 2 gives “the sole Power of Impeachment” to the House,⁹⁷ and Section 3 provides that “the Senate shall have the sole Power to try all

94. *Id.* at 459.

95. At the time of *Coleman*, ratification required thirty-six of the forty-eight States then in the Union.

96. U.S. CONST. art. II, § 4.

97. *Id.* art. I, § 2, cl. 5.

Impeachments.”⁹⁸ Section 5 of Article I states that each house of Congress “shall be the Judge of the Elections, Returns and Qualifications of its own Members.”⁹⁹

In the exercise of those functions, the House and Senate apply law to fact to resolve legal disputes. They perform functions more usually performed by courts, and the Constitution uses “judge” and “try” to describe those functions. Under the rubric of the political question doctrine, the Supreme Court gives substantial finality to congressional decisions pursuant to these powers. With respect to contested elections for the House and Senate, the Court’s position is that the relevant political decision maker’s judgment is absolutely final.

*Roudebush v. Hartke*¹⁰⁰ involved the extremely close 1970 election for Senate in Indiana. Incumbent Senator Vance Hartke was certified the winner by a narrow margin, and his opponent, Richard Roudebush, sought a recount under Indiana law.¹⁰¹ Hartke then sought an injunction against the recount in federal district court, arguing that it was unlawful because of the Senate’s power to judge elections, returns, and qualifications of its members.¹⁰² While that litigation was in progress, the Senate seated Hartke, doing so explicitly without prejudice to the recount and the related litigation.¹⁰³

The Supreme Court concluded that Indiana’s recount procedure was lawful, as it was part of the state election process that would ultimately be reviewed by the Senate.¹⁰⁴ The result of that review would be conclusive. “Which candidate is entitled to be seated in the Senate is, to be sure, a nonjusticiable political question.”¹⁰⁵ The Indiana recount process, including its judicial component, could go forward because it was in service of, and not prejudicial to, the Senate’s action as judge of the election. “Once this case is resolved and the Senate is assured that it has received the final Indiana tally, the Senate will be

98. *Id.* art. I, § 3, cl. 6.

99. *Id.* art. I, § 5, cl. 1.

100. 405 U.S. 15 (1972).

101. *Id.* at 16–17.

102. *Id.* at 17 (claiming that the recount was prohibited under Article I, Section 5 of the U.S. Constitution); *see also* U.S. CONST. art. I, § 5.

103. *Id.* at 18.

104. “A recount does not prevent the Senate from independently evaluating the election any more than the initial count does. The Senate is free to accept or reject the apparent winner in either count, and, if it chooses, to conduct its own recount.” *Id.* at 25–26 (footnotes omitted).

105. *Id.* at 19.

free to make an unconditional and final judgment under Art. I, § 5.¹⁰⁶ Final judgments are made by institutions that conclusively apply law to fact. In *Roudebush*, that institution was the Senate.

The question of congressional finality arose a few years earlier in *Powell v. McCormack*,¹⁰⁷ which involved the qualifications of U.S. Representatives. Adam Clayton Powell, elected to the House from New York, sought a declaration that his exclusion from the 90th Congress had been unlawful.¹⁰⁸ The Court concluded that the district court had subject matter jurisdiction under Article III and the statutes.¹⁰⁹ It then turned to justiciability, which it explicitly distinguished from subject matter jurisdiction, and to the political question doctrine as an aspect of justiciability.¹¹⁰ The Court addressed the Respondents' argument that "this case presents a political question because, under Art. I, § 5, there has been a 'textually demonstrable constitutional commitment' to the House of the 'adjudicatory power' to determine Powell's qualifications."¹¹¹

The Court understood that question as turning on the House's final decisional authority. If Article I, Section 5 "gives the House judicially unreviewable power to set qualifications for membership and to judge whether prospective members meet those qualifications, further review of the House determination might well be barred by the political question doctrine."¹¹² But "if the Constitution gives the House power to judge only whether elected members possess the three standing qualifications set forth in the Constitution, further consideration would be necessary to determine whether any of the other formulations of the political question doctrine" the Court had

106. *Id.*

107. 395 U.S. 486 (1969).

108. Powell was excluded as a result of an investigation into alleged irregularities in his official expenses. *Id.* at 489–93. By the time the Court decided *Powell v. McCormack*, he had already been seated for the 91st Congress and had been fined for financial misconduct. *Id.* at 494–95. The Court concluded that the case was not moot, because a declaration could still bear on his claim for pay from the 90th Congress, *id.* at 495–500, and that it was not barred by the Speech or Debate Clause because Powell properly sought relief from officers of the House who were not Representatives themselves. *Id.* at 505–06.

109. *Id.* at 512.

110. *Id.* ("As we pointed out in *Baker v. Carr*, 369 U.S. 186, 198 (1962), there is a significant difference between determining whether a federal court has 'jurisdiction of the subject matter' and determining whether a cause over which a court has subject matter jurisdiction is 'justiciable.'").

111. *Id.* at 519.

112. *Id.* at 520.

previously identified applied to the case.¹¹³ After an extensive review of the history, the Court concluded that neither House has authority to impose qualifications beyond those set out in the Constitution, reasoning that “Art. I, § 5, is at most a ‘textually demonstrable commitment’ to Congress to judge only the qualifications expressly set forth in the Constitution. Therefore, the ‘textual commitment’ formulation of the political question doctrine does not bar federal courts from adjudicating petitioners’ claims.”¹¹⁴ In assessing the two houses’ function as “judge” of elections and qualifications, the Court found that their decisions were final only to a limited extent.¹¹⁵

Perhaps the clearest example of non-judicial adjudication in the Constitution is the Senate’s sole power to try all impeachments. The meaning of that provision, and the location of the power to interpret and apply it, came before the Court in *Nixon v. United States*.¹¹⁶ Walter Nixon, a U.S. District Judge for the Southern District of Mississippi, was impeached by the House of Representatives.¹¹⁷ In his impeachment trial, the Senate took testimony before a committee rather than in a session of the Senate as a whole.¹¹⁸ The record created before the committee was then available to each Senator, and a session of the full Senate was held at which the House impeachment managers and Judge Nixon’s counsel presented argument and Judge Nixon addressed the Senate.¹¹⁹ Nixon objected to the Senate’s procedure and after his conviction and removal brought suit in federal district court, seeking a declaration that his removal was void and that he was entitled to reinstatement as a federal judge and back pay.¹²⁰ The district court dismissed his claim as nonjusticiable, the court of appeals affirmed the district court, and the Supreme Court affirmed the court of appeals.¹²¹

Nixon v. United States holds that the Senate’s decisions on impeachment are substantially final on political question grounds, though the exact scope of the finality the Court attributed to the

113. *Id.* at 520–21 (footnotes omitted).

114. *Id.* at 548. After resolving that primary question, the Court dealt briefly with other considerations, including the elements of political question cases that had been listed in *Baker*. *Id.* at 548–49.

115. *Id.* at 550.

116. 506 U.S. 224 (1993).

117. *Id.* at 226–27.

118. *Id.* at 227 & n.1.

119. *Id.* at 227–28.

120. *Id.*

121. *See id.* at 228, 238. The District Court concluded that the claim was nonjusticiable and the Court of Appeals and Supreme Court affirmed. *Id.*

Senate is not entirely clear. The Court may have held that a Senate judgment of conviction is absolutely final and subject to no reconsideration by the courts. It is also possible that, like *Powell, Nixon v. United States* recognized a narrower form of finality as to an issue, not the result and everything that went into it. The specific issue was whether the procedures the Senate used qualified as a trial under Article I, Section 5.

Elements of the Court's reasoning point to the broad rationale. Chief Justice Rehnquist, writing for the Court, noted that the House has the "sole" power of impeachment and the Senate the "sole" power to try all impeachments.¹²² In his view, "the word 'sole' indicates that this authority is reposed in the Senate and nowhere else."¹²³ That means that "the Senate alone shall have authority to determine whether an individual should be acquitted or convicted."¹²⁴ The Chief Justice then considered the Federal Convention's decision to move impeachment trials from the Supreme Court to the Senate.¹²⁵ He explained that "the Judiciary, and the Supreme Court in particular, were not chosen to have any role in impeachments."¹²⁶ A decision to exclude the courts completely would not be confined to keeping them from deciding whether the Senate had truly tried an impeachment. That line of reasoning suggests that Senate judgments of conviction are absolutely final, and that the courts may not independently decide any question on which such a judgment rests.

On the other hand, the Court also pointed out that "the use of the word 'try' in the first sentence of the Impeachment Trial Clause lacks sufficient precision to afford any judicially manageable standard of review of the Senate's actions."¹²⁷ The breadth of that term is relevant specifically with respect to judicial determination whether there has been a trial, not with respect to other issues that might come up concerning impeachment. Moreover, the Court said that the question was whether the Constitution contained a textually demonstrable commitment of "the issue" to a political actor.¹²⁸ That may have been an accident of phrasing, or it may have represented the Court's

122. *Id.* at 230–31.

123. *Id.* at 229.

124. *Id.* at 231.

125. *Id.* at 233–35.

126. *Id.* at 234.

127. *Id.* at 230.

128. *Id.* at 228, 230.

understanding that a commitment of only one issue—what constitutes an impeachment—was at stake.

Nixon v. United States found substantial non-judicial finality under the political question rubric. Most likely the case means that Senate impeachments are absolutely conclusive as far as the courts are concerned, but the opinion can be read more narrowly. Each of the three leading cases in which the Court has relied on the political question doctrine—*Luther*, *Coleman*, and *Nixon v. United States*—rests on non-judicial finality. In all three, the Court found that the judiciary was absolutely bound by a political actor's decision that applied legal rules to specific facts.

2. Remedies that would direct political discretion

John Marshall said that “[q]uestions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this [C]ourt.”¹²⁹ That conclusion followed from the principle that “[t]he province of the court is, solely, to decide on the rights of individuals, not to enquire how the executive, or executive officers, perform duties in which they have a discretion.”¹³⁰ That principle would not keep the court from issuing a writ of mandamus ordering that Madison deliver Marbury's commission, Marshall explained, because while mandamus is confined to requiring the performance of non-discretionary, ministerial duties, delivering the commission would involve no exercise of discretion by an executive officer.¹³¹

Contemporary political question doctrine incorporates the principle that courts may not grant remedies that would control non-judicial decisions to an impermissible extent. The Supreme Court applied that principle in *Gilligan v. Morgan*,¹³² an injunctive proceeding against the Governor of Ohio that grew out of the deaths at Kent State University. According to the plaintiffs, the confrontation between demonstrators and the Ohio National Guard had led to fatalities because the Guard was ill-trained and improperly equipped to deal with civil disturbances.¹³³ The district court dismissed for failure to state a claim upon which relief could be granted.¹³⁴ The court of appeals reversed in part and

129. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803).

130. *Id.*

131. *Id.* at 171–73.

132. 413 U.S. 1 (1973).

133. *Morgan v. Rhodes*, 456 F.2d 608, 611 (6th Cir. 1972), *rev'd sub nom. Gilligan v. Morgan*, 413 U.S. 1 (1973) (quoting the facts of the case as they appear in the complaint).

134. *Gilligan*, 413 U.S. at 3.

remanded, instructing the district court to determine whether the Ohio National Guard's "pattern of training, weaponry and orders" made the use of lethal force inevitable in circumstances in which that level of force was not reasonably necessary.¹³⁵ In dissent, Judge Celebrezze argued that there was "no conceivable relief" the district court could grant because "any such relief would present a nonjusticiable political question."¹³⁶ The court of appeals majority responded that if called on to award injunctive relief, the district court "will find much material available for devising a suitable remedy"; for example, as in the report of the National Advisory Commission on Civil Disorders.¹³⁷

The Supreme Court reversed.¹³⁸ Chief Justice Burger, writing for the Court, began by stressing that military decisions are not per se exempt from judicial examination.¹³⁹ *Gilligan* was not a damages action growing out of the Kent State tragedy, nor one "seeking a restraining order against some specified and imminently threatened unlawful action."¹⁴⁰ It was "a broad call on judicial power to assume continuing regulatory jurisdiction over the activities of the Ohio National Guard."¹⁴¹ The plaintiffs wanted the district court to "establish standards for the training, kind of weapons and scope and kind of orders to control the actions of the National Guard," and then to "exercise a continuing judicial surveillance over the Guard to assure compliance" with its order.¹⁴² In the Supreme Court's view, such an order would exert too much judicial control over government actions that the Constitution leaves to the electorally accountable branches.¹⁴³ Courts are not suited either to make military decisions or to supervise them. "The complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, subject *always* to civilian control of the Legislative and Executive Branches."¹⁴⁴

Having found that formulating riot-control policy would require judicial resolution of nonjusticiable political questions, the Court

135. *Morgan*, 456 F.2d at 612.

136. *Id.* at 618 (Celebrezze, J., dissenting).

137. *Id.* at 614.

138. *Gilligan*, 413 U.S. at 12.

139. *Id.* at 11-12.

140. *Id.* at 5.

141. *Id.*

142. *Id.* at 6.

143. *Id.* at 10.

144. *Id.*

reiterated that military decisions could under other circumstances be tested by courts for their legality. “[W]e neither hold nor imply that the conduct of the National Guard is always beyond judicial review or that there may not be accountability in a judicial forum for violations of law or for specific unlawful conduct by military personnel, whether by way of damages or injunctive relief.”¹⁴⁵ Extensive judicial control of military policy was not permissible, but military decisions were still subject to the law.

The Court promptly kept its implicit promise in *Scheuer v. Rhodes*,¹⁴⁶ a damages action for wrongful death arising from the events at Kent State. The plaintiffs sought recovery from the personal funds of Governor Rhodes and other Ohio civilian and military officials.¹⁴⁷ The Supreme Court concluded that the defendants did not enjoy sovereign immunity.¹⁴⁸ They had only the qualified immunity that protects officials when their acts are not clearly unlawful.¹⁴⁹ Qualified immunity would enable decision makers to “act swiftly and firmly”¹⁵⁰ while preserving the possibility of “accountability in a judicial forum for violations of law or for specific unlawful conduct by military personnel, whether by way of damages or injunctive relief.”¹⁵¹

Taken together, *Gilligan* and *Scheuer* show that the branch of the political question doctrine at work in the former case forbids judicial displacement of discretion, not the application of legal standards to military decisions. The remedy at issue in *Gilligan* was a classic prophylactic injunction.¹⁵² Plaintiffs asked the district court to impose on the Ohio National Guard detailed rules that were not legally required, but that were designed to reduce the likelihood of events like those at Kent State. Such an order would constrain the policy discretion of another government actor to take otherwise-lawful measures. *Gilligan* stands for the proposition that when the decisions

145. *Id.* at 11–12 (footnote omitted).

146. 416 U.S. 232 (1974), *abrogated on other grounds by* Harlow v. Fitzgerald, 457 U.S. 800, 814–15 (1982).

147. *Id.* at 234.

148. *Id.* at 237–39 (noting that sovereign immunity protects the government itself, not government officials against whom recovery is sought from their personal funds).

149. *Id.* at 247–48.

150. *Id.* at 246.

151. *Id.* at 249 (quoting *Gilligan v. Morgan*, 413 U.S. 1, 11–12 (1973)).

152. *See generally* ELAINE W. SHOBE ET AL., REMEDIES: CASES AND PROBLEMS 293 (4th ed. 2007) (defining a prophylactic injunction as a method “to safeguard the plaintiff’s rights by directing the defendant’s behavior so as to minimize the chance that wrongs might recur in the future”).

involved are about military discretion, the separation of judicial and executive power imposes limits on the courts' remedial authority.¹⁵³

A leading nineteenth century political question case also falls into this category. *Mississippi v. Johnson*¹⁵⁴ invokes *Marbury* and the distinction between discretionary and ministerial functions in rejecting a suit against the Executive. Under the Reconstruction Acts of 1867, Congress placed the then-existing governments of the former Confederate states under military supervision, and provided for the establishment of new governments created through acts of popular sovereignty administered by the U.S. Army.¹⁵⁵ Mississippi asked the Supreme Court for leave to file a bill in equity against President Andrew Johnson in the Court's state-citizen diversity original jurisdiction (Johnson was sued as a citizen of Tennessee).¹⁵⁶ The Court rejected the bill on the grounds that the injunction it sought would subject presidential actions in "exercise of the power to see that the laws are faithfully executed to judicial control."¹⁵⁷ Actions of that kind were "in no just sense ministerial" but "purely executive and political."¹⁵⁸ *Marbury*, the Court explained, was not to the contrary, because it involved a ministerial duty, "a simple, definite duty, arising under conditions admitted or proved to exist, and imposed by law."¹⁵⁹

Today, the Court apparently regards *Mississippi v. Johnson* as limiting judicial decrees directed to the President himself.¹⁶⁰ As *Gilligan* shows,

153. The Court in *Baker* stressed that all of its earlier political question cases had involved the national separation of powers, not the relations between state and national governments. *Baker v. Carr*, 369 U.S. 186, 210 (1962). A few years later it decided *Gilligan*, in which the defendant was the Governor of Ohio, on political question grounds. *Gilligan*, 413 U.S. at 12. The doctrine thus to some extent operates to protect decisions by state, and not just federal, political actors. The Court has not had occasion to decide whether a state political decision can give rise to non-judicial finality of the kind attributed to the federal political branches in cases like *Luther* and *Coleman*. Nor has it been called on to decide whether state courts may exert the kind of control over state political actors that may not be exerted over the federal political branches.

154. 71 U.S. (4 Wall.) 475 (1867).

155. *Id.* at 475-77.

156. *Id.* at 475.

157. *Id.* at 499.

158. *Id.*

159. *Id.* at 498.

160.

While injunctive relief against executive officials like the Secretary of Commerce is within the courts' power . . . the District Court's grant of injunctive relief against the President himself is extraordinary, and should have raised judicial eyebrows. We have left open the question whether the

however, the Court has not abandoned the principle that there are limits to judicial control of executive discretion, and it still uses the distinction between judicial and political power in referring to those limits. A branch of the political question doctrine enforces that distinction.¹⁶¹

B. Jurisdiction, Justiciability, and Decision on the Merits

Today's Court has indicated in dicta that the political question doctrine limits the power of Article III courts to decide certain cases.¹⁶²

President might be subject to a judicial injunction requiring the performance of a purely "ministerial" duty . . . and we have held that the President may be subject to a subpoena to provide information relevant to an ongoing criminal prosecution . . . but in general "this court has no jurisdiction of a bill to enjoin the President in the performance of his official duties."

Franklin v. Massachusetts, 505 U.S. 788, 802–03 (1992) (internal citations omitted) (quoting *Mississippi v. Johnson*, 71 U.S. (4 Wall.) at 501).

161. Speaking for a plurality of the Court in *Colegrove v. Green*, 328 U.S. 549 (1946) (plurality opinion), Justice Frankfurter concluded that a challenge to alleged malapportionment of congressional districts should be dismissed for want of equity. *Id.* at 556. In Justice Frankfurter's view, the complaint asked "of this Court what is beyond its competence to grant" because it called on the judiciary "to reconstruct the electoral process of Illinois." *Id.* at 552. "Of course no court can affirmatively re-map the Illinois districts so as to bring them more in conformity with the standards of fairness for a representative system." *Id.* at 553. Congress, by contrast, could deal with the problem if there was one. *Id.* at 554. Justice Frankfurter relied on limits on the federal courts' remedial authority and cited *Mississippi v. Johnson*. *Id.* at 556. Justice Frankfurter's opinion in *Colegrove* fits in the line of decisions that include *Mississippi v. Johnson* and *Gilligan*.

162. In *Massachusetts v. EPA*, 549 U.S. 497 (2007), the Court explained that it is "familiar learning that no justiciable 'controversy' exists when parties seek adjudication of a political question." *Id.* at 516 (citing *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849)). As in *Luther*, the Court decided *Massachusetts v. EPA* on the merits. 549 U.S. at 527. In describing the lower court's decision in *Zivotofsky v. Clinton*, 566 U.S. 189 (2012), the Court rejected the court of appeals's holding that "the courts lacked authority to decide the case because it presented a political question," *id.* at 191, but apparently not the premise that if the case did present a political question the courts could not decide it. Having concluded that the case presented no political question, the Court remanded so that the court of appeals could decide the merits. *Id.* at 202.

Justice Scalia recently characterized the political question rationale of *Coleman* as "a rejection of jurisdiction" and cited *Zivotofsky*, a case decided more than eighty years after *Coleman*, for that characterization of the political question doctrine. *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2696–97 (2015) (Scalia, J., dissenting). Because he assumed that the political question doctrine is a limit on jurisdiction, Justice Scalia regarded the Court's resolution of the standing question in *Coleman* as "quite superfluous and arguably nothing but dictum." *Id.* at 2697. The Court in *Coleman* explicitly rejected a challenge to its jurisdiction based on

The Court has never held that there is such a limitation, however. This Section shows that the Supreme Court's cases that apply the political question doctrine do not regard it as a limit on the jurisdiction of Article III courts. It discusses the cases in which the Court has relied on the doctrine, and then turns to *Baker v. Carr*, which, like earlier decisions, treated the doctrine as a source of non-judicial finality, not lack of jurisdiction.

1. *The Court's political question decisions*

Despite the political question doctrine's close relation to the limits on federal judicial power, it is not a limit on subject matter jurisdiction as the Court uses that concept. The political question doctrine has figured in the decision of cases in three ways, none of which involves a lack of jurisdiction under Article III. First, the political question doctrine may require that a court decide on the merits, accepting an earlier political decision. Second, it may bar a court from granting relief that would improperly interfere with a political decision. Third, in applying it, a state court may be so clearly correct that its decision presents no substantial federal question in the statutory appellate jurisdiction of the Supreme Court of the United States. After describing the three contexts, this Section will undertake to better understand the concept of justiciability, which the Court has not fully elaborated.

a. *Decision on the merits based on a political actor's legal judgment*

Perhaps the most straightforward application of the political question doctrine appeared in *Luther*.¹⁶³ The Supreme Court accepted the political branches' judgment that the established government was legitimate, and used it to assess Luther's claim for damages, which was rejected on the merits. The Court affirmed the circuit court's judgment, and did not reverse with instructions to dismiss for want of jurisdiction. *Field v. Clark* worked the same way. Having concluded that the text of an Act certified by Congress was authoritative, the Court decided the case before it on that basis.¹⁶⁴ *Field* no more involved a lack of jurisdiction than does a case that turns in part on the

standing and then affirmed the Supreme Court of Kansas, which had decided the case on the merits. *Coleman v. Miller*, 307 U.S. 433, 437–38 (1939).

163. See *supra* notes 8–37 and accompanying text.

164. See *supra* notes 55–58 and accompanying text.

preclusive effect of a prior judgment. Non-judicial finality often operates in the same fashion as judicial finality.

Because of the political question doctrine, the decision of a non-judicial actor can provide a premise that the court uses in a decision on the merits. As a result, the doctrine can support a decision in favor of the plaintiff, which a limit on jurisdiction cannot do. In the nineteenth century recognition case *Williams v. Suffolk Insurance Co.*,¹⁶⁵ the defendant insurance company refused to pay when the insured's vessel was seized by the government of Buenos Ayres (as Argentina was then known).¹⁶⁶ That seizure followed a warning by Argentine officials that the Falkland Islands were Argentine territory, not open to American fishing vessels.¹⁶⁷ The insurance company argued that the policy did not cover seizure under those circumstances. The insured responded that the master of its vessel had acted reasonably in response to the Argentine threat by asserting the right of American citizens to operate in the Falklands, which the U.S. Executive did not recognize as part of Argentina.¹⁶⁸ The Court found that the Executive's conclusion regarding sovereignty over the Falklands was conclusive, and that in light of that conclusion the master had acted reasonably.¹⁶⁹ The plaintiff prevailed, relying in part on the Executive's conclusive determination of sovereign rights. As that case shows, deference to the legal decision of a political actor does not deprive a court of jurisdiction.

b. Political autonomy and unavailability of relief

In other situations, the political question doctrine prevents the court from granting relief. In those cases, the doctrine bars relief whether or not the defendant's conduct is lawful and so limits the issues the court addresses. The doctrine does not, however, operate as a limitation on subject matter jurisdiction under Article III. When it produces that result, the political question doctrine functions much like a limit on

165. 38 U.S. (13 Pet.) 415 (1839).

166. *Id.*

167. *Id.* at 417.

168. *Id.* at 420.

169.

And we think in the present case, as the executive, in his message, and in his correspondence with the government of Buenos Ayres, has denied the jurisdiction which it has assumed to exercise over the Falkland [I]slands; the fact must be taken and acted on by this Court as thus asserted and maintained. *Id.* at 420. With that premise in place, the Court concluded that the master of the vessel took no risk that would relieve the insurers of liability on the policy. *Id.* at 421.

equitable relief, such as the requirement that the remedy at law be inadequate. If a court applying traditional rules about equitable relief concludes that the plaintiff has an adequate remedy at law, it will deny equitable relief without deciding whether the defendant is a wrongdoer and will be exercising its jurisdiction in doing so.¹⁷⁰

Either branch of the doctrine can require a court to deny a remedy without an inquiry into the lawfulness of the defendant's conduct. *Coleman* shows how non-judicial finality can require that a court withhold relief. The seven Justices who decided the case on political question grounds did so because judicial relief that prevented Kansas from reporting its purported ratification would interfere with a congressional decision that, if made, would be conclusive on the courts. The other branch of the doctrine, found in *Gilligan*, readily falls into this category because it is formulated as a limit on relief. As *Scheuer* demonstrated, the Court in *Gilligan* was concerned with decrees that would intrude into military discretion, not damages judgments based only on whether a use of force was lawful. In *Gilligan*, the Court was able to decide that the plaintiffs were not entitled to the relief they requested without deciding all of the issues they raised. Because the injunction that the plaintiffs asked for could not be granted, the courts did not have to assess the Ohio National Guard's propensity to use force unlawfully.

In both *Coleman* and *Gilligan*, the Court exercised jurisdiction, and denied relief without resolving all the questions the plaintiffs raised.¹⁷¹ When the political question doctrine makes relief unavailable on the facts as pled by the plaintiff, the complaint will be subject to dismissal under Rule 12(b)(6) of the Federal Rules of Civil Procedure.¹⁷² When applicable legal principles require that the plaintiff be denied a favorable decree, the plaintiff has not stated a claim on which relief can be granted. That conclusion can follow from principles governing remedies, just as it can follow from principles governing other

170. See *infra* note 184 and accompanying text.

171. In *Coleman* the Supreme Court of Kansas had resolved the issues the plaintiffs raised under Article V, but the Supreme Court of the United States affirmed that judgment on a different ground, relying on the political question doctrine to do so. *Coleman v. Miller*, 307 U.S. 433, 437-38 (1939).

172. Fed. R. Civ. P. 12(b)(6) (allowing dismissal for "failure to state a claim upon which relief can be granted").

components of the plaintiff's claim for relief, including the substance of the dispute between the parties.¹⁷³

Gilligan illustrates the point that cases like it are properly dismissed under Rule 12(b)(6), not for want of jurisdiction. The district court had dismissed for failure to state a claim upon which relief could be granted.¹⁷⁴ The court of appeals reversed that judgment in part, and the Supreme Court in turn reversed the court of appeals.¹⁷⁵ The Court thereby reinstated a dismissal based not a lack of jurisdiction, but on the legal principles governing the parties' dispute. The Court understood the question to involve the availability of relief, not the courts' jurisdiction. It began its inquiry into justiciability by asking, if the facts alleged by the plaintiffs were true, "whether there is any relief a District Court could appropriately fashion."¹⁷⁶ Having answered that question in the negative, because the decree contemplated would require that a court make military judgments, the Court reinstated the district court's disposition of the case.¹⁷⁷

By treating the political question doctrine as grounds for dismissal under Rule 12(b)(6), the district court used the structure set out in *Baker v. Carr*, which is discussed in depth below. In *Baker*, the Court explicitly distinguished between subject matter jurisdiction and justiciability. The district court in *Baker* had dismissed on the grounds that it lacked jurisdiction and that the plaintiff failed to state a claim on which relief could be granted.¹⁷⁸ The Supreme Court identified

173. For example, the allegations in a complaint that seeks an injunction under standard equitable principles must support the conclusion that the plaintiff is threatened with irreparable injury and would have only an inadequate remedy at law. See, e.g., *Pine Twp. Citizens' Ass'n v. Arnold*, 453 F. Supp. 594, 597–98 (W.D. Pa. 1978) (asserting that before convening a three-judge court, a single judge must determine whether a complaint formally alleges a basis for equitable relief, including irreparable injury and inadequacy of the remedy at law).

174. *Gilligan v. Morgan*, 413 U.S. 1, 3 (1973) (citing *Morgan v. Rhodes*, 456 F.2d 608, 608–09 (6th Cir. 1972) (noting the dismissal in district court for failure to state a claim on which relief could be granted). The court of appeals made the same point below in *Morgan v. Rhodes*. 456 F.2d at 608–09 ("The District Judge dismissed the complaint on motion without either answer or affidavits being filed by appellees, and without hearing. His brief order stated that the pleading failed to state a claim cognizable under federal law.").

175. See *Gilligan*, 413 U.S. at 12; *Morgan*, 456 F.2d at 615.

176. *Gilligan*, 413 U.S. at 5.

177. *Id.* at 10–12.

178. In the three-judge district court, the defendants had moved to dismiss for lack of subject matter jurisdiction, failure to state a claim on which relief could be granted, and failure to join indispensable parties. *Baker v. Carr*, 179 F. Supp. 824, 826 (M.D.

those grounds as first “lack of subject-matter jurisdiction” and then “failure to state a justiciable cause of action.”¹⁷⁹ It considered and rejected the political question argument under the second heading.¹⁸⁰

Nixon v. United States, which like *Gilligan* but unlike *Baker* was decided under the political question doctrine, follows the same pattern. In that case the district court concluded that it had subject matter jurisdiction, and that “[t]he availability of the judicial remedy sought by plaintiff depends, therefore, on whether the controversy here is justiciable.”¹⁸¹ The district court thus believed that non-justiciability would make relief unavailable in a case within the court’s jurisdiction. Concluding that the case was not justiciable, the district court dismissed on that ground.¹⁸² The court of appeals affirmed, holding that “Walter Nixon’s claim is not justiciable.”¹⁸³ The Supreme Court affirmed that judgment. All three courts believed that it was possible for a case to be within the federal courts’ jurisdiction but not to be justiciable.

The courts in *Gilligan* used the now-familiar concept found in Rule 12(b)(6) to categorize cases in which the political question doctrine means that no relief will be available although the court has jurisdiction. Earlier terminology from equity practice may be a source of confusion on this score because as Justice Holmes explained, “Courts sometimes say that there is no jurisdiction in equity when they mean only that equity ought not to give the relief asked.”¹⁸⁴ When

Tenn. 1959) (per curiam), *rev’d*, 369 U.S. 186 (1962). The district court dismissed on the first two grounds and did not address the third. *Id.* at 828.

179. *Baker v. Carr*, 369 U.S. 186, 196, 208–09 (1962).

180. *Id.* at 208–09 (considering political question doctrine under the justiciability heading).

181. *Nixon v. United States*, 744 F. Supp. 9, 11–12 (D.D.C. 1990), *aff’d*, 506 U.S. 224 (1993). Judge Nixon had sought a declaration that his conviction by the Senate was void. *Id.* at 10.

182. *Id.* at 14. The United States had asserted as defenses that the complaint failed to state a claim upon which relief could be granted, that the court lacked subject matter jurisdiction, and that the action was nonjusticiable. Brief for Respondents & Amicus Curiae United States Senate at 12–13, *Nixon v. United States*, 744 F. Supp. 9 (D.D.C. 1990) (No. 91-740). The district court did not indicate whether it understood dismissal for non-justiciability as a form of dismissal for failure to state a claim on which relief could be granted.

183. *Nixon v. United States*, 938 F.2d 239, 246 (D.C. Cir. 1991).

184. *Mass. State Grange v. Benton*, 272 U.S. 525, 528 (1926). Immediately after that sentence, Holmes continued, “In a strict sense the [lower c]ourt in this case had jurisdiction. It had power to grant an injunction, and if it had granted one its decree, although wrong, would not have been void.” *Id.* The plaintiffs claimed that Massachusetts’s daylight savings time statutes were preempted by federal legislation on

courts say they lack jurisdiction in equity they do not mean that they lack the authority to decide the case on the grounds that the parties or the subject matter are outside their jurisdiction. They mean that no relief will be granted, often because of principles that govern equitable remedies and do not require that the court resolve all the issues disputed between the parties. When the plaintiff is subject to laches, for example, the court can decide that equitable relief is unavailable

the subject. The court below found that the plaintiffs had not made the requisite showing for a preliminary injunction: that the case was “reasonably free from doubt” and that they faced “great and irreparable injury.” *Mass. State Grange v. Benton*, 10 F.2d 515, 515–16 (D. Mass. 1925) (per curiam) (three-judge district court). The district court then went on to address the substance of plaintiffs’ challenge, and found that the state and federal laws were consistent. Having reached that conclusion, the court found it unnecessary to “discuss the serious jurisdictional questions raised, either as to the rights of the plaintiffs or as to any power vested in the defendants by the Massachusetts act to enforce that act.” *Id.* at 517 (citing *Massachusetts v. Mellon*, 262 U.S. 447 (1923)). The Supreme Court affirmed in an opinion by Justice Holmes. *Benton*, 272 U.S. at 529. He endorsed the district court’s finding that state and federal law did not conflict in a single sentence, and then went on to emphasize “the important rule . . . that no injunction ought to issue against officers of a State clothed with authority to enforce the law in question, unless in a case reasonably free from doubt and when necessary to prevent great and irreparable injury.” *Id.* at 527 (citation omitted). Having found that the case before him was not an exception to that general principle of equity, Justice Holmes then made the point that courts sometimes say they have no jurisdiction when they mean that no relief is available under equitable principles. *Id.* at 528. Perhaps to emphasize the distinction, he concluded that “upon the merits we think it too plain to need argument that to grant an injunction upon the allegations of this bill would be to fly in the face of the rule which, as we have said, we think should be very strictly observed.” *Id.* at 528–29. The point that the case was decided on the merits and not on a jurisdictional ground was not lost on Justice McReynolds, who in a separate opinion said that the suit was actually against the State of Massachusetts, not its officers, and so was excluded from federal jurisdiction by the Eleventh Amendment. *Id.* at 529.

without having to decide whether the plaintiff's claims are otherwise meritorious.¹⁸⁵ Political question cases often have that feature.¹⁸⁶

When the political question doctrine bars the relief the plaintiff seeks, the case is properly dismissed under rule 12(b)(6) for failure to state a claim upon which relief may be granted, but not for want of jurisdiction.

185. A plaintiff in equity who has delayed unreasonably may be denied relief, or granted only limited relief, under the equitable doctrine of laches. DAN B. DOBBS, *LAW OF REMEDIES* 75 (2d ed. 1993). The independence of laches and the merits is demonstrated by another principle Dobbs discusses, according to which the defense of laches may be limited to delay that prejudiced the defendant. As a result, a plaintiff complaining of trademark infringement may be barred from retrospective relief by laches but entitled to a prospective injunction. *Id.* at 76. In such situations, the defendant's conduct is by hypothesis infringing, but retrospective relief is denied despite that feature of the merits.

In discussing another traditional equitable principle, the requirement that the remedy at law be inadequate, Dobbs makes the point about misleading references to lack of "jurisdiction."

A traditional locution of equity courts referred to the body of equity precedent and practice as "equity jurisdiction." Sometimes a bill in equity would be dismissed because there was no "equity jurisdiction," and sometimes this phrase was used in dismissing an equitable claim under the adequacy rule. But equity jurisdiction is not jurisdictional in the modern procedural sense.

Id. at 88. Justice Frankfurter in *Colegrove* agreed with the district court that the case should be dismissed "for want of equity" because the relief the plaintiff sought was beyond the courts' authority to grant. *Colegrove v. Green*, 328 U.S. 549, 551-52 (1946).

186. The potentially confusing terminology that Holmes and Dobbs discuss is used in *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475 (1867), which was a political question case insofar as it held that a court could not control a discretionary function. Refusing Mississippi leave to file, Chief Justice Chase said that "this court has no jurisdiction of a bill to enjoin the President in the performance of his official duties." *Id.* at 501. He did not deny that the case fell into the Court's original jurisdiction under Article III—Mississippi had sued a citizen of another state, President Johnson being from Tennessee—but did conclude that no injunction would be issued. That conclusion rested on the unavailability of remedies that would control executive or political discretion. *Id.* at 499 (concluding that the President's function under the Reconstruction Acts was not ministerial, but executive and political). Chief Justice Chase likely believed that that for a court to enjoin an executive official with respect to a proposed non-ministerial act that was neither a tort nor an enforcement proceeding would have been to exercise political and not judicial power. Neither the executive nor the legislature, Chief Justice Chase wrote, "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." *Id.* at 500. That statement and its caveat suggest that any constitutional problem was specifically with the remedy. The reference to proper cases suggests, for example, that if one of those statutes bore on a dispute between private people, or an ex post action for damages against an officer, the courts would perform their usual function of assessing constitutionality.

c. Substantial federal questions in the Supreme Court of the United States

Like most legal principles, the Court's political question doctrine has some straightforward applications. Because that doctrine is one of federal law, state courts are required to apply it. When the Supreme Court had much more mandatory appellate jurisdiction over the state courts than it has today, the Court developed the principle that an appeal from a state court decision that presented no substantial federal question could be dismissed for want of statutory jurisdiction instead of being decided on the merits.¹⁸⁷ If the state court was clearly correct under the Court's precedent, an appeal presented no substantial federal question.¹⁸⁸ Perhaps paradoxically, a conclusion about the merits of the federal question implied that the Court had no jurisdiction under the statute governing appeals from state courts. In the same line of cases, the Court came to the conclusion that when a state court was obviously right, either affirmance, or dismissal for want of a substantial federal question, was a permissible outcome.¹⁸⁹ When it did either, the Court was responding to the substance of the state court's decision.

In the early twentieth century, the Court decided three cases involving the Guarantee Clause that illustrate the two options provided by its doctrine and the substantive grounds of even a dismissal for want of jurisdiction. The first, *Pacific States Telephone*, originated in the Oregon courts, where Oregon prevailed on the merits. The case then came to the Supreme Court of the United States via writ of error.¹⁹⁰

As discussed above, the Court relied on *Luther* for the proposition that Congress's recognition of Oregon as a state, with the implication

187. Throughout the Court's history, its appellate jurisdiction over the state courts but not the federal courts has depended on the lower court's resolution of a federal question. See Herbert Wechsler, *The Appellate Jurisdiction of the Supreme Court: Reflections on the Law and the Logistics of Direct Review*, 34 WASH. & LEE L. REV. 1043, 1045, 1048 (1977) (discussing the history and development of the Supreme Court's appellate jurisdiction, in particular the expansion of the Supreme Court's appellate jurisdiction due to the "enormous growth of federal enactments and judicial extrapolation of the constitutional restraints upon state action"). Compare 28 U.S.C. § 1254 (2012) (giving the Court certiorari jurisdiction over all decisions by the federal courts of appeals), with 28 U.S.C. § 1257 (2012) (giving the Court certiorari jurisdiction only over state court decisions that turn on a federal question).

188. See Francis J. Ulman & Frank H. Spears, *Dismissed for Want of a Substantial Federal Question*, 20 B.U.L. REV. 501, 513–16 (1940) (describing development of the doctrine).

189. *Equitable Life Assurance Soc'y v. Brown*, 187 U.S. 308, 314–15 (1902). Like all three of the political question cases discussed in this Section, *Equitable Life Assurance Society* was written by Justice, later Chief Justice, Edward Douglass White.

190. *Pac. States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118, 136–37 (1912).

that its government was republican, was binding on the courts.¹⁹¹ The opinion concludes that because the issues are political “and not, therefore, within the reach of judicial power, it follows that the case presented is not within our jurisdiction, and the writ of error must therefore be, and it is, dismissed for want of jurisdiction.”¹⁹²

By itself, Chief Justice White’s statement is ambiguous. The Court might have lacked jurisdiction under Article III. The other possibility is that the Court lacked jurisdiction because the case presented no substantial federal question under the jurisdictional statutes. Chief Justice White’s earlier characterization of *Luther* as the “leading and absolutely controlling case” indicates that *Pacific States Telephone* rested on statutory grounds. That characterization indicated that the outcome was clear, and when the outcome was clear a case presented no substantial federal question for purposes of the statute.¹⁹³ The same implication that the case presented no substantial federal question under the statute appears in his explanation that a text-based argument against the company’s contentions was not even necessary “since the repugnancy of those contentions to the letter and spirit of that text is so conclusively established by prior decisions of this court as to cause the matter to be absolutely foreclosed.”¹⁹⁴ In other contexts the modifiers “conclusively” and “absolutely” might be just rhetoric, but in appeals from state courts like *Pacific States Telephone* they bore on the Court’s jurisdiction. When a state court decides a federal question in accordance with principles conclusively established by an absolutely controlling Supreme Court precedent that absolutely forecloses contrary argument, the case presents no substantial federal question in the Court.

The case immediately following *Pacific States Telephone* in the *United States Reports* also supports the conclusion that Chief Justice White found no statutory jurisdiction in the prior case. *Kiernan v. Portland*¹⁹⁵ involved a Guarantee Clause challenge to local level direct democracy in Oregon. Having that day decided *Pacific States Telephone*, the Court dismissed the writ of error in *Kiernan* because it presented no question “sufficiently substantial to support the exertion of jurisdiction.”¹⁹⁶ *Kiernan*’s reference to substantiality shows that the case was dismissed for want of statutory jurisdiction.

191. See *supra* notes 43–44 and accompanying text.

192. *Pac. States Tel.*, 223 U.S. at 151.

193. *Id.* at 143, 146.

194. *Id.* at 142–43.

195. 223 U.S. 151 (1912).

196. *Id.* at 164.

Any remaining doubt whether *Pacific States Telephone* had been dismissed under Article III was dispelled a few years later. *Ohio ex rel. Davis v. Hildebrant*¹⁹⁷ came to the Court from the Supreme Court of Ohio. The Ohio Constitution provided for review of legislative acts through referendum, and a statute redrawing the State's congressional districts had been disapproved via that process.¹⁹⁸ Plaintiffs in the state court sought an order directing Ohio election officials to disregard the referendum on the grounds that the power over congressional elections vested in state legislatures by Article I, Section 4, of the Constitution could not be exercised via direct democracy.¹⁹⁹ The Supreme Court of Ohio rejected that argument, pointing out that the most recent act of Congress governing congressional districting had been drafted so as to refer to the legislative authority of the states, not just their legislatures.²⁰⁰ The Ohio court did not discuss the Guarantee Clause.

On appeal, the Supreme Court of the United States affirmed in an opinion by Chief Justice White. The Chief Justice turned the plaintiffs' argument under Article I into an argument under Article IV, because the argument

must rest upon the assumption that to include the referendum in the scope of the legislative power is to introduce a virus which destroys that power, which in effect annihilates representative government and causes a State where such condition exists to be not republican in form in violation of the guarantee of the Constitution.²⁰¹

That argument was "plainly without substance" because it disregarded "the settled rule that the question of whether that guaranty of the Constitution has been disregarded presents no justiciable controversy, but involves the exercise by Congress of the authority vested in it by the Constitution."²⁰² The absence of a justiciable controversy did not

197. 241 U.S. 565 (1916).

198. *Id.* at 566.

199. *State ex rel. Davis v. Hildebrant*, 114 N.E. 55, 56 (Ohio 1916), *aff'd*, 241 U.S. 565 (1916). Article I, Section 4 of the U.S. Constitution provides that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing [sic] Senators." U.S. CONST. art. I, § 4, cl. 1.

200. *Hildebrant*, 114 N.E. at 55; *cf.* *Ohio v. Gallagher*, 425 U.S. 257, 259 (1976) (*per curiam*) (explaining that the Supreme Court of Ohio "speaks as a court only through the syllabi of its cases," not its opinions).

201. *Hildebrant*, 241 U.S. at 569 (citing U.S. CONST. art. I, § 4).

202. *Id.* (citing *Pac. States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118 (1912)). Although Chief Justice White used the word "controversy," which is found in Article

deprive either the Supreme Courts of Ohio or the United States of jurisdiction, and the Chief Justice made clear that his Court was deciding the merits.

It is apparent from these reasons that there must either be a dismissal for want of jurisdiction because there is no power to reexamine the state questions foreclosed by the decision below and because of the want of merit in the Federal questions relied upon, or a judgment of affirmance, it being absolutely indifferent as to the result which of the two be applied.²⁰³

Because of “the subject-matter of the controversy and the Federal characteristics which inhere in it,” the Court decided to affirm rather than dismiss.²⁰⁴ It thereby decided the case on the merits.

For the White Court the political question doctrine was not a jurisdictional limitation. It was a principle of federal law that governed decisions on the merits in both state and federal court. As such, it could be so clearly correctly applied by a state court that the Supreme Court of the United States could either dismiss an appeal or affirm.

d. Justiciability

Although the Supreme Court has not provided a canonical account of justiciability, its use of the terminology and the pattern of results just described yield a reasonably coherent understanding. A question or issue is nonjusticiable when its resolution is confided to a political actor whose conclusion will be absolutely binding on the courts. A claim is nonjusticiable when the relationship between political and judicial power means that no relief can be granted on it, and a case with no justiciable claim is not justiciable. Justiciability is distinct from subject matter jurisdiction in that a court can have jurisdiction to decide a case that turns on nonjusticiability, and indeed a court can award relief in a case in which an issue is nonjusticiable. When a plaintiff with a meritorious claim relies on the political branches’ recognition of a foreign government, for example, the political question doctrine underlies part of the court’s reasoning in a successful suit.

III, he likely meant a dispute in a general sense rather than a lawsuit. *Hildebrant* was in his Court as one of the “cases” arising under the Constitution and laws of the United States to which the Constitution extends the federal courts’ jurisdiction, not one of the “controversies” listed in Article III. See U.S. CONST. art. III, § 2 (extending judicial power to enumerated cases and controversies).

203. *Hildebrant*, 241 U.S. at 570.

204. *Id.*

The difference between jurisdiction and justiciability explains why the political question doctrine generally applies in state court. When some source of federal law assigns final decisional authority to a political actor, the state courts must respect that federal rule just as much as the federal courts must. State courts may not interfere with the political discretion of federal political actors. State courts are not, however, subject to the jurisdictional limits of Article III.²⁰⁵ In general they must implement the political question doctrine created by federal law, as they must implement other principles of federal law that are not confined to federal institutions the way Article III is.

2. *Baker v. Carr, Jurisdiction, and Finality*

Contrary to common impression, Justice Brennan's opinion in *Baker* classifies the political question doctrine as one of non-judicial finality, not as a limitation on Article III or statutory jurisdiction. *Baker* treated subject matter jurisdiction and justiciability as distinct questions.²⁰⁶ The Court thus recognized that the political question doctrine could govern cases within the courts' jurisdiction, as had happened in *Luther, Coleman, and Hildebrant*.

The Court in *Baker* explicitly distinguished between subject matter jurisdiction and justiciability. A careful reading of the opinion, and in particular the now much-quoted paragraph that lists six characteristics of prior political question cases, shows that the Court regarded that doctrine as producing non-judicial finality as to some legal questions.²⁰⁷ An examination of the cases that Justice Brennan had

205.

We have recognized often that the constraints of Article III do not apply to state courts, and accordingly the state courts are not bound by the limitations of a case or controversy or other federal rules of justiciability even when they address issues of federal law, as when they are called upon to interpret the Constitution or, in this case, a federal statute.

ASARCO Inc. v. Kadish, 490 U.S. 605, 617 (1989) (citations omitted). The *ASARCO* Court had no occasion to consider whether any federal non-jurisdictional principles of justiciability might apply in state court.

206. *Baker v. Carr*, 369 U.S. 186, 196 (1962) (concluding that the district court dismissed because it lacked subject matter jurisdiction and the plaintiffs did not state a justiciable cause of action). The Court then discussed subject matter jurisdiction, standing, and justiciability under separate headings. *Id.* at 198, 204, 208.

207.

It is apparent that several formulations which vary slightly according to the settings in which the questions arise may describe a political question, although each has one or more elements which identify it as essentially a function of the separation of powers. Prominent on the surface of any case

reviewed earlier in the opinion, cases that form the basis of that paragraph, shows that all six characteristics were indicators that a political actor had the last word in the application of law to fact. Justice Brennan undertook to distinguish all of those cases from *Baker* itself, so he had no occasion to state general principles governing the political question doctrine.²⁰⁸ Although he did not offer a comprehensive account of the doctrine, he treated political questions as issues on which a non-judicial federal decision maker was final, and he did not present the doctrine as a limit on the Article III jurisdiction.²⁰⁹

The Court's review of earlier cases begins by formulating the question as one of finality. "We have said that 'In determining whether a question falls within [the political question] category, the appropriateness under our system of government of attributing finality to the action of the political departments and also the lack of satisfactory criteria for a judicial determination are dominant considerations.'"²¹⁰

When the Court decided *Baker*, its most recent political question decision outside of the apportionment context was *Coleman v. Miller*. Justice Brennan's language in *Baker* strongly suggests that *Coleman* provided a template for the first two features his opinion listed.²¹¹

In *Coleman v. Miller* . . . this Court held that the questions of how long a proposed amendment to the Federal Constitution remained open

held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Id. at 217.

208. "Since that review [of earlier cases] is undertaken solely to demonstrate that neither singly nor collectively do these cases support a conclusion that this apportionment case is nonjusticiable, we of course do not explore their implications in other contexts." *Id.* at 210.

209. Justice Brennan discussed the Court's earlier political question cases in order to distinguish them from *Baker*. A doctrine of non-judicial finality for federal political actors would not bar a suit like *Baker*, so the account that Justice Brennan gave of the earlier cases was very much in keeping with his conclusion in the case before the Court.

210. *Baker*, 369 U.S. at 210 (quoting *Coleman v. Miller*, 307 U.S. 433, 454-55 (1939)).

211. *Id.* at 217.

to ratification, and what effect a prior rejection had on a subsequent ratification, were committed to congressional resolution and involved criteria of decision that necessarily escaped the judicial grasp.²¹²

Indeed, the word “commitment” may have come directly from Justice Black’s opinion in *Coleman*.²¹³ Chief Justice Hughes in that case also stressed the difficulties for courts of the questions Congress would be called on to address in deciding on timeliness in enacting constitutional amendments.²¹⁴ That concern is echoed in the second consideration on Justice Brennan’s list.²¹⁵

Similar textual evidence points to *Luther*, which was decided on the merits pursuant to a political decision, as another source for the first two features listed in *Baker*.

Clearly, several factors were thought by the Court in *Luther* to make the question there “political”: the commitment to the other branches of the decision as to which is the lawful state government; the unambiguous action by the President, in recognizing the charter government as the lawful authority; the need for finality in the executive’s decision; and the lack of criteria by which a court could determine which form of government was republican.²¹⁶

In the next paragraph, Justice Brennan again indicated that *Luther* turned in part on the second feature on his list. “But the only significance that *Luther* could have for our immediate purposes is in its holding that the Guaranty Clause is not a repository of judicially manageable standards which a court could utilize independently in

212. *Id.* at 214 (footnote omitted). Justice Brennan’s reference to *Coleman* indicates that he had identified the common ground of the seven Justices in the majority on the political question issue, no five of whom joined an opinion.

213. “And decision of a ‘political question’ by the ‘political department’ to which the Constitution has *committed* it ‘conclusively binds the judges, as well as all other officers, citizens and subjects of . . . government.’” *Coleman*, 307 U.S. at 457 (Black, J., concurring) (emphasis added) (quoting *Jones v. United States*, 137 U.S. 202, 212 (1890)). Three of the Justices who joined that opinion—Black, Douglas, and Frankfurter—were on the *Baker* Court.

214.

Where are to be found the criteria for such a judicial determination? None are to be found in Constitution or statute 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.

Id. at 453.

215. *Baker*, 369 U.S. at 217.

216. *Id.* at 222 (footnote omitted).

order to identify a State's lawful government."²¹⁷ On Justice Brennan's reading of prior cases, a textual commitment to a political actor and a lack of standards appropriate to independent judicial decision were prominent on the surface of the Court's two great political question precedents. Both of those cases turned on non-judicial finality. In neither case did the Court deny jurisdiction under Article III.

Non-judicial finality resolves what is otherwise a baffling problem concerning the first characteristic Justice Brennan listed, textual commitment to another branch of government.²¹⁸ All of Congress's powers are committed to it by the text, yet most exercises of those powers do not give rise to political questions. Courts decide for themselves whether federal statutes are constitutional. In the context of quasi-adjudicatory decisions by actors other than courts, however, the textual commitment referred to is one of quasi-adjudicatory authority, not ordinary legislative or executive power. That is the context Justice Brennan set by referring to finality in a political branch, and the context in which he discussed the Court's prior political question cases.

The prior decisions Justice Brennan discussed also illuminate the third characteristic of those cases to which he drew attention, "the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion."²¹⁹ The cases alluded to with that phrase turned on non-judicial finality. Under the heading of "Foreign Relations," Justice Brennan had explained that questions in that realm "frequently . . . involve the exercise of a discretion demonstrably committed to the executive or legislature."²²⁰ In the accompanying footnote, he cited a case from the 19th century, *Doe v. Braden*.²²¹

In *Doe v. Braden*, one party in a Florida land dispute asked the court to find that the King of Spain had not had the authority to cancel prior land grants, which the King had purported to do in the treaty ceding Florida to the United States.²²² Chief Justice Taney concluded that the question of the King's power was political and not judicial.²²³ That question had been conclusively resolved when the United States entered into the treaty, which was accompanied by declarations of both

217. *Id.* at 223.

218. *See id.* at 217.

219. *Id.*

220. *Id.* at 211.

221. 57 U.S. (16 How.) 635 (1854).

222. *Id.* at 654.

223. *Id.* at 657.

parties that the King had annulled prior grants.²²⁴ The discretionary decision was whether to make the treaty. The legal questions involved public rights: the power of the King of Spain to act through a treaty, and the resulting sovereign and proprietary interests of the United States. The treaty, an act of the United States as a sovereign operating with respect to other sovereigns, bound U.S. courts as to the legal assumptions on which it rested.

Braden is an example of non-judicial finality and not lack of jurisdiction. The Court in *Braden* did not deny its authority to decide, or that of the trial court. Rather, it affirmed on the merits a judgment that rested on the assumption that the treaty accomplished what the United States and Spain said it accomplished. The King's power to cancel certain land grants was used as a premise for decision, not as a bar thereto.²²⁵

224.

It was for the President and Senate to determine whether the king, by the constitution and laws of Spain, was authorized to make this stipulation and to ratify a treaty containing it. They have recognized his power by accepting this stipulation as a part of the compact, and ratifying the treaty which contains it.

The constituted and legitimate authority of the United States, therefore, has acquired and received this land as public property.

Id. at 657–58.

225. The second case cited as an example of policy discretion demonstrably committed to another branch also involved a treaty, along with a later statute that affected its operation. *Taylor v. Morton*, 23 F. Cas. 784 (Curtis, Circuit Justice, C.C.D. Mass. 1855) (No. 13,799) (deferring to executive and legislative branches on the question whether a foreign sovereign has violated a treaty), *aff'd*, 67 U.S. (2 Black) 481 (1862). The plaintiff, an importer of Russian hemp, claimed that a lower tariff rate for hemp imported from India was inconsistent with a treaty giving Russian imports most-favored-nation status. *Id.* at 784–85.

Justice Curtis, anticipating the Court's decision in *Chae Chan Ping v. United States* (*Chinese Exclusion Case*), 130 U.S. 581 (1889), maintained that a later-enacted statute would override a treaty if they conflicted. *Taylor*, 23 F. Cas. at 785. He was not, however, willing to conclude that the later statute with the lower tariff violated the treaty.

Is it a judicial question, whether a treaty with a foreign sovereign has been violated by him; whether the consideration of a particular stipulation in a treaty, has been voluntarily withdrawn by one party, so that it is no longer obligatory on the other; whether the views and acts of a foreign sovereign, manifested through his representative have given just occasion to the political departments of our government to withhold the execution of a promise contained in a treaty, or to act in direct contravention of such a promise? I apprehend not.

Id. at 787. Because those questions were confided to Congress, it was “immaterial” to the court whether the statute violated the treaty. If it did not, “the plaintiff [had] no

The fourth characteristic that indicates a political question, “the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government,”²²⁶ also very likely derived from a case that rested on non-judicial finality, *Field v. Clark*. That case treated congressional certification of an enrolled bill as conclusive. After discussing *Coleman* and the enactment of constitutional amendments, Justice Brennan in *Baker* said,

Similar considerations apply to the enacting process [for statutes]: “The respect due to coequal and independent departments,” and the need for finality and certainty about the status of a statute contribute to judicial reluctance to inquire whether, as passed, it complied with all requisite formalities.²²⁷

Once again, Justice Brennan probably drew his phraseology, here the word “respect,” from the earlier case. Having concluded that the bill as enacted was the authoritative text, the Court decided *Field* on the merits.

The fifth characteristic Justice Brennan canvassed, “an unusual need for unquestioning adherence to a political decision already made,”²²⁸ was also a ground of non-judicial finality, not lack of jurisdiction. Earlier in *Baker*, Justice Brennan had discussed “this Court’s refusal to

case.” *Id.* If it did, Congress’s act was “the municipal law of the country,” and complaints should be addressed to the political branches, not the courts. *Id.*

Justice Brennan in *Baker* cited *Taylor* without elaboration, 369 U.S. 186, 211 n.32 (1962), leaving to inference how *Taylor* involved standards that defy judicial application or the exercise of discretion demonstrably committed to a political branch. On the latter point, Congress demonstrably has the power to pass legislation that reflects the state of U.S. foreign relations, for example its relations with Russia concerning tariffs. On the former point, the question whether one party to a treaty has breached it, or has decided not to insist on it, could be very difficult for a court to resolve. Not only is international law often vague, but courts do not have the information about foreign relations necessary to answer such questions. One party to a treaty might quietly agree to allow the other to act in a way inconsistent with it, perhaps in return for some seemingly unrelated concession on another issue. Whether Russia had breached the treaty, or whether a seemingly inconsistent U.S. tariff was nevertheless consistent with this country’s obligations under the treaty, was by itself a question of law. Relations between nations, like relations between individuals, are not only about legal rights. Whether to assert a legal position is a question of policy, not law, and nations, like individuals, may have rights that they do not wish to assert. If the United States acts on the assumption that a treaty permits some action, like adopting a tariff rate, it decides both law and policy: what is this country entitled to, and what is it prepared to assert it is entitled to?

226. *Baker*, 369 U.S. at 217.

227. *Id.* at 214 (quoting *Marshall Field & Co. v. Clark*, 143 U.S. 649, 672, 676–77 (1892)).

228. *Id.* at 217.

review the political departments' determination of when or whether a war has ended. Dominant is the need for finality in the political determination, for emergency's nature demands 'A prompt and unhesitating obedience.'²²⁹ The "prompt and unhesitating obedience" at issue in *Martin v. Mott*,²³⁰ the case Justice Brennan relied on, was a militia member's obligation to report for duty at the President's call. Whether that call really was in response to the exigencies set out in the militia statute was up to the President, whose decision was not to be questioned elsewhere.

Is the President the sole and exclusive judge whether the exigency has arisen, or is it to be considered as an open question, upon which every officer to whom the orders of the President are addressed, may decide for himself, and equally open to be contested by every militiaman who shall refuse to obey the orders of the President?²³¹

In *Martin*, the Court relied on the political question principle to supply a premise on which to decide the merits. Mott sued Martin, and Martin's defense relied on the court martial's judgment, which in turn relied on the President's order, which rested on the President's determination. The Court did not suggest that there was any lack of jurisdiction in the court martial, in the New York court in which Mott first sued, or on writ of error to it from the highest court of New York. Justice Brennan's recognition that all those tribunals had jurisdiction shows that his fifth characteristic was about non-judicial finality, not lack of jurisdiction.

For Justice Brennan, prior cases sought to avoid "embarrassment from multifarious pronouncements by various departments on one question"²³² by giving conclusive effect to prior political-branch decisions. The sixth characteristic he listed was also a marker of non-judicial finality. Often the political branches act without a pronouncement on anything, but they frequently make such pronouncements when they have to apply a legal standard to some factual situation. Before summarizing the earlier political question cases, *Baker* had explained that many questions involving foreign relations "uniquely demand single-voiced statement[s] of the

229. *Id.* at 213 (quoting *Martin v. Mott*, 25 U.S. (12 Wheat.) 19, 30 (1827)).

230. 25 U.S. (12 Wheat.) 19 (1827).

231. *Id.* at 29–30. *Martin* was a collateral challenge to Mott's conviction by a court martial for failing to report. Martin was a deputy marshal who had seized Mott's property to carry out a fine imposed by the court martial whom Mott sued for replevin. *Id.* at 28.

232. *Baker*, 369 U.S. at 217.

Government's views."²³³ Pointing to the need for "single-voiced statement[s] of the Government's views" emphasizes that the Court was talking about statements of position, not all actions that may rest on a position.

Perhaps most important for understanding that reference to a single voice in international relations, and the later-listed characteristic that alludes to it, is the case cited in a footnote, once again *Doe v. Braden*. The U.S. Government's view on the validity of the Spanish land grant in dispute, expressed in its declaration and the President's ratification of a treaty with Spain's declaration, was indeed a pronouncement. Moreover, it was a pronouncement on behalf of the United States as a sovereign acting with respect to other sovereigns, to whom the internal structure of the U.S. government is of no concern. For another component of that government later to undercut that assertion would not be consistent with the Constitution's structure governing foreign relations, in which the complexities of American separation of powers and federalism are largely kept out of the view of external sovereigns.²³⁴ Having found the Executive's statement about the land grant conclusive, the Court went on to decide *Braden* on the merits.

Justice Brennan in *Baker* formulated the political question principle as one of non-judicial finality, discussed prior cases turning on non-judicial finality, and then summarized those cases in his well-known paragraph. Read in light of the rest of the opinion, that paragraph treats the political question doctrine as a principle of conclusive application of law to fact by political decision makers. In the decades after *Baker*, the Court has only once relied on that precedent in finding that the political question doctrine controlled a case. It did so in *Nixon v. United States* and treated the Senate's conviction of Judge Nixon as conclusive and not subject to judicial review. The Court has never held that the political question doctrine is a limit on the jurisdiction of the federal courts. To do so would be a departure from, not an application of, *Baker v. Carr*.

233. *Id.* at 211.

234. "Recognition is a topic on which the Nation must 'speak . . . with one voice.' That voice must be the President's." *Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2086 (2015) (internal citations omitted) (quoting *Am. Ins. Assn. v. Garamendi*, 539 U.S. 396, 424 (2003); *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 381 (2000)). *Zivotofsky* concerned a clash between Congress and the President; *Garamendi* and *Crosby* concerned clashes between federal and state policy. In all three cases, a single actor spoke for the United States despite this country's complex constitutional structure of federalism and separation of powers.

C. Political Questions, Political Power, and Judicial Power

This Section identifies the principles that explain the Court's results and the derivation of those principles from the constitutional separation of political and judicial power.

The two branches of the political question doctrine have a common theme. In each of them, the distinction between judicial and political power poses a problem because one component of the government is called on to perform a function more associated with the other. Non-judicial finality arises only when a political decision maker is called on to apply law to a particular set of facts. Although political actors sometimes perform that function, it is quintessentially the role of the courts. The political question doctrine identifies some of the situations in which the non-judicial decision is binding on the judiciary.²³⁵

The doctrine's limits on the judiciary's authority to give prospective relief arise only when the courts are called on to go beyond requiring compliance with the law and require or forbid some conduct that is itself legally indifferent. The plaintiffs in *Gilligan* did not argue that the law permitted only one choice of weapons or tactics for the Ohio National Guard in dealing with riots. Rather, they asked the court to choose among the legally permissible options in order to prevent unnecessary harm to civilians. In devising relief of that kind, courts make the type of policy decisions normally entrusted to political actors.²³⁶

When the political question doctrine produces non-judicial finality, it enables a political actor to do what courts normally do. When the doctrine limits judicial remedies that control discretion, it keeps courts

235. Non-judicial finality is sometimes created by the Constitution, sometimes by sub-constitutional law. The impeachment provisions of their own force make the Senate's decisions conclusive on the courts. The enrolled bill doctrine, by contrast, is likely subject to change by legislation. With respect to non-judicial finality, therefore, the political question doctrine answers two distinct but closely related questions: whether the Constitution makes a political actor final, and whether sub-constitutional law may make a political actor final. The doctrine considers these questions together because the answers rest on the same considerations concerning the difference between political and judicial power.

236. In a wrongful death action, by contrast, the court asks whether a particular use of deadly force was reasonable, not whether the defendant had been properly trained. A Guardsman who receives proper training, carries an appropriate weapon, is subject to well-conceived doctrine, and panics and kills someone without reason, has acted unlawfully and will be accountable in a tort action. Prospective remedies like injunctions differ fundamentally from retrospective remedies like damages because damages are assessed after decisions are made, and need not be based on guesses about what will happen in the future.

from reaching into the political sphere. In both contexts, the doctrine draws the line between political and judicial power in cases in which that line's location is subject to doubt, because the powers in some sense overlap one another. It draws the line in favor of a political decision maker, rather than the courts.

The Court's rationale for non-judicial finality can be seen in three leading cases: *Luther*, *Coleman*, and *Nixon v. United States*. Each of them has two features that explain why the courts would treat a non-judicial decision as final. Chief Justice Taney made the first feature plain in *Luther*: the identity of a State's legitimate government has very important consequences for a great many people. As he explained, if the Charter government of Rhode Island had been unlawful, then it illegally collected taxes and used force with no legal justification.²³⁷ In similar fashion, the content of the Constitution's text has consequences of the highest importance for everyone in the country. In impeachment cases, the widespread consequences of a single legal decision flow from identifying officers who may lawfully exercise power. Whether one President has been removed and replaced with someone else is a momentous question for the entire country. In each of those cases, the application of a legal rule to one particular set of facts affects the public at large in a fundamental way.

The second feature shared by those three leading cases concerns the legal standards involved. In all of them, the applicable legal rule involved highly delicate normative questions that the rules themselves did not explicitly resolve. Whether a purported state government is lawful is one of political legitimacy. In Chief Justice Hughes's view in *Coleman*, the timeliness of a constitutional amendment depended on the nation's continuing need for change, which in turn depended on many political, economic, and social factors.²³⁸ Those are judgments about the public interest on a very broad scale. In an impeachment trial, the Senate must decide whether the impeached officer has engaged in culpable official conduct that makes that person unfit to exercise power.²³⁹

237. *Luther v. Borden*, 48 U.S. (7 How.) 1, 38–39 (1849).

238. *See supra* note 214.

239. Discussing the Senate as a court of impeachment, Alexander Hamilton, writing under his pen name "Publius," wrote,

The subjects of its jurisdiction are those offences which proceed from the misconduct of public men, or, in other words, from the abuse or violation of some public trust. They are of a nature which may with peculiar propriety be

The other branch of the doctrine, relied on in *Gilligan*, also rests on those two rationales, with the second being especially prominent. That aspect of the doctrine limits judicial intrusion into political discretion, and operates where that discretion is at its height: with respect to military and national security matters. *Gilligan* itself provides an instructive example. In planning for riots, or dealing with a riot, political decision makers face questions of life and death. They must assess and weigh risks concerning the deaths rioters may cause and the deaths the military may cause in putting down a riot. Just as too much force can needlessly kill those against whom it is directed, too little force, or force badly deployed, can let violence continue when it could have been contained.

Slightly below the surface in *Gilligan* is the other consideration found in the non-judicial finality cases. As riot control exemplifies, military decisions regularly affect a large number of people in much the same way. The Ohio National Guard's riot planning affected all potential participants in and victims of rioting, and when implemented that policy would apply to hundreds or thousands of people at once.

Together, those two features can make a strong case for judicial deference to political decisions that normally would be reviewed by the courts, and for judicial non-interference with discretion. When a single legal judgment affects many people, having one voice speak first and conclusively is of great value. *Luther* makes this point. To comply with the law, people need to know who the law-givers and other

denominated POLITICAL, as they relate chiefly to injuries done immediately to the society itself.

THE FEDERALIST NO. 65, at 338 (Alexander Hamilton) (George W. Carey and James McClellan, eds., 2001); cf. CHARLES L. BLACK, JR., IMPEACHMENT: A HANDBOOK 37 (1974) (arguing that impeachable offenses, like treason and bribery, "are offenses (1) which are extremely serious, (2) which in some way corrupt or subvert the political and governmental process, and (3) which are plainly wrong in themselves to a person of honor, or to a good citizen, regardless of words on the statute book"). All three criteria call for normative judgment and the second and third call for judgments about the public interest and the obligations of citizenship.

Another aspect of the applicable legal rule may also matter, though it does not appear in the Court's most prominent cases. As the Court stressed in *Field*, the rules for adoption of statutes apply to facts that arise in the legislative process. Congressional officers who certify passage of a bill judge their own conduct and that of the houses for which they act. Those rules introduce another source of delicacy in their application: because legislative officers are called on to report on their own actions, to say that they have reported incorrectly is close to saying that they are not just mistaken, but lying. That led the Court in *Field* to invoke the respect due to coordinate branches and the Court in *Baker* to echo that sentiment.

government officials are. If private people cannot tell which individuals really are government officials, their uncertainty will undermine many important activities, like paying taxes and making contracts. Professor Charles Black emphasized the same factor with respect to presidential impeachment.²⁴⁰ Wondering whether a President who had been convicted by the Senate had actually been removed could plunge the country into chaos. The sooner a conclusive answer is available, the less damage that doubt will cause. Under those circumstances, the ordinary arrangement in which legislatures and executives act, subject to judicial review at some indefinite time in the future, can turn uncertainty into paralysis.

Second, some legal norms lend themselves to application by politically knowledgeable and accountable decision makers. When the Federal Convention chose the Senate and not the ordinary courts for the trial of impeachments, it put the question whether the Chief Executive and other officers could be trusted with the people's power in the hands of the people's representatives. Those representatives would be familiar with the judgments that must be made in matters of state. Judges are selected for technical expertise in law not for their ability to decide how to deal with riots, or whether a state government satisfies basic principles of political morality of the American republic.

Those practical arguments align with the concepts of judicial and political power. The quintessential role of the courts is the neutral application of law to specific facts that involve specific parties. Balancing competing considerations involving large numbers of people, and deciding for themselves what is right and wrong, are tasks for the politically accountable. The larger the number of parties affected, and the more value-laden the legal standards involved, the more any particular decision smacks of political and not judicial power. Underlying the political question doctrine is thus a paradigm of the judicial role.²⁴¹ The Court's cases reflect the conclusion that in some

240. Black described the scenario in which a President is removed by the Senate and then reinstated by the Court, possibly by a 5-4 vote, and said, "I don't think I possess the resources of rhetoric adequate to characterize the absurdity of that position." BLACK, *supra* note 239, at 54.

241. *Luther* invokes another feature of the judicial power that arises from the fact that courts decide cases about particular parties: different adjudications can resolve the same factual issue differently. As Chief Justice Taney explained, the plaintiffs in *Luther* raised questions of fact that were proper for a jury. Different juries, however, might resolve the factual dispute differently, with one concluding that the charter government had stayed in power and another that it had been replaced with the Dorr

situations where judges would be taken far out of the role, the applicable legal rules assign authority elsewhere. The Constitution makes, or permits, that assignment because the idea of judicial power permits or even requires it.²⁴²

The political question doctrine does not rest on limits on the federal courts' authority to decide cases. It does reflect an attempt to integrate that authority with the functions of the political branches, especially those functions that very much resemble adjudication.

II. POLITICAL RIGHTS, STANDING, AND WHAT THE POLITICAL QUESTION DOCTRINE ONCE WAS

Two Reconstruction cases, *Mississippi v. Johnson* and *Georgia v. Stanton*, are frequently classified as political question decisions. As I explained above, the Court's rationale in *Mississippi v. Johnson* puts it in the same category as *Gilligan*, in which the autonomy of the political branches limits the orders the courts may lawfully give them.²⁴³ *Georgia v. Stanton*, which reached a similar result but on different grounds, would today be classified as a standing case. It might also still be called a political question case in that the State of Georgia lacked standing because the interest it sought to assert was wholly political.²⁴⁴

constitution. *Luther*, 48 U.S. (7 How.) at 41–42 (1849). Political decision makers can provide uniformity of decision when courts may not be able to.

242. The legal rule that creates non-judicial finality need not itself come from the Constitution. Four categories are possible, and each one probably is occupied. First, in some circumstances non-judicial finality is constitutionally mandatory. For example, it is unlikely that Congress could, by statute, give any court appellate jurisdiction over the Senate as a court of impeachment, or even relax the preclusive effect of a judgment of conviction as to removal from office. Second, there are some situations in which Congress may provide for absolute non-judicial finality but need not do so. Whether a statute was properly enacted is probably such a question. Third, as to some issues Congress may provide for partial finality in a non-judicial decision maker. The bulk of agency adjudication, which is subject to judicial review in an appellate form, falls into this category. Finally, as to some issues, or perhaps with respect to some interests, only a court (including a jury) may have any conclusive authority.

243. Whether *Mississippi v. Johnson* would be decided today on the same rationale is not clear. Certainly, the Court would not accept the broad proposition that executive officers may not be enjoined from executing statutes, nor does the old distinction between discretionary and ministerial duties have the force it had in the nineteenth century.

244. A leading theme of this Article is that the political question doctrine as the Court now expounds it is not a limit on the subject matter jurisdiction of the federal courts. The constitutional standing doctrine is such a limit, and it makes sense as such because it concerns the plaintiff's interest, which is the subject matter of a lawsuit. Insofar as *Georgia v. Stanton* would today be classified as a political question case, the

Under current Supreme Court doctrine, Article III courts may adjudicate only cases in which the plaintiff has standing. By that the Court means not only that some source of law must authorize the plaintiff to sue, but also that the legal rules that do so must meet certain criteria. Those rules may enable suits by a private plaintiff only if the plaintiff has suffered or is threatened with an injury in fact, a category that does not include all harms that might be defined as actionable by sub-constitutional law.²⁴⁵ It is clear that one particular interest does not count: a citizen's interest that the law be complied with, either by the government or another private person.²⁴⁶

After the Supreme Court dismissed the bill in *Mississippi v. Johnson*, another former Confederate state sought relief from the Reconstruction Acts of 1867 in the Supreme Court's original jurisdiction. In *Georgia v. Stanton*, Georgia had a slightly different theory. The state sought to persuade the Court that property rights were at stake, and not just the political rights of sovereignty.²⁴⁷ At

political question doctrine includes a limit on subject matter jurisdiction, but only because it overlaps with the Article III standing limitation.

245. The "irreducible constitutional minimum of standing contains three elements." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). A plaintiff must first suffer an "injury in fact"—an invasion of a legally-protected interest which is (a) concrete and particularized, and (b) 'actual or imminent,' not 'conjectural' or 'hypothetical.'" *Id.* (citing *Allen v. Wright*, 468 U.S. 737, 756 (1984)). The second element requires "a causal connection between the injury and the conduct complained of," which means that the injury must be "fairly traceable" to the defendant's challenged action. *Id.* at 560 (citing *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 41–42 (1976)). "Third, it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" *Id.* at 561 (citing *Simon*, 426 U.S. at 38, 43).

246.

We have consistently held that a plaintiff raising only a generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy.

Id. at 573–74.

247.

The bill [that Georgia asked leave to file] in setting forth the political rights of the State of Georgia, and of its people sought to be protected, averred among other things, that the State was owner of certain real estate and buildings therein . . . exceeding in value \$5,000,000; and that putting the acts of Congress into execution and destroying the State would deprive it of the possession and enjoyment of its property. This reference [to the State's property was] not set up, however, as a specific or independent ground of relief.

argument, counsel for Georgia maintained that “the great objection, of the other side . . . that the subject-matter of this bill, the case stated, and the relief sought, are *political in their nature*,—is without force.”²⁴⁸

The Court was not persuaded, concluding that it “possesse[d] no jurisdiction over the subject-matter presented in the bill for relief.”²⁴⁹ That subject matter included both “political questions” and “rights, not of persons or property, but of a political character For the rights for the protection of which our jurisdiction 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.”²⁵⁰ Courts protect a different kind of interest. “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.”²⁵¹

In both *Mississippi v. Johnson* and *Georgia v. Stanton*, the Court appears to have concluded that it lacked jurisdiction over the subject matter of the suit, where by the subject matter it meant the interests the plaintiffs presented for adjudication; those interests were political, and hence not the kind of legal rights that courts protect. In similar fashion, the Court today regards standing as a limitation on the federal courts’ subject-matter jurisdiction. Care must be taken in interpreting

Georgia v. Stanton, 73 U.S. (6 Wall.) 50, 53 (1868).

248. *Id.* at 67.

249. *Id.* at 77. That conclusion meant that the Court did not have to consider the defendants’ argument that under *Luther* it was bound to regard the plaintiff government of Georgia as illegal, unrepresentative, and provisional only, on the grounds that Congress had determined it to be so in one of the Reconstruction Acts.

250. *Id.*

251. *Id.* at 74 (citing *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 15, 20 (1831)). Writing for the Court in *Georgia v. Stanton*, Justice Nelson relied on a dictum of Chief Justice Marshall in *Cherokee Nation*. In the earlier case, the Cherokee Nation had sought an injunction in the Court’s original jurisdiction against the implementation of Georgia legislation that, said Justice Nelson, “if permitted to be carried into execution, would have subverted the tribal government of the Indians; and subjected them to the jurisdiction of the State.” *Georgia v. Stanton*, 73 U.S. (6 Wall.) at 74. The Court in *Cherokee Nation* found that the Cherokee Nation was not a state for purposes of the original jurisdiction. 30 U.S. (5 Pet.) at 20. Justice Nelson said in *Georgia v. Stanton* that Marshall’s majority “intimated that the bill [in equity in the original jurisdiction] was untenable on another ground, namely, that it involved simply a political question.” *Georgia v. Stanton*, 73 U.S. (6 Wall.) at 74 (quoting *Cherokee Nation*, 30 U.S. (5 Pet.) at 20). Marshall was concerned that the request “to control the Legislature of Georgia, and to restrain the exertion of its physical force . . . savours too much of the exercise of political power to be within the proper province of the judicial department.” *Id.* Marshall’s reasoning in *Cherokee Nation* closely resembles the Court’s in *Mississippi v. Johnson*.

statements about jurisdiction, not all of which really concern the fundamentals of judicial power. The interest of the plaintiff, however, does go to those fundamentals. If there are interests that are categorically excluded from the judicial purview, then a plaintiff seeking the vindication of only such interests brings to court a matter with which the courts are not concerned. When political rights fall into that excluded category, the Article III courts have no authority to give relief to protect them, whether that conclusion is explained under the rubric of standing or political rights or questions.

It is hard to say how the Court today would apply its standing doctrine to the kind of sovereign interest asserted in *Georgia v. Stanton*. The main rationale for contemporary standing doctrine would not bar such a suit. That rationale is that litigation concerning interests that are widely or universally shared, like the people's interest in compliance with the law, should be controlled by politically accountable officers, not by self-appointed private litigants.²⁵² When a state sues through its political officers, that requirement is met. Quite possibly the current Court would think that a case like *Georgia v. Stanton* presents problems concerning the remedy, not the interest at stake.

Whatever the status of rights of sovereignty may be today, one political interest definitely can support adjudication in Article III courts: the right to vote.²⁵³ The category of interests that Article III courts do not protect may be different today from the 1860s, but the contemporary standing cases show that the category still exists.

III. THE LOWER COURTS' JURISDICTIONAL POLITICAL QUESTION DOCTRINE

In the last few decades a substantial number of lower court decisions have seriously misunderstood the Supreme Court's political question doctrine. Several of the courts of appeals have decided cases that have the following characteristics: (1) the case was dismissed under the political question doctrine for want of jurisdiction; (2) the plaintiff was a private person seeking relief on the basis of principles of liability that

252. Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881 (1983). In then-Judge Scalia's view, the interests of the public at large—majorities as he puts it—should be protected by political actors, while the courts protect the rights of minorities who face distinct and particularized harm. *Id.* at 894–95.

253. *See, e.g., Baker v. Carr*, 369 U.S. 186, 208 (1962) (“A citizen's right to a vote free of arbitrary impairment by state action has been judicially recognized as a right secured by the Constitution . . .”).

apply between private persons; (3) the court found that granting the plaintiff relief would in some way be inconsistent with a policy decision concerning national security or foreign relations ostensibly made on behalf of the United States; (4) the plaintiff did not seek mandatory relief against the United States or one of its officials that would direct the performance of official functions; and (5) the court did not find that it was bound to treat as conclusive the application of law to fact by a political actor.²⁵⁴

None of those decisions has any foundation in the political question doctrine as the Supreme Court has applied it, nor did any of those cases fall outside the federal courts' subject matter jurisdiction as constrained by Article III for the reason the court gave. The version of the political question doctrine the lower courts have developed in those cases is unsound.²⁵⁵

This Section will first give a number of examples of lower court cases that fit into the category just described. It will then explain how they do not rest on the Supreme Court's political question doctrine, nor on any plausible understanding of the judicial power under Article III.

254. Many lower court political question cases do not meet that description and are consistent with the Supreme Court's doctrine as described in this article. A significant number of cases do meet that description, and I think that any case that does is not a correct application of the Supreme Court's precedents. The description refers to principles that govern liability between private parties, and not just to suits between private parties, so as to include suits against the United States under the Federal Tort Claims Act and other waivers of sovereign immunity that make the federal government liable when a private defendant would be. *See, e.g.*, 28 U.S.C. § 1346(b)(1) (2012) (providing that the U.S. government is liable in tort when a private person would be). I refer to liability, not damages, because the law that applies between private parties might give rise to declaratory or injunctive relief, as under the Sherman Act. The important point is not that damages were sought, but that the remedy was not of the kind disapproved in *Gilligan*, a feature of the cases captured in the fourth part of the description.

255. To say that the lower courts' doctrine is in error is not to say that any particular case was decided incorrectly. First, cases that follow applicable circuit precedent cannot be faulted on the grounds that the precedent is incorrect. Second, courts decide cases on the basis of the parties' arguments, and often are under no obligation to identify an argument no party has made. If all parties agree that the political question doctrine is a constitutional limit on jurisdiction, a court may be allowed to accept that conclusion. It is also hard to say whether a court of appeals decides incorrectly when it follows a dictum from the Supreme Court that describes the Court's cases, when the dictum is itself inaccurate. As discussed above, the Court has said that its political question cases rest on a limit on the Article III jurisdiction, but that is not correct, and the Court has never relied on that principle as part of its reasoning in deciding a case.

A. Lower Court Political Question Cases

In recent years, the U.S. Court of Appeals for the D.C. Circuit has relied on the political question doctrine in deciding a number of cases in which the plaintiff sought recovery from the personal funds of current or former federal officials for actions connected with U.S. foreign or national security affairs. A leading example is *Schneider v. Kissinger*,²⁵⁶ brought against former Secretary of State Henry Kissinger concerning decisions he made while serving as National Security Adviser to President Nixon. Plaintiffs were the two sons and the estate of the late General Rene Schneider of Chile, who was killed in 1970.²⁵⁷ According to the plaintiffs, General Schneider was murdered by members of Chile's military with the encouragement of high U.S. officials, including Kissinger.²⁵⁸ The plaintiffs maintained that Kissinger was involved in arranging a military coup against Chilean President Salvador Allende, and that the success of the coup depended on eliminating General Schneider.²⁵⁹ The plaintiffs sought recovery against Kissinger personally on a number of tort claims.²⁶⁰

The district court granted a motion to dismiss for want of subject matter jurisdiction, and the court of appeals affirmed.²⁶¹ Relying on four of what it characterized as the six factors set out in *Baker*, the court found that "this case raises political questions committed to the political branches and therefore is beyond the jurisdiction of the courts."²⁶² After *Schneider*, the D.C. Circuit dismissed on political

256. 412 F.3d 190 (D.C. Cir. 2005).

257. *Id.* at 191.

258. *Id.* at 192.

259. *Id.*

260. *Id.* at 192–93. Pursuant to the Westfall Act, 28 U.S.C. § 2679 (2012), the Attorney General certified that Kissinger had been acting within the scope of his office at the time of the events covered by the complaint and the United States was substituted as the defendant. *Schneider*, 412 F.3d at 192–93. Substitution of the United States under the Westfall Act is not an assertion of sovereign immunity, because Congress has waived sovereign immunity under the Federal Tort Claims Act, which provides that, subject to certain exceptions, "the United States shall be liable . . . in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 2674. Under the Westfall Act and the Federal Tort Claims Act, the United States was liable only if Secretary Kissinger would have been liable personally. The court of appeals in *Schneider* thus treated that case as if it were still against Kissinger personally for purposes of the political question doctrine.

261. *Schneider*, 412 F.3d at 191.

262. *Id.* at 198. The court found that the suit "raises policy questions that are textually committed to a coordinate branch of government," *id.* at 194, that there were no judicially discoverable or manageable standards under which to resolve it because

question grounds several more suits in which private parties sought damages from U.S. government officials for events arising out of U.S. intelligence activities.²⁶³

The D.C. Circuit has also dismissed on political question grounds a claim for tort damages arising out of a U.S. military targeting decision. *El-Shifa Pharmaceutical Industries Co. v. United States*²⁶⁴ was brought under the Federal Tort Claims Act to recover for the destruction of the plaintiff's pharmaceutical plant in Sudan by U.S. military action. President Clinton explained in a radio address to the nation that the plant was targeted because it was believed to be associated with terrorist activities and used for the production of chemical weapons.²⁶⁵ Plaintiffs maintained that the facility was civilian property not associated with terrorism and thus not a legitimate target under the law of war.²⁶⁶ The D.C. Circuit, sitting en banc, found that "[i]f the political question doctrine means anything in the arena of national security and foreign relations, it means the courts cannot assess the merits of the President's decision to launch an attack on a foreign target, and the plaintiffs ask us to do just that."²⁶⁷

In recent years the courts of appeals have also dismissed on political question grounds suits against members of the military, and private military contractors, for alleged negligence in the conduct of military

plaintiffs' tort claims did "not provide standards for making or reviewing foreign policy judgments," *id.* at 197, that "judicial resolution would require an initial policy determination of a kind clearly for nonjudicial discretion" because "we would be forced to pass judgment on the policy-based decision of the executive to use covert action to prevent [the Allende] government from taking power," *id.*, and that the court "could not determine Appellants' claims without passing judgment on the decision of the executive branch to participate in the alleged covert operations," *id.* at 198.

263. *Gonzalez-Vera v. Kissinger*, 449 F.3d 1260 (D.C. Cir. 2006), like *Schneider*, arose out of U.S. support for the coup against President Allende in Chile. Relying on *Schneider*, the court of appeals found that the district court lacked jurisdiction because the case presented a political question. *Id.* at 1264–65. In *Bancoult v. McNamara*, 445 F.3d 427 (D.C. Cir. 2006), former residents of the island of Diego Garcia sued a number of former executive officials in their personal capacities, and the United States under the Federal Tort Claims Act, claiming that they had been illegally removed from their homes. *Id.* at 429–30. Relying on *Schneider*, the court of appeals found that the case presented a political question and affirmed the district court's dismissal for want of subject matter jurisdiction. *Id.* at 437–38. *Harbury v. Hayden*, 522 F.3d 413 (D.C. Cir. 2008), is another damages action involving U.S. foreign policy that was dismissed for lack of jurisdiction on political question grounds. *Id.* at 421.

264. 607 F.3d 836 (D.C. Cir. 2010) (en banc).

265. *Id.* at 838.

266. *Id.* at 838–40.

267. *Id.* at 844.

operations. An example is *Carmichael v. Kellogg Brown & Root Services, Inc.*²⁶⁸ *Carmichael* was an action by Annette Carmichael, wife of Sergeant Keith Carmichael, who had become disabled as a result of injuries suffered while serving in Iraq. In May 2004, Sergeant Carmichael was severely injured while riding in a truck operated by Kellogg Brown & Root (KBR) that was part of a military convoy traveling an extremely dangerous route.²⁶⁹ Annette Carmichael sued KBR in state court, alleging that the truck's driver, a KBR employee, had been negligent.²⁷⁰ KBR removed the case to the U.S. District Court for the Northern District of Georgia and moved to dismiss for want of jurisdiction under the political question doctrine.²⁷¹ The district court granted the motion and the U.S. Court of Appeals for the Eleventh Circuit affirmed.²⁷² Relying on two of the so-called *Baker* factors, the Eleventh Circuit found that the district court lacked jurisdiction because the case presented a political question.²⁷³

268. 572 F.3d 1271 (11th Cir. 2009).

269. *Id.* at 1275–76, 1278.

270. *Id.* at 1278–79.

271. *Id.* at 1279.

272. *Id.* The district court dismissed the case rather than remanding it to state court. Section 1447(c) of Title 28 of the United States Code provides, “If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded.” 28 U.S.C. § 1447(c) (2012).

273. See *Carmichael*, 572 F.3d at 1296 (holding that inquiring into the cause of the accident would require the court to address matters assigned to other branches of government, a political question over which the court lacked jurisdiction). Similar to *Carmichael* is *Taylor v. Kellogg Brown & Root Services*, 658 F.3d 402 (4th Cir. 2011), in which the Fourth Circuit found a lack of jurisdiction on political question grounds over a tort claim by a service member who had been severely injured, allegedly as a result of negligence by KBR employees in connection with U.S. military operations in Iraq. *Harris v. Kellogg Brown & Root Services*, 724 F.3d 458 (3d Cir. 2013), *cert. denied*, 135 S. Ct. 1152 (2015), was a negligence claim by the parents and estate of a U.S. service member who was electrocuted while taking a shower in Iraq. The district court dismissed for want of jurisdiction on political question grounds. *Id.* at 463. The Third Circuit found that a case against a private contractor could under certain circumstances be dismissed for want of jurisdiction on political question grounds, *id.* at 465–66, and discussed in depth the appropriate analysis under its reading of *Baker v. Carr*, *id.* at 466–82, and the application of that analysis to different claims under different possible sources of law. The court of appeals ultimately concluded that the case depended on a choice of law question, which the district court had not resolved: if Pennsylvania law applied, the case contained no nonjusticiable issue, but if Tennessee or Texas law applied, some of the issues were nonjusticiable. The court of appeals remanded the case so the district court could identify the applicable substantive law and apply the court of appeals's reasoning. *Id.* at 482.

Another decision treating the political question doctrine as a jurisdictional bar to claims of private liability is *Spectrum Stores, Inc. v. Citgo Petroleum Corp.*²⁷⁴ The plaintiffs, who were gasoline retailers, sued a number of petroleum production companies, some of which, like Citgo, are wholly or partially state-owned.²⁷⁵ The plaintiffs claimed that the defendants participated in conspiracies to fix prices and limit the production of oil in violation of the Sherman and Clayton Acts.²⁷⁶ Although no governments were sued, the pricing and production decisions at issue were in large measure those of governments that are members of the Organization of Petroleum Exporting Countries (OPEC).²⁷⁷ The Fifth Circuit concluded that the case should be dismissed for lack of jurisdiction on political question grounds.²⁷⁸ Largely accepting the arguments in a Statement of Interest submitted by the Department of Justice on behalf of several cabinet departments, the Fifth Circuit found that “adjudication of this case would result in the frustration of various objectives ‘of vital interest to the United States’ national security.”²⁷⁹ The court of appeals did not decide whether the federal statutes on which plaintiffs relied entitled them to relief against the defendants.²⁸⁰

B. *The Lower Court Cases and the Supreme Court’s Doctrine*

As I have explained, the Supreme Court’s political question doctrine has two branches, neither of which limits subject matter jurisdiction. The first, non-judicial finality, tells the courts how to decide cases, and sometimes tells them to withhold relief in a case over which they have jurisdiction. The second, limits on prospective remedies, similarly instruct the courts to withhold relief in cases they are authorized to decide.

274. 632 F.3d 938 (5th Cir. 2011).

275. *Id.* at 942.

276. *Id.* at 944–45.

277. *Id.*

278. *Id.* at 948.

279. *Id.* at 951–52 (footnote omitted).

280. *Id.* at 956. In addition to the U.S. Courts of Appeals for the D.C., Third, Fourth, Fifth, and Eleventh Circuits, the Second and Ninth Circuits have also held that the political question doctrine imposes limits on the subject matter jurisdiction of the federal courts. *See, e.g., Saldana v. Occidental Petroleum Corp.*, 774 F.3d 544, 555 (9th Cir. 2014) (per curiam) (dismissing for want of subject matter on political question grounds); *Whiteman v. Dorotheum GmbH & Co. KG*, 431 F.3d 57, 73–74 (2d Cir. 2005) (same).

The lower court cases with which I am concerned do not fall into either of those categories. This Section will elaborate on the difference between the limited circumstances in which the political question doctrine limits the courts and the much more common circumstances in which the branches of government perform their ordinary functions. In those more usual circumstances, courts apply law to fact on their own, and while they may decide whether an official's discretionary act complied with the law, they do not themselves exercise discretion.

Because they misunderstand *Baker* and the earlier cases it expounds, the courts of appeals routinely fail to recognize that the political question doctrine mainly turns on non-judicial finality. Instead of looking for indicia that a political actor has been given authority to apply law to fact conclusively, as Justice Brennan did in *Baker*, they often find that the doctrine operates when the political branches have their usual relationship to the law, in which they are not final as the courts are. Many of the cases involve rules of liability that apply directly to government decision makers and those acting at their direction. Of course, the person who has a duty to comply with a legal rule is not in the position of a court; potential tortfeasors do not conclusively decide whether they have committed a tort. Unlike an adjudicator, a potential tortfeasor need know nothing about the content of the law. Someone who has never heard of negligence can take due care and so act lawfully, and a military commander with a very limited knowledge of the law of war can comply with it and so avoid personal liability. Being held to a rule and being called on to determine whether it has been violated are very different functions.²⁸¹

Cases like *Spectrum Stores* involve executive officials who are charged with applying legal rules to someone else, but whose decisions nevertheless are not conclusive on that question the way that a court's judgment is. The executive branch enforces the antitrust laws, but when it brings a prosecution under the Sherman Act the court decides for itself whether the statute has been violated. Non-judicial finality is very much the exception and not the rule, and when the political question doctrine is properly understood it will rarely be found to be applicable.

281. A similar distinction applies with respect to Congress, although the legal category involved is power and not duty. In voting on legislation, members of Congress often make judgments about its constitutionality. While the courts may give some level of deference to the legislature's judgment, they are not absolutely bound thereby; if they were, judicial review as known in this country would not exist.

According to the Court, the political question rubric also applies when mandatory judicial remedies would intrude into political discretion. Again misled by the famous passage from *Baker*, the lower courts have often failed to see the distinction the Court adumbrated in *Scheuer*.²⁸² Legal rules, including rules that impose personal liability on executive officials, set the limits on official discretion. When officials act within their discretion they have official privilege, but when they go outside it they do not and may be liable (though they may also be immune in close cases).²⁸³ Although the possibility of liability very likely will affect official conduct—indeed, that is one of its functions—when the courts decide on the limits of discretion they do not usurp it. That is why the Court was untroubled by the possibility of ex post personal liability for military decisions in *Scheuer*, and in a dictum in *Gilligan*.²⁸⁴ The political question doctrine is implicated in cases like the latter, in which courts are asked to give mandatory remedies that go beyond enforcing rules that limit the Executive.

282. See *Scheuer v. Rhodes*, 416 U.S. 232, 247–48 (1973) (suggesting that executive officials do not have absolute personal immunity, but a qualified immunity from liability when their acts are not clearly unlawful).

283. The relations between government officials and the legal rules that enable and constrain them underlie so-called officer suits, in which private plaintiffs seek damages from the personal funds of government officials for allegedly illegal conduct under color of official authority. Officials like law enforcement officers and members of the military involved in combat have privileges to inflict harm that ordinarily would be unlawful. When they act beyond those privileges they are personally liable for harm they inflict. See *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 390–92 (1971) (describing officer suit structure). An early case involving the privileges of combatants to invade private rights is *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804). Captain Little of the U.S. Navy seized the *Flying Fish* and was sued for damages from his private funds by its owners, who claimed that he had exceeded the privilege to seize granted by Congress as part of the Quasi-War with France in the late 1790s. The Court concluded that Congress had authorized seizures of vessels bound to French ports, but not those coming from French ports like the *Flying Fish*, and upheld an award of damages. *Id.* at 176–79.

In addition to substantive privileges to invade private rights, like those of a lawful combatant who engages in hostilities within the law of war, officials often enjoy immunity from litigation for unlawful acts that they reasonably believed to have been lawful. See, e.g., *Pearson v. Callahan*, 555 U.S. 223, 231, 244–45 (2009) (finding that police officers whose warrantless search was not clearly unlawful when conducted are entitled to qualified immunity).

284. See *Scheuer*, 416 U.S. at 249 (quoting *Gilligan v. Morgan*, 413 U.S. 1 (1973)) (“Indeed, [in *Gilligan*] we specifically noted ‘that we neither held nor implied that the conduct of the National Guard is always beyond judicial review or that there may not be accountability in a judicial forum for . . . unlawful conduct by military personnel . . .’”).

The lower court cases that go beyond non-judicial finality and limits on mandatory remedies thus have no warrant in the Supreme Court's decisions.

C. Jurisdictional Limits, Substantive Law, and Article III

When the lower courts find that they lack jurisdiction on political question grounds they depart, not only from the Court's precedents, but also from Article III.

The lower court cases that find jurisdictional limits under the political question rubric rest on a fundamental confusion of the roles of substantive and jurisdictional law. They have relied on a jurisdictional limitation to perform functions that can be performed only by the legal rules that set out the authority of executive officers and determine whether the conduct of those officers and others is lawful. One of the functions that only the substantive rules can perform is the role the lower courts attribute to the political question doctrine itself: ensuring that the courts respect the lawful authority of the political branches.

When the lower courts treat the political question doctrine as a limit on their jurisdiction, as they do in the decisions with which I am concerned, the doctrine thereby keeps them from applying the substantive rules that govern the plaintiff's claim, and in particular the substantive legal rules that determine whether the defendant's conduct was lawful. For example, when the defendant is a member of the U.S. military and the conduct at issue is related to combat, the lower courts' doctrine keeps them from deciding whether the defendant was entitled to combatant privilege under the law of war. Combatant privilege permits actions that otherwise would be tortious or criminal, and is central to the lawfulness of war.²⁸⁵ Without

285.

International law affords combatants a special legal immunity from the domestic law of the enemy State for their actions done in accordance with the law of war. This legal immunity is sometimes called the "combatant's privilege" or "combatant immunity." This means that a combatant's "killing, wounding, or other warlike acts are not individual crimes or offenses," if they are done under military authority and are not prohibited by the law of war. Similarly, a combatant's warlike acts done under military authority and in accordance with the law of war also do not create civil liability.

U.S. DEP'T OF DEF., LAW OF WAR MANUAL 108 (2015) (hereinafter LAW OF WAR MANUAL), <http://archive.defense.gov/pubs/Law-of-War-Manual-June-2015.pdf> (footnotes omitted) (quoting E.D. Townsend, Assistant Adjutant Gen., Gen. Orders No. 100, INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD art. 57 (1898)); W. Thomas Mallison & Sally V. Mallison, *The Juridical Status of*

jurisdiction over a claim, a court cannot decide whether that privilege was available or not.

Combatant privilege is part of a large body of rules that govern official conduct related to national security and foreign relations. Related principles apply to the activities of private persons who participate in government operations, such as military contractors.²⁸⁶ Conceived yet more broadly, foreign relations and national security law includes all the rules that bear on the foreign affairs and military operations of the United States. The Sherman Act is part of that law, especially because its so-called extraterritorial application can have major consequences for relations between the United States and other sovereigns.²⁸⁷ Not all the legal rules that regulate or affect foreign relations and national security are federal law. In a tort action, the plaintiff's claim may arise from the law of the place of the tort, which may be a foreign country, or from the law of the plaintiff's domicile, which may be a state of the union.²⁸⁸ But if federal law is applicable it ultimately controls in any American court. In a tort action growing out of military operations, the plaintiff's claim may come from non-federal law, but the defendant's combatant privilege may be based on statute or federal common law.²⁸⁹

Privileged Combatants Under the Geneva Protocol of 1977 Concerning International Conflicts, 42 DUKE J. LAW & CONTEMP. PROBS. 5, 5 (1978) (stating that individuals who enjoy combatant privilege have "the legal right, limited by the laws and customs of war, to exercise coercion and violence in a public armed conflict situation").

286. The law of war recognizes a distinct category of "persons authorized to accompany the armed forces," which includes civilian government employees and government contractors. LAW OF WAR MANUAL, *supra* note 285, at 142, 144.

287. In *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004), the Supreme Court read the Foreign Trade Antitrust Improvements Act consistent with its practice to construe "ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations" because "America's antitrust laws, when applied to foreign conduct, can interfere with a foreign nation's ability independently to regulate its own commercial affairs." *Id.* at 164–65.

288. *Taylor v. Kellogg Brown & Root Servs., Inc.*, 658 F.3d 402, 405 n.6 (4th Cir. 2011) (noting that the parties agreed that Virginia law applied to Taylor's negligence claim).

289. The federal source of federal officers' official privilege was central to the important case of *In re Neagle*, 135 U.S. 1 (1890), in which Deputy U.S. Marshal David Neagle sought discharge through habeas corpus from state custody on a murder charge. *Id.* at 3–6. Neagle had been appointed as a bodyguard for Justice Field and had killed David Terry when, the Court found, Terry assaulted Field. *Id.* at 52–53. The Court found that Neagle was eligible for relief through habeas corpus because he had an "element of power and authority asserted under the government of the United States." *Id.* at 54. For that reason, Neagle was being held in state custody for "an act

Taken together, those principles perform the primary function of legal rules: they determine whether conduct is lawful. When courts apply them, those principles perform two other functions specifically related to the role of the judiciary in the constitutional system. First, by applying the substantive law of national security and foreign relations, courts respect the discretion of the political branches, including the Executive. By applying statutes that Congress has validly adopted, courts implement the legislature's policy decisions. Many rules confer some kind of authority on executive officials. Combatant privilege does so, by making lawful all legitimate acts of hostility; within the bounds set by the law, military decision makers may choose the strategy and tactics they think best suited to accomplishing the nation's goals.

Second, by applying the substantive law relating to foreign relations and national security, courts avoid interfering with, and to some extent help implement, the foreign and national security policy of the United States. For example, the foreign policy of the United States is that foreign sovereigns may be sued by private parties with respect to their commercial activities. The Foreign Sovereign Immunities Act adopts the so-called restrictive theory of sovereign immunity, according to which sovereigns have immunity for their governmental conduct but not for their dealings in the marketplace.²⁹⁰ Congress endorsed that approach to immunity when it adopted the statute, and the federal courts both respect and implement Congress's choice when they apply the relevant substantive law, like the law of contract, to cases in which foreign governments are properly sued. A court that refused to hear such a case would disrupt U.S. foreign policy.

Only substantive rules can fully perform those three functions; jurisdictional limits cannot do so. That is clear with respect to determining whether conduct is lawful, which substantive rules accomplish and jurisdictional limits prevent. Perhaps less obvious, but crucial in assessing the lower courts' political question cases, is that only by applying substantive rules can the judiciary properly respect political discretion and U.S. policy. A court can defer to discretionary

done or omitted in pursuance of a law of the United States" as required to be eligible for relief under the habeas corpus statute. *Id.* at 41.

290. See *Republic of Austria v. Altmann*, 541 U.S. 677, 690–91 (2004) (noting that the Foreign Sovereign Immunity Act adopts the restrictive theory of sovereign immunity).

choices by the political branches only if it knows the scope of their discretion, which only substantive rules can tell it.

Two of the lower court cases illustrate this point. In *Schneider*, the D.C. Circuit concluded that the political question doctrine deprived it of jurisdiction, and that the doctrine did so in order to protect executive discretion and U.S. foreign policy from judicial interference.²⁹¹ Because it did not address the merits, however, the court was not in a position to decide whether there had been a legitimate exercise of executive discretion and therefore was not in a position to know what U.S. foreign policy was. If the Constitution and laws of the United States authorized the National Security Advisor to encourage the elimination of a foreign political figure, then even if Secretary Kissinger did what the plaintiffs claimed he did, his acts were within his discretion and constituted the foreign policy of the United States. If Secretary Kissinger lacked that authorization, then the court was neither respecting executive discretionary choices nor giving appropriate deference to foreign policy; it was allowing lawless acts by individuals to avoid the liability imposed by the substantive law.

Spectrum Stores is similar. The plaintiffs claimed that actions of foreign firms, some of them owned by governments, violated U.S. antitrust statutes. The court of appeals agreed with the executive branch that the court had no jurisdiction because the policy of the United States was to manage through negotiations issues concerning foreign sovereigns' decisions with respect to their natural resources.²⁹² Those positions contradicted one another, and the contradiction could be resolved only by deciding the merits and in particular by deciding whether the Sherman Act applied as the plaintiffs said it did. If the plaintiffs were right, and the antitrust statutes are constitutional

291. See *Schneider v. Kissinger*, 412 F.3d 190, 193 (D.C. Cir. 2005).

292.

By adjudicating this case, the panel would be reexamining critical foreign policy decisions, including the Executive Branch's longstanding approach of managing relations with foreign oil-producing states through diplomacy rather than private litigation, as discussed in the government's amicus brief and in several official statements of administration policy. In accordance with this policy, the Department of Justice has, upon thorough consideration, declined to bring a Sherman Act case on behalf of the United States. Any merits ruling in this case, whether it vindicates or condemns the acts of OPEC member nations, would reflect a value judgment on their decisions and actions—a diplomatic determination textually committed to the political branches.

Spectrum Stores, Inc. v. Citgo Petroleum Corp., 632 F.3d 938, 951 (5th Cir. 2011) (footnote omitted).

in that respect, then the foreign policy of the United States on this topic is not limited to negotiation, but includes liability to private parties. When it acts within its constitutional sphere, Congress sets the foreign policy of this country, and limits the discretion of the Executive.²⁹³ For all the Fifth Circuit knew in *Spectrum Stores*, the court's decision departed from a foreign policy choice made by the institution authorized to act for the United States. Only by interpreting the statutes, which it declined to do, could the court of appeals achieve the goals it set out to achieve, of ensuring that it implemented U.S. foreign policy.

The court of appeals in *Spectrum Stores* might have encountered a constitutional question concerning legislative and executive power had it decided the merits. It might have found that the antitrust statutes authorize the kind of lawsuits the executive branch maintained would be disruptive to U.S. foreign policy. It then would have found itself with the kind of question the Supreme Court resolved on the merits in *Zivotofsky v. Kerry (Zivotofsky II)*.²⁹⁴ In *Zivotofsky II*, the plaintiff claimed an entitlement under a statute that, the executive branch maintained, impermissibly interfered with the President's constitutional authority.²⁹⁵ The Court agreed with the executive branch, and found the statute unconstitutional.²⁹⁶ It did so after having reversed the court of appeals's dismissal of the suit on political question grounds in *Zivotofsky v. Clinton (Zivotofsky I)*.²⁹⁷ The political question doctrine does not keep the courts from deciding whether

293. In *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221 (1986), plaintiffs sought an order requiring the Secretary of Commerce to make a statutorily required certification that Japan's whaling activities undermined the effectiveness of quotas set by international convention. *Id.* at 228. The executive branch had concluded an executive agreement with Japan concerning Japan's whaling policy and had determined that whaling by Japan in compliance with the agreement would not undermine the quotas. *Id.* at 227–28. Rejecting the argument that the case presented a nonjusticiable political question, the Court explained that “interpreting congressional legislation is a recurring and accepted task for the federal courts. It is also evident that the challenge to the Secretary's decision not to certify Japan for harvesting whales in excess of [International Whaling Commission] quotas presents a purely legal question of statutory interpretation.” *Id.* at 230. When Congress legislates within its constitutional authority, the Executive must implement Congress's choices, and the courts will enforce that duty in appropriate cases.

294. 135 S. Ct. 2076 (2015).

295. *Id.* at 2083–84.

296. *Id.* at 2096.

297. 566 U.S. 189 (2012).

Congress has validly constrained executive discretion with respect to foreign affairs.²⁹⁸

The phrases that the courts of appeals have carried over from *Baker* very likely have confused them on this point, often causing them to assume their conclusion. They often say that foreign relations or national security matters are textually committed to the Executive, which is at best a half truth.²⁹⁹ No text gives U.S. military personnel a privilege to commit war crimes. Whether the Constitution or any statute authorizes the National Security Adviser to conspire to arrange a homicide was a crucial question in *Schneider*, and the invocation of general commitment of foreign relations to the President cannot answer it. Executive officials set and carry out the foreign policy of the United States only when they act within their lawful authority, which does not include all the acts they commit under color of law.³⁰⁰

Substantive principles also hold the solution to a problem several courts of appeals have thought they faced in political question cases.

298.

The federal courts are not being asked to supplant a foreign policy decision of the political branches with the courts' own unmoored determination of what United States policy toward Jerusalem should be. Instead, Zivotofsky requests that the courts enforce a specific statutory right. To resolve his claim, the Judiciary must decide if Zivotofsky's interpretation of the statute is correct, and whether the statute is constitutional. This is a familiar judicial exercise.

Zivotofsky I, 566 U.S. at 196.

299.

As the Supreme Court suggested in *Marbury* and made clear in later cases, "The conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative—the political—Departments of the Government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision."

Schneider v. Kissinger, 412 F.3d 190, 194 (D.C. Cir. 2005) (quoting *Oetjen v. Cent. Leather Co.*, 246 U.S. 297, 302 (1918)). Most constitutional grants of authority to Congress and the President do not involve the quasi-judiciary function that leads to non-judicial finality under the political question doctrine. *See id.* at 195. *Oetjen* is an exception to that generalization, because it involved recognition of a foreign government, which is quasi-judiciary and does give rise to non-judicial finality. The statement the D.C. Circuit quoted from *Oetjen* was correct in its context, but not applicable in all contexts.

300. Action under color of law can be unlawful. For example, the Supreme Court has held that the Constitution itself imposes tort liability on federal officials. *See Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 397 (1971). Because it is imposed on federal officials as such, that liability attaches only to conduct under color of law, and not to conduct in a wholly personal capacity. Because it is tort liability, it applies to conduct that is not actually legally authorized; if an act is authorized, the actor enjoys official privilege to engage in it and is not personally liable.

Drawing on *Baker's* reference to judicially manageable standards, a number of cases have found that the legal rule on which the plaintiff relied cannot be applied by the federal courts because it requires that they second-guess foreign policy or national security choices in ways that would go beyond the judicial role.³⁰¹ Few if any rules of liability on which a plaintiff may rely are likely to put such demands on the courts. Ordinary tort negligence almost certainly does not do so. Negligent conduct creates an unreasonable risk.³⁰² Courts routinely decide whether law enforcement officers acted reasonably in making split-second decisions with life and death in the balance.³⁰³ Military judgments are similar.

If somehow the law on which the plaintiff relies calls on a court to make a military or foreign policy judgment that federal courts may not make, principles of official privilege can obviate the problem by incorporating deference to official judgment. The more deference the courts give official decision makers, the less the judges are substituting their own judgment for those of the Executive. The privilege of federal officials derives from the Constitution, federal statutes, or unwritten federal law. The Supreme Court has interpreted the latter two sources of legal rules so as to provide military decision makers with appropriate

301. For example, *Aktepe v. United States*, 105 F.3d 1400 (11th Cir. 1997), was a damages claim by members of the Turkish Navy for wrongful death and personal injury arising out of an accident in a training exercise with the U.S. Navy. *Id.* at 1401–02. Suit was brought pursuant to statutory waivers of sovereign immunity and the applicable substantive law was that of wrongful death. *Id.* at 1402. The Eleventh Circuit found that the case presented a nonjusticiable political question in part because “no judicially discoverable and manageable standards exist for resolving the questions raised by this suit. In order to determine whether the Navy conducted the missile firing drill in a negligent manner, a court would have to determine how a reasonable military force would have conducted the drill.” *Id.* at 1404. As discussed above, *Baker* used the lack of judicially manageable standards as an indicator of non-judicial finality.

302. The law of negligence protects bodily security against “against unintentional invasion by conduct involving in the thought of reasonable men an unreasonable hazard that such invasion would ensue.” *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99, 99 (N.Y. 1928), *reh'g denied* 164 N.E. 564 (1928).

303. In *Scott v. Harris*, 550 U.S. 372 (2007), the Supreme Court considered whether a law enforcement official can, consistent with the Fourth Amendment, attempt to stop a fleeing motorist from continuing his public-endangering flight by ramming the motorist's car from behind. Put another way: Can an officer take actions that place a fleeing motorist at risk of serious injury or death in order to stop the motorist's flight from endangering the lives of innocent bystanders?

Id. at 374.

protection from undue judicial second-guessing.³⁰⁴ The courts have at least as much flexibility in shaping unwritten federal law as they do in interpreting written federal law, and they can derive requirements of deference from the general principle that official privilege exists in order to enable officers to perform their function effectively.

Substantive rules have another feature that points up the error of the lower courts' jurisdictional doctrine: they apply in state court, where the limits of Article III do not. If the lower courts are right, the federal judiciary is barred from deciding highly sensitive issues and cases that the state courts are free to decide as far as federal law is concerned. Had the plaintiffs in *Schneider* sued Secretary Kissinger in New York state court, no federal rule would have kept the court from deciding the case, but federal principles of privilege, immunity, and deference would have protected Kissinger from liability that would unduly interfere with his federal function. State courts follow their own rules about jurisdiction, but when they have it, Article VI requires that they apply federal law that governs the relations of the parties.³⁰⁵

The lower courts' jurisdictional political question doctrine thus subverts Article III's purpose and does not implement it. The Constitution provides for federal courts so that federal law, federal interests, and federal officials will have an impartial forum free from local prejudice.³⁰⁶ Those courts can perform that function only if they

304. In *Chappell v. Wallace*, 462 U.S. 296 (1983), the Court found that special factors counseled against inferring a cause of action under the Constitution for service members against their superior officers. *Id.* at 298, 305. In *Feres v. United States*, 340 U.S. 135 (1950), the Court concluded that the Federal Tort Claims Act does not make the United States liable for injuries arising out of military service. *Id.* at 146.

305.

The requirement that a state court of competent jurisdiction treat federal law as the law of the land does not necessarily include within it a requirement that the State create a court competent to hear the case in which the federal claim is presented. The general rule, "bottomed deeply in belief in the importance of state control of state judicial procedure, is that federal law takes the state courts as it finds them."

Howlett v. Rose, 496 U.S. 356, 372 (1990) (quoting Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 508 (1954)).

306. Cases involving foreign relations and national security generally turn on federal law and affect this country's foreign relations. Hamilton regarded as axiomatic "the propriety of the judicial power of a government being coextensive with its legislative," noting that "[t]he mere necessity of uniformity in the interpretation of the national laws, decides the question." THE FEDERALIST NO. 80, at 412 (Alexander Hamilton) (George W. Carey and James McClellan, eds., 2001). The importance of a

have jurisdiction. Article III and the statutes give them jurisdiction in a wide range of cases involving foreign relations and national security, and a version of the political question doctrine that denies that jurisdiction departs from the Constitution.

CONCLUSION

As the Supreme Court has developed it, the political question doctrine implements limits on the judicial power but not on the cases Article III courts may decide. The doctrine reflects the quite limited assignments of final decisional authority to political actors, and the basic but rarely relevant principle that courts may not exercise political power through their mandatory remedies. In both respects, it tells courts how to decide cases, and then leaves them to decide the disputes that are within their jurisdiction. The doctrine reflects a coherent view of the nature and limits of the federal judicial power, but to take it as a limit on the cases federal courts may decide is an easy but serious error. John Marshall said that no political question could be made in his court, not that his tribunal could not decide any case involving a political question.

federal forum for cases affecting U.S. foreign relations “rests on this plain proposition, that the peace of the WHOLE ought not to be left at the disposal of a PART.” *Id.*