

# IN DEFENSE OF THE POLITICAL QUESTION DOCTRINE

J. PETER MULHERN†

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† Assistant Professor, College of Law, Northern Illinois University. B.A. 1977, University of New Hampshire; J.D. 1980, Cornell Law School; LL.M. 1987, Harvard Law School.

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## INTRODUCTION

In law, as in science, a phenomenon that refuses to conform with orthodox theory should inspire reexamination of the theory.<sup>1</sup> Scientists have difficulty explaining phenomena that inconveniently challenge their presuppositions. It is easier and more respectable for lawyers to do so. We observe and analyze judicial opinions rather than physical

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<sup>1</sup> See T. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* 97 (2d ed. 1970). Kuhn argues that the most dramatic scientific advances result from revolutionary changes of the scientific "paradigm." By paradigm, Kuhn means a scientific world view that gives scientists a basis for explaining most of the phenomena they observe. See *id.* at 10-11. Scientific revolutions destroy an existing paradigm and replace it with a new one that explains phenomena that resisted explanation by the preexisting paradigm. See *id.* at 92-93.

phenomena. We can usually dismiss opinions as mistaken and urge that judges abandon them. Nonetheless, an enduring legal phenomenon that contradicts common assumptions concerning our legal system may call for changes in those assumptions. This Article posits that the political question doctrine is such a phenomenon, and that its existence challenges orthodox notions about judicial review and the role of courts in our constitutional system.

Since judges first claimed the power of judicial review, they have tried to define a category of "political questions" outside the scope of that power.<sup>2</sup> To many who make their living writing about constitutional law, this effort is an embarrassment. Limiting the power of judicial review is inconsistent with the assumptions of many modern legal scholars regarding the role of courts in our constitutional order. As a result, contemporary commentary concerning the political question doctrine is often hostile to it. Commentators attack the doctrine as inconsistent with basic principles of our constitutional practice, but these attacks are unsuccessful. Their failure reveals flaws in the critics' assumptions about the role of the judiciary in our constitutional system.

Critics of the political question doctrine have put forward two closely related theses: either the doctrine does not exist<sup>3</sup> or it does, but should not.<sup>4</sup> Both of these theses are based on the same two intertwined assumptions: 1) the judiciary is the only institution with the authority and capacity to interpret the Constitution and 2) to limit the judicial monopoly on constitutional interpretation is to threaten, if not destroy, the rule of law. These two assumptions are intertwined because critics commonly offer the second as support for the first. I will refer to the

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<sup>2</sup> See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803) (discussed *infra* text accompanying notes 8-9).

<sup>3</sup> See, e.g., Henkin, *Is There a Political Question Doctrine?*, 85 YALE L.J. 597, 600 (1976) ("The thesis I offer for discussion is that there may be no doctrine requiring abstention from judicial review of 'political questions.'"); McCormack, *The Justiciability Myth and the Concept of Law*, 14 HASTINGS CONST. L.Q. 595, 614 (1987) (stating that the doctrine is "more easily demonstrated to be nonexistent than any other nonjusticiability doctrine"); cf. Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 YALE L.J. 517, 596 (1966) ("[W]hatever sense I have been able to find [in political question cases] seems to point toward an understanding of the doctrine, which . . . is quite limited in its scope of actual and potential relevance.").

<sup>4</sup> See, e.g., Henkin, *Lexical Priority or "Political Question": A Response*, 101 HARV. L. REV. 524, 529 (1987) ("I see the political question doctrine as being at odds with our commitment to constitutionalism and limited government, to the rule of law monitored and enforced by judicial review."); Redish, *Judicial Review and the "Political Question"*, 79 NW. U.L. REV. 1031, 1059-60 (1985) (asserting that the moral cost of judicial abdication outweighs its benefits); Tigar, *Judicial Power, The "Political Question Doctrine," and Foreign Relations*, 17 UCLA L. REV. 1135, 1136 (1970) (arguing that federal courts should not abstain from ruling on American military involvement abroad on the basis of the political question doctrine).

first as the "judicial monopoly" assumption<sup>5</sup> and to the second as the "cataclysmic consequences" assumption.

If these assumptions were valid it would follow that there should be no political question doctrine. If the Constitution commits all interpretation to the judiciary, and exceptions to this rule threaten the constitutional framework, courts should never rely on the political question doctrine to relinquish their charge as interpreters of the Constitution.

This Article will argue that these assumptions are not valid, or even plausible. It will analyze this argument within the structure of Ronald Dworkin's two dimensional model of interpretation. Dworkin's model directs us to test interpretations both for their fit with our tradition and for their normative appeal as a matter of political morality.<sup>6</sup>

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<sup>5</sup> This term derives from Donald Morgan's phrase "judicial monopoly theory," which he used to describe the theory that constitutional interpretation is the exclusive province of the judiciary. See D. MORGAN, CONGRESS AND THE CONSTITUTION 89-96 (1966).

<sup>6</sup> Dworkin recommends that judges measure possible interpretations of legal texts, including the Constitution, along both a dimension of "fit" and a dimension of "political morality." He argues that judges should choose from among interpretations that adequately fit our traditions the one that shows our "community's structure of institutions and decisions" in the best light "from the standpoint of political morality." R. DWORKIN, LAW'S EMPIRE 256 (1986). Dworkin makes it clear that the threshold requirement of fit will sometimes rule out interpretations that a judge considers desirable as a matter of political morality: "[I]f [a judge's] threshold of fit is wholly derivative from and adjustable to his convictions of justice, so that the latter automatically provide an eligible interpretation—then he cannot claim in good faith to be interpreting his legal practice at all." *Id.* at 255. He also makes it clear, however, that one should apply the fit test less stringently when an interpretation has particularly strong normative appeal. See *id.* at 247-48.

Dworkin's theory of interpretation has not escaped criticism. Stanley Fish claims that Dworkin's description of the dimension of fit assumes that texts impose constraints on the interpreter. See Fish, *Working on the Chain Gang: Interpretation in Law and Literature*, 60 TEX. L. REV. 551, 559 (1982) (criticizing Dworkin for assuming "that history in the form of a chain of decisions has . . . the status of a brute fact"). Fish argues that there is no such constraint on the interpreter. To the contrary, texts, both literary and legal, are subject to any interpretation that can find acceptance in the relevant interpretive community. See S. FISH, IS THERE A TEXT IN THIS CLASS?: THE AUTHORITY OF INTERPRETIVE COMMUNITIES 15-16 (1980). This conceptual attack does not make Dworkin's theory of interpretation any less useful as a framework for constitutional analysis. Even if Dworkin is confused about the ontological status of texts, his theory is an excellent description of the way in which those who belong to the American legal community approach constitutional interpretation. Even scholars who have broad areas of disagreement with Dworkin describe interpretation in terms very similar to his. For example, Duncan Kennedy characterizes judicial interpretation as a process of accommodating the legal materials that constrain the judge, thus acknowledging the dimension of fit, to her preferred result in the case that she is interpreting, relying on a preference shaped by the normative dimension of political morality. See Kennedy, *Freedom and Constraint in Adjudication: A Critical Phenomenology*, 36 J. LEGAL EDUC. 518, 548-51 (1986). Kennedy's judge is not as pure of heart as Dworkin's Hercules, but their similarities in thinking about legal problems are much more important than their differences.

This Article will show that the judicial monopoly assumption embodies an interpretation of our constitutional practice that does not "fit" our tradition. The cataclysmic consequences assumption is best understood as an effort to shore up the ill-fitting judicial monopoly interpretation with a claim that it has great normative appeal. This effort is a failure; there is no compelling case for the judicial monopoly assumption as a matter of political morality.

In sum, the interpretation that underlies the criticisms of the political question doctrine fails both the test of fit and the test of normative appeal. Consequently, we need a different interpretation. Any interpretation that fits our tradition must acknowledge that courts share responsibility for interpreting the Constitution with the political branches of government. The political question doctrine is just one device courts use to define this division of responsibility. Moreover, an interpretation can acknowledge our system of shared responsibility without becoming vulnerable to normative critique. This conclusion does not necessarily imply that courts have articulated the political question doctrine coherently. To the contrary, commentators have properly criticized the Supreme Court's explanation of the political question doctrine. They have shown that nothing in the Court's explanations helps distinguish cases in which judicial review is routinely available from cases that are immune from review because they present political questions.<sup>7</sup> Although this criticism does not support a claim that the courts should abandon the political question doctrine, it demonstrates the need for a better explanation.

Full development of such an explanation is beyond the scope of this Article. Nevertheless, one may begin to see the outline of such an explanation by recognizing that the courts share responsibility for constitutional interpretation with the political branches of government. To explain the doctrine fully, one must answer the broad question of how properly to divide responsibility for constitutional interpretation between courts and other decision makers. A rough sketch of the answer to that question, however, is enough to give direction and meaning to political question analysis.

The first Part of this Article will describe the development and current status of the political question doctrine. Part II will describe and analyze the critical commentary that has grown up around the doctrine. Part III demonstrates that critics of the political question doctrine rest their criticisms on an interpretation of our constitutional practice

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<sup>7</sup> See McCormack, *supra* note 3, at 614-26; Redish, *supra* note 4, at 1034-35; *infra* notes 244-52 and accompanying text.

that fails the threshold test for fit. Part IV will show that this underlying interpretation also is without any compelling normative support. Part V will sketch a better interpretation of our practice and the role of the political question doctrine within it. This alternative is based on the assumption that our system divides responsibility for constitutional interpretation among the three branches of government. This "divided responsibility" model both fits our practice and has normative appeal.

## I. THE POLITICAL QUESTION DOCTRINE IN THE COURTS

The political question doctrine stems from Chief Justice Marshall's opinion in *Marbury v. Madison*.<sup>8</sup> Even as he claimed the power to decide questions of law authoritatively for all three branches of government, Chief Justice Marshall recognized limitations on that power:

The province of the court is, solely, to decide on the rights of individuals, not to inquire how the executive, or executive officers, perform duties in which they have a discretion. Questions in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court.<sup>9</sup>

Apparently Chief Justice Marshall assumed a sharp, stable distinction between issues of law that courts must resolve and political questions they must permit others to answer.

*Luther v. Borden*<sup>10</sup> demonstrated the difficulties with this assumption. Plaintiff in *Luther* sought damages for trespass to his Rhode Island home. Defendants admitted to breaking into plaintiff's house and searching it, but argued that they did so in the service of the state government. Plaintiff countered that the government to which defendants referred, the charter government under which Rhode Island had operated before the revolution, was not the lawful government of Rhode Island. This counterargument was not frivolous: the alleged trespass occurred during the Dorr Rebellion of 1842, in which defendants accused plaintiff of participating, which resulted from a dispute about the legitimacy of the charter government.<sup>11</sup> Plaintiff, thus called on the

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<sup>8</sup> 5 U.S. (1 Cranch) 137 (1803).

<sup>9</sup> *Id.* at 170.

<sup>10</sup> 48 U.S. (7 How.) 1 (1849). *Luther* combined two cases into one, as both Martin and Rachel Luther were suing Luther Borden and others on identical facts. *See id.* at 2.

<sup>11</sup> For a summary of the facts of the case, including the historical facts of the Dorr Rebellion, see *id.* at 34-38.

courts to decide whether the rebellion had been justified.<sup>12</sup>

The Supreme Court refused to make such a decision. Writing for the Court, Chief Justice Taney recognized that the Constitution mandates a particular form of government for the states.<sup>13</sup> It follows that if plaintiff could show that the charter government did not meet the requirements of the mandate, then defendants could not rely on its authority to shield them from liability and plaintiff should prevail.<sup>14</sup>

<sup>12</sup> See *id.* at 20.

<sup>13</sup> Chief Justice Taney cited the guarantee clause and argued that only Congress could determine what government is established in a state and whether it is "republican." *Id.* at 42.

<sup>14</sup> Professor Henkin argues that this is not what the plaintiffs in *Luther* sought to show. See Henkin, *supra* note 3, at 608 n.33. He treats *Luther* as a case in which the plaintiffs failed to invoke any constitutional limit on the powers of the political branches of government. According to Henkin, they failed to show any constitutional requirement that Congress or the President prefer either the charter government or its competitor: "Petitioners did not allege that the charter government failed to satisfy the requirement for a republican form of government, that the other regime was 'more republican' or that the act of Congress in recognizing it violated some other provision of the Constitution." *Id.* In the absence of such a requirement, the Court had to sustain any choice the political branches made between the two contending Rhode Island governments. This interpretation permits him to conclude that *Luther* "established no pure 'political question doctrine.'" *Id.* at 608.

This argument mischaracterizes the claim that the petitioners brought to the Court in *Luther*. They argued at great length that the people of Rhode Island had a right to change their government by constitutional convention, that they had done so, and that the charter government had no legitimacy after the change. See *Luther*, 48 U.S. (7 How.) at 19-21. The summary of petitioners' brief that appears in the case report cites a number of authorities to support this argument and concludes: "All these go to establish the constitutional right of changing State forms of government." *Id.* at 25.

The notes of the arguments do not indicate that petitioners cited constitutional text in support of the proposition that it guarantees this right. One explanation for this omission is that nineteenth century lawyers did not have the aversion to relying on natural rights in constitutional argument that we have today. See, e.g., *Shaw v. Cooper*, 32 U.S. (7 Pet.) 292, 303 (1833) (summary of appellant's brief) (discussing the natural rights of men pertaining to copyright); see also *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 387 (1798) ("It appears to me a self-evident proposition, that the several state legislatures retain all the powers of legislation, delegated to them by the state constitutions; which are not expressly taken away by the constitution of the United States."); L. TRIBE, *AMERICAN CONSTITUTIONAL LAW*, § 8-1, at 560 (2d ed. 1988) ("During the 17th and 18th centuries, there evolved an American tradition of 'natural law,' postulating that 'certain principles of right and justice . . . are entitled to prevail of their own intrinsic excellence.'" (quoting Corwin, *The "Higher Law" Background of American Constitutional Law* (pt. 1), 42 HARV. L. REV. 149, 152 (1928) (emphasis deleted by Tribe))). Petitioners' attorney may have felt no need for such support.

It would not distort petitioners' argument to modernize it as follows: The Constitution directs the United States to guarantee every state a republican form of government. In our tradition, one aspect of such a government is that it is subject to change at the will of the people expressed through a constitutional convention. When the people of Rhode Island made such a change, the Constitution mandated that the United States recognize the new government and protect it against its predecessor. In accord with this mandate, the Court has an obligation to treat defendants as mere trespassers. Any actions by the political branches of government inconsistent with this mandate are nulli-

Chief Justice Taney indicated, however, that only the political branches of government could enforce the constitutional mandate in question.<sup>15</sup> Because the President had accepted the charter government at the time of the Dorr Rebellion, the Court would not reach an inconsistent result.<sup>16</sup>

By ordinary criteria, whether the charter government matched the Constitution's specifications for an acceptable state government seems to be a legal question. It is difficult to distinguish it from the sort of question Chief Justice Marshall had claimed the power to answer authoritatively in *Marbury*. Yet the Court treated the question as a political one that the President could answer free from any judicial revision. Thus, with the *Luther* opinion, Chief Justice Marshall's *Marbury* dictum distinguishing political and legal questions became the basis for an ill-defined exception to the scope of the judicial authority *Marbury* claimed for the courts.

The Supreme Court has done little to clarify this exception. On rare occasions, it has employed the political question doctrine to avoid reaching the merits of a case.<sup>17</sup> Paradoxically, the opinion that includes

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ties. Chief Justice Taney seems to have understood petitioners to make roughly this argument; he acknowledged that the guarantee clause imposes limits on state governments, but held that only Congress could enforce it. See *Luther*, 48 U.S. (7 How.) at 42.

Once we recognize that this is the substance of what the petitioners argued, Henkin's optimistic account of *Luther's* implications will not work. Petitioners brought the Court a constitutional challenge to the validity of the charter government, and the Court said that the political branches of government had already rejected that challenge.

<sup>15</sup> See *Luther*, 48 U.S. (7 How.) at 42.

<sup>16</sup> Chief Justice Taney noted that the President had expressed his willingness to support the charter government with military force. This led him to conclude: "[C]ertainly 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." *Id.* at 44. Concern over problems of proof associated with any attempt to determine the legitimacy of an established government also played an important role in his reasoning. He was concerned both about a court's capacity to find the requisite facts and about problems of consistency if the outcome of such cases depended on jury findings of fact necessary to determine the legitimacy of the charter government. See *id.* at 40-43.

<sup>17</sup> See, e.g., *Goldwater v. Carter*, 444 U.S. 996, 1002 (1979) (Rehnquist, J., concurring in the judgment) (stating that questions involving the extent to which Congress is authorized to negate the action of the President in foreign policy matters are "'political' and therefore nonjusticiable"); *Colegrove v. Green*, 328 U.S. 549, 553-54 (1946) (holding that the duty to secure fair representation of the states in the House of Representatives has been committed to the exclusive control of Congress); *Oetjen v. Central Leather Co.*, 246 U.S. 297, 302-03 (1918) (taking as given that the Executive's official recognition of the Mexican regime touched on foreign relations and consequently was a matter committed to the political departments and beyond judicial review); *Pacific States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118, 143 (1911) (finding *Luther* absolutely controlling in holding that enforcement of U.S. CONST. art. IV, § 4, belongs to the legislative branch).



the Court's best effort to clarify that doctrine rejects its application. In *Baker v. Carr*,<sup>18</sup> Justice Brennan summed up the law of political questions as of 1962. As will be shown, the few subsequent Supreme Court cases have done little to expand or improve upon his work.

*Baker* involved a challenge under the equal protection clause to malapportionment of legislative districts in Tennessee. Seventeen years earlier, in *Colegrove v. Green*,<sup>19</sup> the Court had refused to consider a similar challenge to malapportionment of congressional districts in Illinois. Justice Frankfurter's plurality opinion in *Colegrove* was a strong statement of the political question argument against considering such cases, identifying reapportionment as a "political thicket" that courts would not enter.<sup>20</sup>

Justice Brennan set out to justify a different result in *Baker*. In laying the foundation for his argument that the political question doctrine should not apply to the case, he gave that doctrine its fullest judicial treatment to date. Justice Brennan surveyed the issues that the

The ambiguity in the doctrine has been increased further by the fact that the Court frequently has divided in its interpretation of the doctrine. *Coleman v. Miller*, 307 U.S. 433 (1939), for example, involved an attempt to nullify the Kansas legislature's ratification of the Child Labor Amendment. The case presented two principal issues: first, whether the legislature could properly ratify the amendment, having once rejected it, and second, whether too much time had passed after Congress enacted the amendment for any ratification to be effective. Three justices held that both of these questions were political. Three more held that all questions having to do with the amendment process are for Congress to answer "subject to no judicial review." *Id.* at 459 (Black, J., concurring). With respect to the second issue, the plurality maintained that the Constitution requires ratification within a reasonable time, but argued that only Congress can determine how much time is reasonable in a particular situation. Compare McCormack, *supra* note 3, at 617 ("*Coleman* is nothing other than a decision that the Constitution alone does not impose an expiration date.") with Scharpf, *supra* note 3, at 589 ("It is one thing for the Court to strike down the Child Labor Law as incompatible with its choice of constitutional values . . . but it would seem to be quite a different matter if the Court could, by a narrow interpretation of the amendment procedures, prevent the ratification of the amendment which was intended to overrule [its decision]. . . . [T]his seems to be one instance in which the Court cannot assume responsibility for saying 'what the law is' without, at the same time, undermining the legitimacy of its power to say so.").

<sup>18</sup> 369 U.S. 186 (1962).

<sup>19</sup> 328 U.S. 549 (1946).

<sup>20</sup> See *id.* at 556. Justice Frankfurter wrote: "Courts ought not to enter this political thicket. . . . The Constitution has left the performance of many duties in our governmental scheme to depend on the fidelity of the executive and legislative action and, ultimately, on the vigilance of the people in exercising their political rights." *Id.* The Court recently decided that redistricting presented a justiciable question. See *Davis v. Bandemer*, 106 S. Ct. 2797, 2800 (1986). At least one observer has noted that the opinions in *Davis* seem overly concerned with the subjective motivations of the legislators, putting the Court in the midst of the political thicket that Justice Frankfurter sought to avoid in *Colegrove*. See Comment, *Politics and Purpose: Hide and Seek in the Gerrymandering Thicket After Davis v. Bandemer*, 136 U. PA. L. REV. 183, 215-28 (1987).

*Colegrove* Court had treated as political and distilled the following criteria from them:

Prominent on the surface of any case 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 non-judicial 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.<sup>21</sup>

The Supreme Court has, for the most part, rested on this statement of the political question doctrine. *Powell v. McCormack*<sup>22</sup> is one of the few major Supreme Court opinions after *Baker* discussing the doctrine. In *Powell*, the Court merely quoted and applied Justice Brennan's summary of the defining characteristics of a political question. *Powell* presented the question whether Congress could constitutionally refuse to seat Adam Clayton Powell.<sup>23</sup> Most of the discussion of the political question doctrine is devoted to examining the constitutional text and history in an attempt to determine whether this issue was textually committed to Congress.<sup>24</sup>

The political question doctrine is more prominent in the opinions of the lower federal courts. The Supreme Court has avoided, with its power to deny certiorari, resolving divisive issues<sup>25</sup> that some lower courts avoided by applying the political question doctrine. For example, some lower courts have held the constitutionality of both the war in

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<sup>21</sup> *Baker*, 369 U.S. at 217.

<sup>22</sup> 395 U.S. 486 (1969).

<sup>23</sup> *See id.* at 489.

<sup>24</sup> *See id.* at 522-47. The Court determined that it was not. This result was made almost inevitable by the Court's view of its role as expressed near the end of the opinion: "[I]t is the responsibility of this Court to act as the ultimate interpreter of the Constitution." *Id.* at 549 (citing *Marbury v. Madison*). If this is the Court's role, how can the Constitution commit questions about what it means to anyone else?

<sup>25</sup> *See, e.g.,* *Crockett v. Reagan*, 558 F. Supp. 893 (D.D.C. 1982) (holding that a suit by members of Congress against the President, challenging the legality of the United States' presence in and military assistance to El Salvador under the War Powers Resolution and the war powers clause of the Constitution, was a nonjusticiable political question), *aff'd*, 720 F.2d 1355 (D.C. Cir. 1983), *cert. denied*, 467 U.S. 1251 (1984).

Vietnam<sup>26</sup> and of American involvement in Nicaragua<sup>27</sup> to be nonjusticiable political questions. The Supreme Court has not addressed itself to a case that presented either issue.<sup>28</sup>

Although the political question doctrine may have had more practical impact in the lower courts than in the Supreme Court, it has not received any more illumination there. Most cases do little more than cite *Baker v. Carr*.<sup>29</sup> A few discuss Justice Brennan's criteria in some

<sup>26</sup> See *Mitchell v. Laird*, 488 F.2d 611, 615 (D.C. Cir. 1973); *Holtzman v. Schlesinger*, 484 F.2d 1307, 1309-12 (2d Cir. 1973), *cert. denied*, 416 U.S. 936 (1974); *Orlando v. Laird*, 443 F.2d 1039, 1043-44 (2d Cir. 1971), *cert. denied*, 404 U.S. 869 (1971); *Atlee v. Laird*, 347 F. Supp. 689 (E.D. Pa. 1972), *aff'd mem. sub nom. Atlee v. Richardson*, 411 U.S. 911 (1973). In each of these cases except *Mitchell*, the court held that a claim that the war or some aspect of it was unconstitutional in the absence of formal congressional approval presented a political question. In *Mitchell*, the court was prepared to consider such a claim. See *id.* at 616. It refused, however, to consider whether President Nixon was doing his best to end the war. See generally Sugarman, *Judicial Decisions Concerning the Constitutionality of United States Military Activity in Indo-China: A Bibliography of Court Decisions*, 13 COLUM. J. TRANSNAT'L L. 470 (1974) (giving a general overview and bibliography of cases related to American involvement in Indo-China).

Much of the scholarly hostility to the political question doctrine seems to spring from disappointment over the judiciary's refusal to support efforts to end that conflict. See, e.g., Henkin, *supra* note 3, at 623-24 (arguing that courts should have considered the constitutionality of prosecuting a war that Congress did not declare); Redish, *supra* note 4, at 1048 ("[I]f the [Constitution] provides . . . that it is Congress' province to declare war, one may ask why it is appropriate for the courts . . . [to conclude] that the conduct of military affairs . . . must lie in the executive's uncontrolled discretion." (footnote omitted)); Tigar, *supra* note 4, at 1135-36 ("I urge that the federal courts . . . have the power, and in an appropriate case, the duty, to decide the constitutional and federal law issues posed by American military involvement abroad, in Indochina today and in any future conflict.").

<sup>27</sup> See *Ramirez de Arellano v. Weinberger*, 568 F. Supp. 1236, 1238-40 (D.D.C.) (holding nonjusticiable as a political question a private citizen's challenge to the U.S. Government's use of private land in Honduras for military purposes), *aff'd on other grounds*, 724 F.2d 143 (D.C. Cir. 1983), *rev'd on reh'g*, 745 F.2d 1500 (D.C. Cir. 1984) (en banc), *vacated and remanded*, 471 U.S. 1113 (1985), *aff'd on other grounds*, 788 F.2d 762 (D.C. Cir. 1986); *Sanchez-Espinoza v. Reagan*, 568 F. Supp. 596, 600 (D.D.C. 1983) (holding that claims arising out of U.S. government actions in Nicaragua presented nonjusticiable political questions), *aff'd*, 770 F.2d 202 (D.C. Cir. 1985) (Scalia, J.). Similar issues have arisen with respect to El Salvador. See, e.g., *Crockett v. Reagan*, 558 F. Supp. 893 (D.D.C. 1982) (holding that a suit by members of Congress against the President, challenging the legality of the United States' presence in and military assistance to El Salvador under the War Powers Resolution and the war powers clause of the Constitution, was a nonjusticiable political question), *aff'd*, 720 F.2d 1355 (D.C. Cir. 1983), *cert. denied*, 467 U.S. 1251 (1984).

<sup>28</sup> The Court did affirm *Atlee v. Laird*, 347 F. Supp. 689 (E.D. Pa. 1972), but it did so without an opinion. See *Atlee v. Richardson*, 411 U.S. 911 (1972).

<sup>29</sup> See, e.g., *Ramp v. Reagan*, 758 F.2d 653 (6th Cir. 1985) (unpublished opinion) (holding, with a bare citation to *Baker*, that a petition for mandamus to compel the President to file suit in the International Court of Justice presented a political question); *Greenham Women Against Cruise Missiles v. Reagan*, 755 F.2d 34, 37 (2d Cir. 1985) (upholding lower court's dismissal under *Baker* of a suit to prevent deployment of cruise missiles), *aff'g* 591 F. Supp. 1332 (S.D.N.Y. 1984); *Republic of Panama v.*

depth,<sup>30</sup> but none adds much to our understanding of those criteria.<sup>31</sup>

Nature abhors a vacuum. Thus, the dearth of meaningful judicial discussion about the political question doctrine has drawn a number of commentators to try their hands at illuminating that doctrine.

## II. SCHOLARLY COMMENTARY ON THE POLITICAL QUESTION DOCTRINE

Modern debate about the political question doctrine began as a quarrel over the implications of that doctrine for contending theories of judicial review. Some scholars used the doctrine as support for an effort to discredit a traditional theory of review and make room for a replacement. Others fought back, attempting to demonstrate the consistency of the political question doctrine with that theory.

More recent commentators have, however, lost touch with the close connection between theories of judicial review and the political question doctrine. This disengagement has been at least partly responsible for the failure of their assault on that doctrine; it has led them to rest their arguments on implausible assumptions that they do not defend. A survey of the debate concerning the political question doctrine will reveal the essential link between theories of judicial review and the political question doctrine. It will also illuminate the arguments with which this Article takes issue.

### A. *The Initial Debate: Political Questions and Judicial Review*

Scholarly arguments about the proper role of judicial review in

Citizens and S. Int'l Bank, 682 F. Supp. 1544, 1545 (S.D. Fla. 1988) (concluding that the political question doctrine precludes a suit by a foreign government that the executive branch has refused to recognize).

<sup>30</sup> See, e.g., *Lowry v. Reagan*, 676 F. Supp. 333, 339-40 (D.D.C. 1987) (finding that cases concerning foreign relations are nonjusticiable because the government must speak with a single voice, but failing to explain why the court may not interpret the constitutional limits of that voice); *Chaser Shipping Co. v. United States*, 649 F. Supp. 736, 737-40 (S.D.N.Y. 1986) ("The undisputed starting point [for a political question analysis] is *Baker v. Carr*."); *Greenham Women*, 591 F. Supp. at 1335-36 ("The most authoritative and commonly cited formulation of the political question doctrine is that of Justice Brennan in the seminal case of *Baker v. Carr*.")

<sup>31</sup> See, e.g., *Morgan v. United States*, 801 F.2d 445, 446-47 (D.C. Cir. 1986) (holding that a suit seeking review of the result of a congressional election presents a political question under *Baker* because of a textually demonstrable commitment of the issue to Congress); *United States v. Stahl*, 792 F.2d 1438, 1440 (9th Cir. 1986) (ruling that a challenge to the ratification of the sixteenth amendment presents a political question under *Baker*); *Americans United for Separation of Church and State v. Reagan*, 786 F.2d 194, 202 (3d Cir. 1986) (finding that a challenge to diplomatic relations with the Vatican raises a political question under *Baker* because "there is . . . a textually demonstrable commitment with respect to recognition of foreign states").

our constitutional order have consumed a huge quantity of ink in the last thirty years. In the late 1950s and early 1960s, some scholars sought to reconcile our theory and practice of judicial review with the changes that realism and the New Deal made in the legal landscape.<sup>32</sup> The political question debate grew out of that effort.

Judge Learned Hand was one of the most influential early contributors to this effort.<sup>33</sup> He argued that courts should rarely exercise the power to declare a governmental act unconstitutional.<sup>34</sup> To rebut the charge that this argument was inconsistent with the role that the Constitution gives to the courts, Judge Hand reexamined the basis for the institution of judicial review. He claimed that the power of judicial review is not grounded in the text or structure of the Constitution. Instead he found support for that power in the need for a final arbiter of constitutional disputes to avoid the collapse of the federal government through deadlock.<sup>35</sup> He concluded that judges are free to avoid any constitutional issue whenever they find no pressing need to intervene. In the absence of any mandate that judges decide all constitutional issues, there could be no inconsistency between the constitutional role of judges and Judge Hand's proposal that courts should use their power of judicial review sparingly.<sup>36</sup> For Judge Hand, the political question doctrine played the key role of providing evidence that judicial practice conformed to his view that the Constitution does not impose an inflexible duty on courts to decide any properly presented case.<sup>37</sup>

Professor Herbert Wechsler found Judge Hand's thesis disturbing because it struck at the heart of the traditional justification for judicial review.<sup>38</sup> That justification, which Chief Justice Marshall hallowed in

<sup>32</sup> See *infra* notes 166-74 and accompanying text.

<sup>33</sup> See L. HAND, *THE BILL OF RIGHTS* (1958) (originally presented as the Oliver Wendell Holmes Lecture at Harvard Law School).

<sup>34</sup> See *id.* at 29 ("That is no doubt a dangerous liberty, not lightly resorted to . . .").

<sup>35</sup> See *id.* ("[I]t was probable . . . that without some arbiter whose decision should be final the whole system would have collapsed . . .").

<sup>36</sup> As Judge Hand wrote:

[S]ince [the power of judicial review] is not a logical deduction from the structure of the Constitution but only a practical condition upon its successful operation, it need not be exercised whenever a court sees, or thinks that it sees, an invasion of the Constitution. It is always a preliminary question how importunately the occasion demands an answer.

*Id.* at 15.

<sup>37</sup> Judge Hand used his gift for colorful turns of phrase to make this point. He called the political question doctrine "a stench in the nostrils of strict constructionists."

*Id.* at 15.

<sup>38</sup> See Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 1-10 (1959) (responding to Hand's lecture).

*Marbury v. Madison*,<sup>39</sup> deduced the power to strike down unconstitutional legislation from the judicial duty to decide cases.<sup>40</sup> To concur with Hand that the Constitution imposes no such duty on courts entails rejecting this justification for judicial review. Professor Wechsler vigorously defended the reasoning in *Marbury*.<sup>41</sup> He argued that the political question doctrine is not inconsistent with the premise of an inflexible judicial duty to decide cases on which that reasoning rests: “[A]ll the [political question] doctrine can defensibly imply is that the courts are called upon to judge whether the Constitution has committed to another agency of government the autonomous determination of the issue raised, a finding that itself requires an interpretation.”<sup>42</sup> This, he said, is “*toto caelo* different from a broad discretion to abstain or intervene.”<sup>43</sup>

Shortly after the exchange between Hand and Wechsler, Alexander Bickel joined the debate. He argued powerfully that the *Marbury* justification for judicial review was flawed.<sup>44</sup> He saw nothing in the Constitution to prevent courts from choosing to decide some constitutional issues and not others.<sup>45</sup> Like Judge Hand, Professor Bickel pointed to the political question doctrine as evidence of this freedom of choice.<sup>46</sup> Unlike Hand, however, he did not propose that courts should use this freedom to circumvent most constitutional issues.<sup>47</sup> He put forward a new justification for judicial review that supports far more judicial activity than Judge Hand advocated.

Bickel justified judicial review as a tool for ensuring that government remains appropriately principled. He believed that the judiciary

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<sup>39</sup> 5 U.S. (1 Cranch) 137 (1803).

<sup>40</sup> See *infra* note 150.

<sup>41</sup> He argued that the power of judicial review “is grounded in the language of the Constitution and is not a mere interpolation” as Judge Hand suggested. See Wechsler, *supra* note 38, at 3. Wechsler identified the supremacy clause as the proper textual “hook” for this power. See *id.* He concluded that, “[f]or me, as for anyone who finds the judicial power anchored in the Constitution, there is no . . . escape from the judicial obligation.” *Id.* at 6. Wechsler bolstered his textual and logical arguments with a practical one. He pointed out that Hand’s theory could emasculate judicial review, for if the only reason for judicial review is that without some review the government would founder, review must either be confined to a very few cases or extended far beyond its rationale. See *id.*

<sup>42</sup> *Id.* at 7-8.

<sup>43</sup> *Id.* at 9.

<sup>44</sup> See A. BICKEL, *THE LEAST DANGEROUS BRANCH* 1-14 (1962).

<sup>45</sup> See *id.*

<sup>46</sup> See Bickel, *The Supreme Court, 1960 Term—Foreword: The Passive Virtues*, 75 HARV. L. REV. 40, 46 (1961).

<sup>47</sup> Cf. L. HAND, *supra* note 33, at 15 (stating that the court need not exercise judicial review every time that it “sees, or thinks that it sees, an invasion of the Constitution”).

should be entrusted with such a tool because it is the institution best able to derive principles from our "enduring values" and to educate the public concerning those principles.<sup>48</sup> To perform this function, he concluded, the courts must have discretion to avoid issues when the time is not right for their resolution.

He identified the political question doctrine as one device courts can use to exercise this discretion. Bickel suggested that they invoke the doctrine to dismiss cases that are poor vehicles for articulating and enforcing principles.<sup>49</sup> By doing so whenever the extent to which a decision should be governed by principle is "circumstantial and varying,"<sup>50</sup> they could avoid either legitimating the government's decision or overturning it.<sup>51</sup>

Bickel elaborated his theory of the political question doctrine in a much-quoted passage:

Such is the foundation, in both intellect and instinct, of the political-question doctrine: the Court's sense of lack of capacity, compounded in unequal parts of (a) the strangeness of the issue and its intractability to principled resolution; (b) the sheer momentousness of it, which tends to unbalance judicial judgment; (c) the anxiety, not so much that the judicial judgment will be ignored, as that perhaps it should but will not be; (d) finally ("in a mature democracy"), the inner vul-

<sup>48</sup> See A. BICKEL, *supra* note 44, at 26-27.

<sup>49</sup> See *id.* at 183-98.

<sup>50</sup> *Id.* at 187.

<sup>51</sup> See *id.* at 187-98. Reapportionment cases were one example he cited. He focused in particular on *Colegrove v. Green*, 328 U.S. 549 (1946) and *Baker v. Carr*, 369 U.S. 186 (1962). He asserted that "[o]ne cannot with . . . moral confidence proclaim the principle of equal individual representation, holding everything else to be a temporary if necessary evil." A. BICKEL, *supra* note 44, at 192. Equality of representation was "one goal" relevant to reapportionment decisions "and the only principled one, among many." *Id.* In the absence of any principled way to accommodate these multiple legitimate goals, Bickel indicated that most challenges to legislative apportionment should be treated as political questions. See *id.* at 191-93. Although this argument seemed to contradict the holding in *Baker v. Carr*, Bickel claimed consistency based on a narrow reading of the case:

The decision in *Baker v. Carr* may . . . be read as holding no more than that, Tennessee having last been malapportioned sixty years ago, the situation there is the result, not of a deliberate if imperfect present judgment of the political institutions, but merely of inertia and oligarchic entrenchment. In the face of so faint an assertion, if any, by the political institutions of their own function, the principled goal of equal representation had enough vitality to enable the Court to prod the Tennessee political institutions into action. . . . The Court here opened a colloquy, posing to the political institutions of Tennessee the question of apportionment, not answering it for them.

*Id.* at 196.

nerability, the self-doubt of an institution which is electorally irresponsible and has no earth to draw strength from.<sup>52</sup>

Bickel was aware that this explanation did little to help courts distinguish political questions from ordinary constitutional issues.<sup>53</sup> He indicated that there is a distinction between the two, but offered few suggestions to help courts draw it.<sup>54</sup>

The debate among Judge Hand and Professors Wechsler and Bickel focused on the extent to which the political question doctrine authorized discretionary refusal to exercise review based on expedience. Judge Hand and Professor Bickel both accepted such discretion, although they recommended that it serve different functions. Professor Wechsler rejected it, arguing that exceptions to judicial review must rest on more principled grounds if the classic defense of judicial review is to retain its vitality. That defense demands judicial resolution of nearly all constitutional questions.

### B. *The Contemporary Debate*

After Professor Bickel's contribution, debate about the political question doctrine changed. The new participants tried to discuss the doctrine without directly addressing the classic conundrums of judicial review. They have gone even further than Professor Wechsler in assuming that judicial review must always be available to resolve constitutional questions. They do not, however, defend any theory that could justify that assumption. As a result, they build on a faulty foundation. Bickel's arguments crippled the classic support for an absolute or near absolute approach to judicial review; nobody has put forward an adequate replacement.<sup>55</sup>

Professor Louis Henkin was the first important contributor to the new genre of commentary on the political question doctrine. In an article that set the tone for that genre, he argued that "[j]udicial review is now firmly established as a keystone of our constitutional jurisprudence. A doctrine that finds some issues exempt from judicial review cries for strict and skeptical scrutiny."<sup>56</sup> After engaging in such scrutiny, Professor Henkin concluded that the Supreme Court had not ap-

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<sup>52</sup> *Id.* at 184.

<sup>53</sup> *See id.* at 184 ("The case does not exist in which the power of judicial review has been exercised without some such misgivings being applicable in some degree.").

<sup>54</sup> *See id.* at 184-85 ("There are cases of which no more need be said than what Maurice Finkelstein said of *Dred Scott v. Sandford*: 'A question which involved a Civil War can hardly be proper material for the wrangling of lawyers.'").

<sup>55</sup> *See infra* notes 172-175 and accompanying text.

<sup>56</sup> Henkin, *supra* note 3, at 600.



plied the political question doctrine to make any such exemptions; the contrary impressions of most observers he attributes to confusion.<sup>57</sup>

The Court, Professor Henkin argues, never invokes the political question doctrine without either reaching the merits of the claim at issue, however subtly, or disposing of that claim on procedural or equitable grounds.<sup>58</sup> The "political question doctrine" does not, therefore, exist: It "is an unnecessary, deceptive packaging of several established doctrines that has misled lawyers and courts to find in it things that were never put there and make it far more than the sum of its parts."<sup>59</sup> Professor Henkin recommends that "we [break] open that package, assign[] its authentic components elsewhere, and [throw] the package away."<sup>60</sup>

This argument permits Professor Henkin to avoid considering the question whether exceptions to judicial review are inconsistent with the judicial role under the Constitution. Because he concludes that the political question doctrine does not provide for such exceptions, he never reaches that question. His choice of words, however, implies disapproval of exempting any issues from judicial review; chipping away at a keystone is dangerous.

Professor Redish disputes Professor Henkin's conclusion that the political question doctrine does not exist.<sup>61</sup> Nonetheless, he shares im-

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<sup>57</sup> See *id.* at 600-25. Professor Henkin distinguishes decisions rejecting claims that another branch of government exceeded the limits of its power from those refusing to consider the merits of such claims at all. He sees failure to make this distinction as the source of confusion confounding most commentators about the political question doctrine. As long as the court reaches the merits of such a claim, Henkin sees no extraordinary exception to judicial review. Thus, if a court rejects the claim out of deference to the government agency that allegedly exceeded its power, there is no cause for alarm. See *id.* at 598-600 & n.8. Only if courts are entirely deaf to some set of constitutional claims do they "forego their unique and paramount function of judicial review of constitutionality." *Id.* at 599. Henkin's emphasis on this distinction harks back to Wechsler's argument that the political question doctrine is just a routine form of constitutional adjudication. See Wechsler, *supra* note 38, at 7-8. It is also reminiscent of Professor Jaffe's argument that a decision to apply the political question doctrine represents a judgment that no standards should confine political discretion in the area the decision affects. See Jaffe, *Standing to Secure Judicial Review: Public Actions*, 74 HARV. L. REV. 1265, 1303-04 (1961). That argument was a precursor of arguments in recent work critical of the political question doctrine. See Redish, *supra* note 4, at 1048-49 (discussing "substantive" deference versus "procedural" deference).

<sup>58</sup> See Henkin, *supra* note 3, at 605-06, 617-22.

<sup>59</sup> *Id.* at 622.

<sup>60</sup> *Id.* at 625.

<sup>61</sup> See Redish, *supra* note 4, at 1032-39. Redish makes the curious argument that cases refusing to characterize an issue as a political question add to the evidence that the doctrine exists, because "if no political question doctrine existed, there would have been no need for the Court to expend so much effort to explain why the doctrine was inapplicable." *Id.* at 1033. Redish finds further evidence for the existence of the political question doctrine in opinions that decline to strike down government action after

portant premises with Professor Henkin, taking the critique of the doctrine one step further in the same direction. For Professor Redish, any exception to the rule of justiciability is inconsistent with the place of judicial review in our constitutional jurisprudence.<sup>62</sup> Accordingly, he mounts a crusade for its extirpation, promising to show why "the doctrine should be given the total and complete repudiation it so richly deserves."<sup>63</sup>

Professor Redish tries to deliver on this promise by attacking both Professor Wechsler's "classical" version of the political question doctrine, and Professor Bickel's "prudential" version. According to Professor Wechsler's version, the Constitution gives the government some powers without authorizing the judiciary to restrict their exercise.<sup>64</sup> Professor Redish is skeptical that anyone can articulate a basis for selecting some power-granting provisions for review and exempting others.<sup>65</sup> He observes that even the most unlimited grant of power remains subject to the general limitations on the exercise of government power contained in various constitutional amendments.<sup>66</sup> Those provisions, he argues, should always be subject to judicial enforcement. Thus, if Wechsler's version of the political question doctrine excludes judicial review whenever the constitutional text grants a power in absolute terms, it "is unacceptable because it disregards long accepted principles of judicial review."<sup>67</sup> If it only means that the courts must uphold governmental actions that do not violate any constitutional provisions, it is "simply the product of the application of neutral principles of judicial review."<sup>68</sup>

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cursory review or despite the absence of any plausible argument for the constitutionality of the action. *See id.* at 1037-39. He uses *Korematsu v. United States*, 323 U.S. 214 (1944), as one example of such a case. He thus recognizes that judicial deference can result in abdication of judicial review even when a court purports to exercise review. *See Redish, supra* note 4, at 1037-39. He does not, however, seem to realize the full implications of this recognition. *See infra* notes 192-96 and accompanying text.

<sup>62</sup> *See Redish, supra* note 4, at 1059-60. Redish sums up his argument by pointing out that the political question doctrine "inherently implies that one or both of the political branches may continue conduct that could conceivably be found unconstitutional, without any examination or supervision by the judicial branch." *Id.* at 1060. He regards this observation as the damning blow for the doctrine: "The moral cost of such a result . . . far outweighs whatever benefits are thought to derive from the judicial abdication of the review function." *Id.*

<sup>63</sup> *Id.* at 1033.

<sup>64</sup> *See Wechsler, supra* note 38, at 8-9.

<sup>65</sup> "[T]he mere fact that a constitutional provision expressly refers to the exercise of power by the political branches but not to the review role of the judicial branch cannot justify an abdication of the review function, since judicial review is *nowhere* mentioned in the Constitution." Redish, *supra* note 4, at 1042.

<sup>66</sup> *See id.* at 1043.

<sup>67</sup> *Id.* at 1039.

<sup>68</sup> *Id.* at 1042.

In responding to Professor Bickel, Professor Redish criticizes four justifications for judicial abstinence that he distills from Bickel's theory: 1) the intractability of an issue to principled resolution, 2) "the judiciary's lack of institutional capacity to review particular judgments of . . . the political branches," 3) "the judicial humility that flows from the judiciary's . . . undemocratic nature," and 4) "fear that the judiciary's authority and legitimacy will be undermined by a blatant disregard of its decision by the political branches."<sup>69</sup>

Professor Redish rejects the first three justifications by demonstrating that they give us no basis for distinguishing political questions from all other constitutional issues.<sup>70</sup> With respect to the fourth justification, he notes that the political branches of government are very unlikely to ignore a judicial pronouncement.<sup>71</sup> Even if they did, he doubts that the courts' prestige would suffer more as a result of being ignored than it would if courts turned their backs on sensitive constitutional issues.<sup>72</sup> Thus, Professor Redish concludes that "[o]nce we make the initial assumption that judicial review plays a legitimate role in a constitutional democracy, we must abandon the political question doctrine, in all of its manifestations."<sup>73</sup>

The latest substantial contribution to the genre of political question criticism is Professor McCormack's provocatively entitled article *The Justiciability Myth and the Concept of Law*.<sup>74</sup> Professor McCormack argues that, as a matter of logic, the political question doctrine cannot exist, because dismissing a challenge to governmental action on the ground that the government is entitled to decide the constitutional-

<sup>69</sup> *Id.* at 1043-44.

<sup>70</sup> *See id.* at 1045-52. In regard to the first rationale, Professor Redish argues that attempts to distinguish ordinary cases from cases that are not susceptible to "principled resolution" prove too much. If courts refrained from review whenever an issue did not lend itself to principled resolution, they would strangle the institution of judicial review. *See id.* at 1047-50. "[A] substantial portion of all constitutional review" takes place without the benefit of an inflexible governing principle to provide a clear standard for judicial decision. *Id.* at 1047. Similarly, if the judiciary actually doubted its institutional capacity to review particular judgments of the other branches of government and acted on that doubt, judicial review would be effectively eliminated as a check on those branches. Finally, the undemocratic nature of the judiciary might support an argument against any judicial review. It does not, however, give us grounds for selective exceptions to the general rule that the judiciary will measure governmental action against the requirements of the Constitution. *See id.* at 1045-46.

<sup>71</sup> Redish argues that this justification is based on erroneous factual assumptions. *See id.* at 1053-55. Professor Bickel also rejected the fourth justification, noting that the Court can wield immense power in its role as "teacher to the citizenry." A. BICKEL, *supra* note 44, at 187-88 (quoting Wyzanski, *Constitutionalism: Limitation and Affirmation*, in GOVERNMENT UNDER LAW 473, 485-86 (A. Sutherland ed. 1956)).

<sup>72</sup> *See* Redish, *supra* note 4, at 1053-55.

<sup>73</sup> *Id.* at 1059-60.

<sup>74</sup> McCormack, *supra* note 3.

ity of that action for itself is equivalent to holding that the challenged action is constitutional.<sup>75</sup> He does not defend this claim of equivalence. Instead, he repeats it in a number of different forms.<sup>76</sup>

Professor McCormack's position is unique. All the other critics of the political question doctrine have assumed that courts could leave an issue to political resolution without resolving it. Professor Henkin argued that the Supreme Court actually reached the merits in political question cases, but he never suggested that decision on the merits is impossible to avoid. Thus, Professor McCormack brings a new twist to the debate. Even though he concludes that every decision to dismiss on justiciability grounds necessarily reaches the merits of the underlying claim, Professor McCormack disapproves of the political question doctrine; he maintains that it is a dishonest and misleading practice.<sup>77</sup> McCormack considers various justifications for engaging in such dishonesty and rejects them all.<sup>78</sup>

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<sup>75</sup> McCormack indicates that Henkin relied on similar reasoning. For example, he explains the disagreement between Henkin and Redish over the existence of the political question doctrine as follows: "Redish looks to the manner of the Court's decision, while Henkin and this author look at the results of the Court's decision." *Id.* at 616 n.111. In summarizing Henkin's argument, he observes: "As Henkin asserts, however, it should also be recognized that the effect of adjudication is the same regardless of how the court labels its result." *Id.* at 626. The implication is that Henkin, like McCormack, is committed to the view that if the petitioner loses, the Court has effectively upheld the challenged action.

McCormack attributes to Henkin the argument that "the Supreme Court never has and could not possibly avoid decision on a foreign affairs issue." *Id.* at 625. Henkin does argue that the Court never has, or at least rarely has, avoided such an issue, but he does not defend the broader claim that it is theoretically impossible for it to do so. Henkin is careful to distinguish decisions that reach the merits of a claim from those that fail to do so. His argument depends on that distinction. *See supra* note 57. McCormack's insistence that all decisions necessarily reach the merits denies that such a distinction exists. Other scholars share Henkin's insight that a political question decision can mask a determination on the merits. *See, e.g.,* Champlin & Schwarz, *Political Question Doctrine and Allocation of the Foreign Affairs Power*, 13 *HOFSTRA L. REV.* 215, 219-20 (1985) (arguing that political question cases based upon a lack of clear standards for judicial determination "are simply merit determinations of constitutionality"). But McCormack's broader thesis is, as far as I can tell, unique.

<sup>76</sup> Thus, he writes: "To say that a 'case' before the court is nonjusticiable is to say that the plaintiff has no judicially enforceable right." McCormack, *supra* note 3, at 595. He adds: "[I]t is necessarily an exercise in interpretation and application of th[e] law to say that the law applied by the court does not protect the plaintiff." *Id.*

<sup>77</sup> *See id.* at 614, 633. He never clearly explains why it matters whether a court reaches the merits explicitly or does so implicitly while dismissing a claim under the political question doctrine. If a court must resolve the same issues when it finds a lack of justiciability that it would resolve if it reached the merits, it is difficult to see that anything important turns on which route the court chooses to follow. McCormack may be assuming that a court will give an issue fuller consideration if it faces the issue explicitly. Any such assumption is open to doubt. *See supra* note 61.

<sup>78</sup> *See* McCormack, *supra* note 3, at 626-33. The justifications McCormack considers are similar to those Redish distilled from Bickel's defense of the political question

### C. *The Basis of the Contemporary Political Question Critique*

Two separate strands of argument are evident in the positions of the three contemporary critics. First, they urge us to reject the political question doctrine as inconsistent with central principles of our constitutional order. Second, they argue that the justifications others have offered for the doctrine fail to articulate a distinction between political questions and ordinary constitutional issues that are suitable for judicial resolution.

#### 1. The Political Question Doctrine as a Constitutional Abomination

Each of the critics makes in similar terms the claim that the political question doctrine threatens the foundation of our constitutional order. They all begin with the assumption that there should be no exceptions to the rule of judicial review.<sup>79</sup> Professor Henkin has enough optimism and ingenuity to satisfy himself that the political question doctrine does not authorize any such exceptions.<sup>80</sup> Professor Redish, lacking Henkin's optimism, attacks the political question doctrine as a malignant anomaly.<sup>81</sup> Professor McCormack seems to concur with both positions.<sup>82</sup> I refer to their common starting point as the "judicial monopoly" assumption.

Professors Redish and McCormack convey the impression that their attachment to the judicial monopoly assumption rests largely on their fear of what might follow if we began making exceptions to the rule of judicial review. They tell us that any provision of the Constitution that the judiciary will not enforce is meaningless. If courts refuse

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doctrine. McCormack's grounds for rejecting those justifications are also similar to those Redish put forward. *See supra* notes 69-73 and accompanying text.

<sup>79</sup> McCormack does not state this assumption as baldly as did his predecessors. It is, however, an essential link in his argument that a decision invoking the political question doctrine is always a disguised decision on the merits. That argument rests on an assertion that any right courts will not enforce is not a legal right. That assertion can be true only in a system that makes the judiciary responsible for resolving all legal questions. Thus, exceptions to judicial review are antithetical to Professor McCormack's argument. *See supra* notes 74-78 and accompanying text.

In a system that makes exceptions to the rule of judicial review, courts share responsibility for giving effect to the legal constraints of the Constitution with other government agencies. In such a system, institutions other than the judiciary may be charged with protecting a right. If so, the absence of judicial enforcement does not necessarily deprive that right of legal status.

<sup>80</sup> *See supra* notes 56-60 and accompanying text.

<sup>81</sup> *See supra* notes 61-73 and accompanying text.

<sup>82</sup> *See McCormack, supra* note, 3 at 626 ("As Redish states, the [political question] doctrine should be repudiated in favor of judicial review . . . . As Henkin asserts, however, it should also be recognized that the effect of adjudication is the same regardless of how the court labels its result.").

to enforce enough provisions, the political branches will run wild in the jungle of a "constitutional state of nature."<sup>83</sup> The rule of law, which is the heart of our constitutional system, depends on absolute judicial control over constitutional interpretation.<sup>84</sup> This outlook follows from what I call the "cataclysmic consequences" assumption.

Those who adopt either of the assumptions described above have no room for the political question doctrine in their conceptual universe. This strand of argument in the work of the doctrine's contemporary critics is the basis for their broad claim that the doctrine must be rejected.

## 2. The Failure to Define Political Questions

The critics also make a narrower point. Professors Redish and McCormack have shown that the traditional justifications for the political question doctrine fail to explain why courts refrain from deciding issues they label political questions when they decide other issues that seem similar in all relevant respects.<sup>85</sup> This second strand of argument does not imply that the political question doctrine is irreconcilable with the rest of our constitutional law. It merely suggests that we need a better articulation of the basis for that doctrine.

The balance of this Article refutes the critics' broad first strand of argument and attempts to remedy the deficiency revealed by their narrow second strand of argument. The first strand is weak because the judicial monopoly assumption reflects an ill-fitting interpretation of our constitutional practice. Moreover, the cataclysmic consequences assumption is too unrealistic to provide strong normative support for that interpretation. A better interpretation of our constitutional practice reveals an answer to the question the second strand raises: How can we draw a meaningful distinction between political questions and constitutional issues that courts routinely resolve?

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<sup>83</sup> Redish, *supra* note 4, at 1050 ("If the judiciary declines to resolve sensitive constitutional disputes, the nation is effectively left in a constitutional state of nature."). Professor Redish says that if the judiciary fails to resolve constitutional questions, "the majoritarian branches are left totally unchecked." *Id.* at 1049.

<sup>84</sup> As Professor McCormack states: "At least with regard to constitutional constraints, law must exist apart from the enforcers. . . . Otherwise, the game is given completely to the politicians . . . at which point constitutional law would become nonlaw." McCormack, *supra* note 3, at 634 n.185.

<sup>85</sup> See *supra* notes 70-78 and accompanying text. Professor Fisher recently noted that a federal judge's statement that "political question" refers to an issue that is outside the sphere of judicial power "recalls this dictionary explanation: 'violins are small cellos, and cellos are large violins.'" L. FISHER, CONSTITUTIONAL DIALOGUES: INTERPRETATION AS POLITICAL PROCESS 110 (1988) (quoting Roche, *Judicial Self-Restraint*, 49 AM. POL. SCI. REV. 762, 768 (1955)).

### III. THE JUDICIAL MONOPOLY ASSUMPTION AND OUR CONSTITUTIONAL TRADITION

The judicial monopoly assumption fails to fit our constitutional tradition. This failure reveals itself in several aspects of that tradition. First, the judicial monopoly assumption is difficult to reconcile with the role article III defines for the federal courts. Second, the political branches have made many claims of authority that explicitly repudiate that assumption. Finally, and most important, if the judicial monopoly assumption is right, then a great deal of modern constitutional practice is wrong. Each of these problems with the judicial monopoly assumption merits further discussion.

#### A. *The Role of Article III Courts*

The judicial monopoly assumption suggests that there should be no obstacles to judicial resolution of constitutional issues. If no other institution can be responsible for such issues, we must submit them to the judiciary and cannot tolerate any obstacle which prevents us from doing so. Yet article III erects at least one such obstacle and permits Congress to erect others. The requirement of article III that courts only decide issues arising in the context of a case or controversy<sup>86</sup> sets up a barrier to judicial review. As Professor Thayer pointed out nearly a century ago, that requirement may prevent some constitutional issues from ever reaching the courts.<sup>87</sup> Moreover, the Constitution gives Congress extensive control over the federal courts' jurisdiction.<sup>88</sup> This power may permit Congress to block judicial consideration of many constitutional questions. The anomaly between these aspects of article III and the judicial monopoly assumption helps demonstrate the awkward fit between that assumption and our constitutional tradition.

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<sup>86</sup> See U.S. CONST. art. III, § 2, cl. 1.

<sup>87</sup> See Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 135-38 (1893). As Thayer observed: "The judiciary may well reflect that if they had been regarded by the people as the chief protection against legislative violation of the constitution, they would not have been allowed merely this incidental and postponed control." *Id.* at 136.

<sup>88</sup> The textual basis for this assertion is language in article III providing for only such lower courts as "Congress may from time to time ordain and establish," U.S. CONST. art. III, § 1, and the language providing that "the Supreme Court shall have appellate Jurisdiction . . . with such Exceptions, and under such Regulations as the Congress shall make." U.S. CONST. art. III, § 2, cl. 2. There is no doubt that this language gives Congress some power over the jurisdiction of the federal courts. See *Ex Parte McCordle*, 74 U.S. (7 Wall.) 506, 512-513 (1869); *Sheldon v. Sill*, 49 U.S. (8 How.) 441, 448 (1850). The scope of this power is, however, a subject of vigorous academic debate. See *infra* notes 97-104 and accompanying text.

## 1. Expansive Judicial Review and the "Case or Controversy" Requirement

Courts and commentators have struggled with the tension between an expansive vision of judicial review and the "case or controversy" requirement. In the 1960s, the prevalence of a broad view of the judicial role<sup>89</sup> put tremendous pressure on courts to break out of the case-or-controversy requirement's confines.<sup>90</sup> At that time, the Supreme Court responded to the pressure and relaxed the restrictions on the judiciary that flow from the case-or-controversy requirement.<sup>91</sup> The

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<sup>89</sup> The Supreme Court has expressed such a view of its own role in a number of cases. See, e.g., *Powell v. McCormack*, 395 U.S. 486, 549 (1969) (stating that "it is the responsibility of this Court to act as the ultimate interpreter of the Constitution"); *Cooper v. Aaron*, 358 U.S. 1, 18 (1958) (stating that *Marbury v. Madison* "declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution"). Indeed, in light of the conventional understanding of judicial review, it is surprising that there are so few such cases in which the role of the judiciary has been expansively described.

<sup>90</sup> Any judge who adopts a broad view of the courts' role is likely to chafe when constrained by a narrow definition of the circumstances under which constitutional adjudication is appropriate. As Professor Chayes put it, the ability to bring what he calls "public law litigation" to the courts "is ultimately the ability to elicit judicial pronouncements on the public policies and values implicated in the challenged official actions. Limitations on standing thus translate into limitations on the power of the courts . . ." Chayes, *The Supreme Court, 1981 Term—Foreword: Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4, 9-10 (1982).

<sup>91</sup> An example of this response is *Flast v. Cohen*, 392 U.S. 83 (1968). The Court held in *Flast* that the plaintiffs had standing, by virtue of their status as taxpayers, to challenge as a violation of the establishment clause of the first amendment the use of federal money for the benefit of religious schools. The Court reached this result despite *Frothingham v. Mellon*, 262 U.S. 447 (1923), in which the Court had denied standing to a plaintiff taxpayer who claimed injury resulting from allegedly unconstitutional federal expenditures. The Court said that such a claim alleged merely that the plaintiff "suffer[ed] in some indefinite way in common with people generally." *Id.* at 488.

The *Flast* Court attempted to distinguish *Frothingham*. The attempt was a spectacular failure. The Court argued that taxpayers can have standing by virtue of their status as taxpayers only if their claim is sufficiently related to that status. It indicated that somehow the claim in *Flast* was more closely related to that status than the claim in *Frothingham*. The Court's basis for this distinction was that *Flast* involved a challenge to an exercise of the taxing and spending power on the ground that the government had violated a specific constitutional limitation on that power, but that *Frothingham* involved an exercise of the commerce power that the plaintiffs had challenged as beyond the scope of that power.

As Justice Harlan pointed out in his *Flast* dissent, however, the injury alleged was exactly the same in both cases. In both cases, "the interests [the plaintiff] represents, and the rights he espouses, are, as they are in all public actions, those held in common by all citizens." 392 U.S. at 128-29 (Harlan, J., dissenting). *Flast* suggested that the courts might begin hearing cases asserting the public interest. Its reasoning gave little basis for picking and choosing among such actions, therefore raising the possibility that the courts might hear a wide range of nontraditional cases. Indeed, it was fear of this result that animated Justice Harlan's dissent: "There is every reason to fear that unrestricted public actions might well alter the allocation of authority among the three branches of the Federal Government." *Id.* at 130 (Harlan, J., dissenting). Scholars also



Court has been more resistant to the pressure in recent years.<sup>92</sup> This ebb and flow of article III doctrine arose in part from the difficulty of reconciling the judicial monopoly assumption with traditional doctrine.

Academic writings reflect the same pressure that influenced judicial opinions. Professor Monaghan argued in the early 1970s that restrictive rules governing "who may obtain constitutional declarations and when" were inconsistent with courts' "special function" of revealing the meaning of the Constitution.<sup>93</sup> He urged the courts to recast the definition of "case or controversy" to require primarily that issues be "sharply defined and capable of judicial solution."<sup>94</sup> Such a definition would permit the courts to fulfill their special function without hindrance from outmoded conceptions of standing, ripeness, and mootness.

This argument highlights the inconsistency between the traditional understanding of these conceptions and a "special function" model of the judicial role in our system. Professor Monaghan assumes the propriety of a special function model and concludes that the traditional definition of a properly presented case must yield.<sup>95</sup> His insight is equally useful as one element of an argument that a special function model, at least in the extreme form to which the judicial monopoly assumption would lead, cannot fit our constitutional tradition.<sup>96</sup>

saw far-reaching implications of *Flast*. See, e.g., Bittiker, *The Case of the Fictitious Taxpayer: The Federal Taxpayer's Suit Twenty Years After Flast v. Cohen*, 36 U. CHI. L. REV. 364, 365 (1969) (acknowledging *Flast* as a "cornerstone of the law of standing," and maintaining that courts have "erected upon it an imposing . . . structure" (quoting Davis, *Standing: Taxpayers and Others*, 35 U. CHI. L. REV. 601, 601 (1968) (stating that the *Flast* holding seemed "destined to become a long-term cornerstone of the law of standing"))).

<sup>92</sup> See, e.g., *Allen v. Wright*, 468 U.S. 737, 750-66 (1984) (displaying a narrow view of standing requirements in reversing a lower court's grant of injunctive and declaratory relief to parents of black children who had alleged that the IRS had not adopted sufficient standards and procedures to fulfill its obligation to deny tax-exempt status to racially discriminatory private schools); *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 479-80 (1982) (reading *Flast* narrowly to limit taxpayer standing to challenges directed at the exercise of congressional, rather than executive or administrative, power).

<sup>93</sup> Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363, 1370 (1973). Monaghan proposed that virtually unanimous agreement about the Court's "special function" as sole interpreter of the Constitution means that "today, [it is] simply unacceptable for the Court to dismiss as *beyond judicial competence* challenges by Congress to the practice of the pocket veto or to presidential attempts to impound funds solely because traditional 'private' interests are not at stake." *Id.* at 1370 (emphasis in original).

<sup>94</sup> *Id.* at 1371.

<sup>95</sup> *Id.* at 1397 ("[I]t is up to Congress to fashion the boundaries of a model of judicial competence better suited to the Court's special function.").

<sup>96</sup> Monaghan's insight may be more useful for this latter purpose after the recent Supreme Court opinions reaffirming the place of case-or-controversy doctrine in that

## 2. Congressional Control over Federal Jurisdiction

Congressional control over federal jurisdiction is another area of constitutional law that poses a problem for proponents of the judicial monopoly assumption. One can marshal an impressive array of authorities for the proposition that when article III says "the supreme Court shall have appellate Jurisdiction . . . with such Exceptions, and under such Regulations as the Congress shall make,"<sup>97</sup> it means the Court's appellate jurisdiction is at the mercy of congressional whim.<sup>98</sup> Nobody disputes congressional authority to control the jurisdiction of the lower federal courts.<sup>99</sup> If our system leaves the courts at the mercy of Congress, however, it values them less than the judicial monopoly assumption suggests it should.

Congress has considered numerous proposals to use its authority over jurisdiction to diminish the impact of controversial Supreme Court opinions. It has, however, rejected almost all of them.<sup>100</sup> One might therefore assume that a debate about congressional power to limit appellate jurisdiction is less than urgent, even pointless. Yet debate

tradition. *See supra* note 92 and accompanying text.

<sup>97</sup> U.S. CONST. art. III, § 2, cl. 2.

<sup>98</sup> *See, e.g.,* Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 STAN. L. REV. 895, 908 (1984) (arguing that the Constitution, Supreme Court language, and congressional practice "all contribute to a compelling argument that there are no substantial internal limits on Congress' article III power to limit the Court's appellate jurisdiction"); *see also* Bator, *Congressional Power Over the Jurisdiction of the Federal Courts*, 27 VILL. L. REV. 1030, 1030-31 (1982) (stating that Congress decides what cases "to which the federal judicial power extends should be litigated in the lower federal courts"); Hart, *The Power of Congress to Limit the Jurisdiction of the Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362 (1953) (presenting a dialogue addressing the implications of Congress' power to limit federal court jurisdiction); Redish, *Congressional Power to Regulate Supreme Court Appellate Jurisdiction Under the Exceptions Clause: An Internal and External Examination*, 27 VILL. L. REV. 900, 903 (1982) ("Even if . . . limits are found to exist, however, there will remain substantial opportunity for Congress to curb Supreme Court appellate jurisdiction."); Wechsler, *The Courts and the Constitution*, 65 COLUM. L. REV. 1001, 1005 (1965) (presenting the same argument). One traditional argument is that the "counter-majoritarian" power of judicial review is defensible only because Congress can curb the courts by restricting their jurisdiction. *See* M. PERRY, *THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS* 125-39 (1982); *cf.* C. BLACK, *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* 71 (1969) (arguing that judicial review rests on congressional acquiescence, which is shown in part by jurisdiction legislation).

<sup>99</sup> *See* *Sheldon v. Sill*, 49 U.S. (8 How.) 440 (1850).

<sup>100</sup> *See* Gunther, *supra* note 98, at 897 ("[The jurisdiction-curling] bills failed, a fate that has befallen all such efforts directed at the Supreme Court—with one notable exception . . ."); *see also* Nagel, *Court-Curling Periods in American History*, 18 VAND. L. REV. 925, 926 (1965) ("A total of only nine out of the 165 bills regulating the Court have passed Congress.").

rages,<sup>101</sup> sustained by proponents of the judicial monopoly assumption who are attempting to construct a consistent theory of the Constitution. To do so, they must reconcile the exceptions and regulations clause with their broad view of the Supreme Court's function. The literature is rich with their efforts.<sup>102</sup> They argue, for example, that Congress cannot exercise its power to limit the Court's appellate jurisdiction sufficiently to "destroy the essential role of the Supreme Court in the constitutional plan."<sup>103</sup>

A powerful counterargument is that the Supreme Court's role must be understood in light of the exceptions and regulations clause.<sup>104</sup> That role should not be inflated to the point of inconsistency with the textual indication of congressional supremacy. The argument that Congress cannot destroy the Court's essential role arguably relies on such inflation. Anyone who sees the force of this counterargument must conclude that the judicial monopoly assumption and congressional control over jurisdiction are strange bedfellows. This incompatibility and the case-or-controversy requirement help to show that the assumption fails to fit our constitutional tradition. There are, however, other problems with the fit of the assumption. Its proponents ignore many claims by representatives of the political branches of government to authority over constitutional interpretation as well as important aspects of our contemporary constitutional practice.

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<sup>101</sup> Professor Van Alstyne described the debate as "choking on redundancy" in a letter to Professor Gunther. See Gunther, *supra* note 98, at 897 n.9.

<sup>102</sup> For authors attacking congressional authority, see Ratner, *Congressional Power Over the Appellate Jurisdiction of the Supreme Court*, 109 U. PA. L. REV. 157, 171-72 (1960) ("[T]he Convention gave Congress authority to specify such orderly procedures and to modify the jurisdiction . . . within the limits imposed by the Court's essential constitutional role."); Ratner, *Majoritarian Constraints on Judicial Review: Congressional Control of Supreme Court Jurisdiction*, 27 VILL. L. REV. 929, 933 (1982) (maintaining that unlimited congressional control over appellate jurisdiction "is not consistent with the constitutional plan of judicial review"); Sager, *The Supreme Court 1980 Term—Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17, 30 (1981) (stating that, when Congress undertakes to limit jurisdiction, "it is fully bound by the constitutional provisions that ordinarily constrain its behavior"). For authors who challenge the judicial monopoly assumption, see *supra* note 98.

<sup>103</sup> This phrase originally came from Professor Hart's famous dialogue. See Hart, *supra* note 98, at 1365. The dialogue did not, however, fully develop the implications of the phrase. Hart conceded that Congress had extensive authority to limit federal court jurisdiction. See *id.* at 1398-99.

<sup>104</sup> Cf. Redish, *supra* note 98, at 906-15 (examining the exceptions and regulations clause and concluding that it implies no limitations on congressional authority to control federal court jurisdiction).

## B. Political Branches' Claims of Interpretive Authority

*Marbury v. Madison*<sup>105</sup> is an American icon. Both lawyers and lay people commonly read Chief Justice Marshall's statement "[i]t is emphatically the province and duty of the [courts] to say what the law is"<sup>106</sup> for all it is worth.<sup>107</sup> Even the most sophisticated commentators sometimes argue that the broadest understanding of this language is so much a part of our constitutional tradition that it needs no contemporary defense.<sup>108</sup> Any suggestion that *Marbury* must mean less than the full import of its most sweeping language is likely to provoke charges of iconoclasm.<sup>109</sup>

Thomas Jefferson<sup>110</sup> and Abraham Lincoln<sup>111</sup> are also American icons, however, and both made strong assertions of executive authority over constitutional interpretation. Other chief executives have made similar assertions,<sup>112</sup> and not all are mere relics of our distant past. The Reagan Administration has been Jeffersonian, at least in this respect.<sup>113</sup>

Early objections to *Marbury* were based on the theory that it claimed a power for the judiciary inconsistent with the concept of three

<sup>105</sup> 5 U.S. (1 Cranch) 137 (1803).

<sup>106</sup> *Id.* at 177.

<sup>107</sup> See, e.g., Kauper, *The Supreme Court: Hybrid Organ of State*, 21 Sw. L.J. 573, 586-87 (1967) ("Americans take it for granted that the Supreme Court will exercise [the] power [of judicial review]."). The Supreme Court has done little to discourage this view. See *supra* note 89 and accompanying text.

<sup>108</sup> For example, Ronald Dworkin writes:

Marshall decided that the courts in general and the Supreme Court in the last analysis have the power to decide for the government as a whole what the Constitution means . . . . [A]lmost two centuries of practice have put his position beyond challenge . . . and the constitutional wars are now fought on the terrain it defines.

R. DWORKIN, *supra* note 6, at 356-57. Dworkin argues that those who advocate judicial restraint confuse the question of how the Constitution should be interpreted with the question of who has the authority to interpret it. He says that "*Marbury v. Madison* settled the second . . . question, at least for the foreseeable future." *Id.* at 370.

<sup>109</sup> It is important to note that such a suggestion need not be at odds with *Marbury* itself, only with the very "imperialistic" reading of it that has become common. See P. BREST & S. LEVINSON, *PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS* 107 (2d ed. 1983) (coining the term "imperialistic" reading). For example, Professor Van Alstyne describes a possible reading of *Marbury* that makes quite modest claims of judicial prerogative. See Van Alstyne, *A Critical Guide to Marbury v. Madison*, 1969 DUKE L.J. 1, 20 ("The phrase 'in pursuance thereof' might as easily mean 'in the manner prescribed by this Constitution,' in which case acts of Congress might be judicially reviewable as to their procedural integrity, but not as to their substance." (emphasis in original)).

<sup>110</sup> See *infra* notes 115-16 and accompanying text.

<sup>111</sup> See *infra* note 119 and accompanying text.

<sup>112</sup> See *infra* notes 117-18 & 120 and accompanying text.

<sup>113</sup> See *infra* notes 121-23 and accompanying text.

separate and coequal branches of government.<sup>114</sup> Jefferson stressed this theme in his correspondence more than once.<sup>115</sup> When he did so, his hostility to *Marbury* was apparent. In a letter he wrote to the prosecutor in the treason trial of Aaron Burr, President Jefferson agreed to provide whatever evidence the court might need to ensure a just trial but reserved the right to decide for himself whether the Court should see any particular papers in his possession. The inconsistency between this position and *Marbury* was not lost on Jefferson:

I think it material to stop at the threshold the citing that case as authority, and to have it denied to be law. . . . The Constitution intended that the three great branches of the government should be co-ordinate, & independent of each other. As to acts, therefore, which are to be done by either, it has given no controul to another branch. . . . Where different branches have to act in their respective lines . . . they may give to it different and opposite constructions. . . .

On this construction I have hitherto acted; on this I shall ever act, and maintain it with the powers of the government, against any control which may be attempted by the judges, in subversion of the independence of the executive & Senate within their peculiar department. . . . I have long wished for a proper occasion to have the gratuitous opinion in *Marbury v. Madison* brought before the public and denounced as not law . . . .<sup>116</sup>

Andrew Jackson made a somewhat milder claim of executive authority over constitutional interpretation in the message he sent Congress with his veto of the 1832 act to renew the charter of the Bank of the United States. Although the Supreme Court had upheld the constitutionality of the Bank in *McCulloch v. Maryland*,<sup>117</sup> President Jack-

<sup>114</sup> See *Eakin v. Raub*, 12 Serg. & Rawle 330 (Pa. 1825) (Gibson, J., dissenting) (attacking the doctrine of judicial review).

<sup>115</sup> See, e.g., 11 THE WRITINGS OF THOMAS JEFFERSON 49, 51 (A. Lipscomb ed. 1904) (letter from T. Jefferson to Abigail Adams dated Sept. 11, 1804) ("[T]he opinion which gives to the judges the right to decide what laws are constitutional, and what not, not only for themselves in their own sphere of action, but for the legislature and executive also, in their spheres, would make the judiciary a despotic branch."); 15 THE WRITINGS OF THOMAS JEFFERSON 276-79 (A. Lipscomb ed. 1904) (letter from T. Jefferson to William C. Jarvis dated Sept. 28, 1820) (disputing the argument that judges are the ultimate arbiters of all constitutional questions on the ground that this threatens the mutual independence of the three branches of government and thus of the constitutional system itself).

<sup>116</sup> 9 THE WRITINGS OF THOMAS JEFFERSON 53-54 (P. Ford ed. 1898) (letter from T. Jefferson to George Hay dated June 2, 1807).

<sup>117</sup> 17 U.S. (4 Wheat.) 316 (1819).

son considered the issue still open:

It is maintained by the advocates of the bank that its constitutionality in all its features ought to be considered as settled . . . by the decision of the Supreme Court. To this conclusion I can not assent.

. . . The Congress, the Executive, and the Court must each for itself be guided by its own opinion of the Constitution. . . . The opinion of the judges has no more authority over Congress than the opinion of Congress has over the judges, and on that point the President is independent of both.<sup>118</sup>

In his first inaugural address, Abraham Lincoln took a similar position concerning the force of the Supreme Court's interpretation of the Constitution:

I do not forget the position assumed by some, that constitutional questions are to be decided by the Supreme Court; nor do I deny that such decisions must be binding in any case, upon the parties to a suit. . . . At the same time the candid citizen must confess that if the policy of government, upon vital questions, affecting the whole people, is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made, in ordinary litigation . . . the people will have ceased, to be their own rulers, having, to that extent, practically resigned their government, into the hands of that eminent tribunal.<sup>119</sup>

More recently, Franklin Roosevelt defended his infamous plan to "pack" the Supreme Court by arguing that the Court had twisted the Constitution to obstruct important social welfare legislation. He asserted the authority to interpret the Constitution, to find the Court's actions inconsistent with his interpretation, and to act to bring the Court into line with his view. His language was, as usual, forceful: "We must find a way to take an appeal from the Supreme Court to the Constitution itself."<sup>120</sup>

Recent events provide another example. Former Attorney General Edwin Meese provoked a firestorm of criticism by claiming some exec-

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<sup>118</sup> 2 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789-1897, at 581-82 (J. Richardson ed. 1898).

<sup>119</sup> 4 THE COLLECTED WORKS OF ABRAHAM LINCOLN 268 (R. Basler ed. 1953).

<sup>120</sup> Address by President Franklin Roosevelt (March 9, 1937), *reprinted in* 81 CONG. REC. app. 470 (1937).

utive autonomy with respect to constitutional interpretation.<sup>121</sup> He drew a sharp distinction between judicial opinions concerning the meaning of the Constitution and the Constitution itself.<sup>122</sup> According to the former Attorney General, the coordinate branches of government can properly respond to a decision they consider erroneous. They are not bound to obey decisions in the same way that they are bound to obey the Constitution.<sup>123</sup>

In light of all these dissident voices it is puzzling that so many contemporary legal scholars and practitioners consider *Marbury* the final word with respect to judicial review. There is no obvious reason why a court's assertion of judicial power should be any more authoritative than a President's assertion of executive power. Both are part of our constitutional tradition, and there is no apparent way to establish any priority between them.<sup>124</sup>

The claims made throughout our history that the nonjudicial organs of government are entitled to a share of the power that the judicial monopoly assumption assigns exclusively to the courts constitute one more aspect of our constitutional tradition that that assumption fails to fit. It remains to consider the far more serious charge that the judicial monopoly assumption fails to fit modern constitutional practice as well.

### C. *Judicial Deference in Modern Constitutional Practice*

The judicial monopoly assumption is not useful as a description of constitutional practice in our system of government because judges resolve questions of constitutional interpretation only under limited, defined circumstances. Such a system necessarily imposes substantial responsibility for constitutional interpretation on the political branches of government.

A demonstration that our system makes the political branches of government responsible for constitutional interpretation begins with an uncontroversial observation: Congress and the President have a duty to

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<sup>121</sup> A critical reader might object to including the assertions of authority by both Meese and Roosevelt in a list of incidents in our tradition inconsistent with the judicial monopoly assumption, because both were widely condemned. So was *Marbury* in its day. See 1 C. WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 232 (1922). Such condemnation is never universal.

<sup>122</sup> See Meese, *The Law of the Constitution*, 61 TUL. L. REV. 979, 985 (1987).

<sup>123</sup> See *id.*

<sup>124</sup> To do so would require an exercise in circular reasoning: The question of who can interpret the Constitution authoritatively is itself an interpretive question; the Court resolved it in *Marbury*; we must accept that resolution because judicial interpretations are authoritative.

ensure that their actions conform to the law.<sup>125</sup> Although members of Congress occasionally call this principle into question,<sup>126</sup> the strongest defender of the judicial monopoly assumption should find it inoffensive.<sup>127</sup> Even private citizens with no special public responsibilities are required to obey the law.<sup>128</sup> The rule of law depends on extending this obligation to government officials; officials must have a duty to measure their behavior against the requirements of law. The oath that the President takes to uphold the Constitution reflects this duty.<sup>129</sup>

Congress and the President cannot discharge this duty merely by ensuring that none of their actions are subject to challenge in court. The courts do not oversee government operations and invalidate all actions that are inconsistent with the Constitution. There are any number of situations in which a government official may contemplate an action she believes to be unconstitutional, but knows the courts will not disturb. In such a situation, the responsible official should act on her own interpretation of the Constitution.<sup>130</sup>

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<sup>125</sup> See, e.g., Brest, *The Conscientious Legislator's Guide to Constitutional Interpretation*, 27 STAN. L. REV. 585, 587-88 (1975) (arguing that a "conscientious legislator" has a duty to discern the constitutionality of a measure's objective before deciding to support it).

<sup>126</sup> See D. MORGAN, *supra* note 5, at 3-10 (discussing the behavior of some senators and representatives concerning various bills they believed to be unconstitutional). For example, during hearings on the constitutionality of what ultimately became the Civil Rights Act of 1964, Senator Magnuson remarked:

I think we ought to get this in perspective. Congress doesn't determine what is under the interstate commerce clause. The Constitution and court decisions determine that. . . .

. . . We are talking about how far you want to go . . . in a particular field with a bill. . . . Whether a business is in interstate commerce or not is a question of the interpretation of the Constitution and of the courts' rules in these matters.

*Hearings on S. 1732 Before the Senate Comm. on Commerce*, 88th Cong., 1st Sess. 71 (1963).

<sup>127</sup> Indeed, defenders of the judicial monopoly assumption should be among the most enthusiastic supporters of this principle. That assumption tends to be linked with concern for maintaining the rule of law. See *supra* note 83-84 and accompanying text. The essence of the rule of law is that government officials are obliged to obey the law.

<sup>128</sup> Cf. Brest, *Congress as Constitutional Decisionmaker and Its Power To Counter Judicial Doctrine*, 21 GA. L. REV. 57, 63 (1986) ("To suggest that Congress need not consult the supreme law of the land is analogous to asserting that individual citizens need not consult the law before they act.").

<sup>129</sup> The Constitution states:

Before he enter on the Execution of his Office, [the President] shall take the following Oath or Affirmation: "I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States."

U.S. CONST. art. II, § 1, cl. 8.

<sup>130</sup> Cf. Thayer, *supra* note 87, at 144 ("[O]ne who is a member of a legislature



## 1. Legislators' Actions and Judicial Deference

One situation that calls for nonjudicial interpretation of the Constitution arises when courts severely limit their role by reviewing a challenged action under a rationality standard.<sup>131</sup> Whenever courts test

may vote against a measure as being, in his judgment, unconstitutional; and, being subsequently placed on the bench, when this measure, having been passed by the legislature in spite of his opposition, comes before him judicially, may there find it his duty, although he has in no degree changed his opinion, to declare it constitutional." (repeating a remark of Judge Thomas Cooley)).

<sup>131</sup> See Brest, *supra* note 125, at 594-99. Professor Brest posed the following rhetorical question: "[D]o the rationality standards comprehend all that the due process and equal protection clauses usually demand of a legislature?" *Id.* at 595. He answered the question, at least tentatively: "The very permissiveness of the rationality test may indicate that it is a standard of *judicial* review of a prior decision made on the basis of a more meaningful criterion." *Id.* at 599 (emphasis in original).

This argument does not imply that the rational basis test must always represent judicial abdication of the power to say what the Constitution requires. Like any other verbal formula, that test can mean different things in different situations. No doubt some courts have engaged in meaningful review under the auspices of the rationality test. See L. TRIBE, *supra* note 14, § 16-3, at 1443-45 (describing instances of "covertly heightened scrutiny" and referring to them collectively as a "sporadic move away from near-absolute deference to legislative judgment"); see also Note, *Rational Basis With Bite: Intermediate Scrutiny By Any Other Name*, 62 *IND. L.J.* 779, 779 (1987) ("A finding that . . . regulations are unconstitutional under rational basis review implies that the Court used a more searching scrutiny. This signals a break from traditional equal protection analysis in which the Court applies only the most deferential standard of review . . ." (footnote omitted)). The argument that rationality review leaves the political branches of government with substantial responsibility for constitutional interpretation implies only that courts often have used the rational basis test to avoid meaningful review. When they do, they leave constitutional questions to other decision makers. Cf. L. TRIBE, *supra* note 14, § 16-2, at 1439-43 (noting that, under the rationality requirement, courts have exhibited extreme deference to legislative purposes and acts, resulting in a strong presumption of their constitutionality).

There are a number of other situations that allow constitutional interpretation to be made by nonjudicial branches of government. Professor Brest identified one such situation, which is closely related to rationality review. That situation arises out of the courts' treatment of legislative motive. See Brest, *supra* note 125, at 589-94. It can be argued that the Supreme Court has taken the position that the constitutional validity of governmental action may depend on the actor's motives. See, e.g., J. ELY, *DEMOCRACY AND DISTRUST* 136-45 (1980) (surveying the Court's treatment of legislative motive); Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 *YALE L.J.* 1205 (1970) (same). From this perspective, the motive of Congress in passing legislation may determine its constitutionality. However, courts are reluctant to invalidate legislation on the ground that Congress passed it in order to achieve an illicit end. Problems of proof discourage inquiry into motives. See J. ELY, *supra*, at 137-38. These problems are far less discouraging for members of Congress. Unlike the courts, they are in a position to assess their motives and those of their colleagues. A member of Congress who thinks proposed legislation is an effort to achieve an unconstitutional end should oppose that legislation even if the courts are certain to uphold it. See Brest, *supra* note 125, at 587-88 (arguing that the "conscientious legislator" has a duty to discern the constitutionality of a measure's objective before deciding to support it).

The definition of a properly presented case can also insulate from judicial consideration questions of constitutional interpretation that the political branches of government cannot avoid. See *supra* notes 89-96 and accompanying text. *Schlesinger v. Re-*

the constitutionality of legislation by asking whether the action is rationally related to some legitimate government purpose, the legislation may well be repugnant to the Constitution even if it survives judicial review. Judicial consideration under such a standard means only that a rational person could conclude the requirements of the Constitution are satisfied. A rational conclusion can be wrong. A legislator has a duty to reach the right conclusion.<sup>132</sup>

Almost any case applying the rational basis test can serve to illus-

servists Committee to Stop the War, 418 U.S. 208 (1974), a standing case, also illustrates this judicial insulation. The issue in *Schlesinger* was whether members of Congress could hold commissions in the military reserves without violating the incompatibility clause of the Constitution. The Supreme Court held that the plaintiff lacked standing to bring the suit even though, as the lower court had pointed out, nobody else would be likely to have it. See *Schlesinger*, 418 U.S. at 208 (citing *United States v. Richardson*, 418 U.S. 166, 179 (1974)). The question whether the Constitution bars members of Congress from holding commissions in the reserves was therefore one that the judiciary could not resolve. The judiciary's abstinence left Congress as the only branch of government that could consider the constitutional question.

<sup>132</sup> This is essentially the same argument that underlies Professor Sager's "under-enforcement thesis." See Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1213-28 (1978). Sager argues that courts often reject a constitutional claim because of "institutional concerns" rather than out of a conviction that the Constitution does not support the plaintiff. When they do so, their decision represents only "the boundaries of [their] role of enforcement" not the full "conceptual limits" of the constitutional norm at issue. *Id.* at 1213.

After all, what the members of the federal tribunal have actually determined is that there are good reasons for stopping short of exhausting the content of the constitutional concept with which they are dealing; the limited judicial construct which they have fashioned or accepted is occasioned by this determination and does not derive from a judgment about the scope of the constitutional concept itself.

*Id.* at 1221. Sager's prime example of circumstances under which "institutional concerns" rather than substantive convictions mandate a result is the judiciary's use of the "rational relationship" test in equal protection analysis. He draws three principal conclusions: 1) government officials are legally obligated to obey constitutional norms to their fullest extent, not merely to conform to court decisions; 2) congressional enforcement of constitutional norms can go further than existing doctrine; and 3) courts should limit federal review of state cases that go further than federal doctrine in protecting constitutional rights. See *id.* at 1264. The difference between Professor Sager's analysis and my own is that I think his reasoning can support broader conclusions. He is cautious in articulating the implications of his insights:

[I]t is understood that Supreme Court decisions are the ultimate and authoritative source of federal constitutional interpretation. While I have neither the impulse nor the temerity to quarrel with this root premise of our legal system, I do want to register disagreement with its application to one species of Supreme Court decision.

*Id.* at 1212-13. It seems to me that the characteristic of our system he identified is evidence that supports the conclusion that the Supreme Court shares responsibility for interpreting the Constitution with other institutions. This view requires at least enough modification of the traditional view that the Supreme Court is the "ultimate and authoritative source of federal constitutional interpretation" to make room for the political question doctrine.

trate the disparity between rationality and constitutionality. *United States Railroad Retirement Board v. Fritz*<sup>133</sup> is a familiar example. *Fritz* was a challenge to a congressional statute that established two classes of railroad workers: one class was entitled to receive benefits under both social security and the railroad retirement system, the other class was not.<sup>134</sup> The Court indicated that the challenged classification was valid if the workers who retained dual benefits had a stronger equitable claim to those benefits than the workers that lost them.<sup>135</sup> The majority held that Congress could rationally have found that equitable considerations supported its classification, but the Court made only a cursory attempt to explain how the congressional classification responded to equitable considerations.<sup>136</sup>

Justice Brennan argued in dissent that the only reason Congress drew the classification as it did was that the favored group had more political influence and expertise than the disfavored group.<sup>137</sup> Justice Brennan also concluded that members of the favored class had no better equitable claim to continued dual benefits than members of the disfavored group.<sup>138</sup>

The majority could have defeated Justice Brennan's criticisms by holding that the Constitution permits Congress to pursue political expediency by benefiting one group at the expense of a weaker group.

<sup>133</sup> 449 U.S. 166 (1980).

<sup>134</sup> Railroad Retirement Act of 1974, Pub. L. No. 93-445, 88 Stat. 1305 (1975) (codified as amended at 45 U.S.C. §§ 231-231u (1982)).

<sup>135</sup> As the Court stated:

The only remaining question is whether Congress achieved its purpose in a patently arbitrary or irrational way. . . . Congress could properly conclude that persons who had actually acquired statutory entitlement to windfall benefits while still employed in the railroad industry had a greater equitable claim to those benefits than the members of appellee's class.

*Fritz*, 449 U.S. at 177-78. The Court went on to say: "It is, of course, 'constitutionally irrelevant whether this reasoning in fact underlay the legislative decision.'" *Id.* at 179 (quoting *Flemming v. Nestor*, 363 U.S. 603, 612 (1960)).

<sup>136</sup> Justice Brennan's dissent emphasized the Court's failure to articulate the equitable considerations that justified the statutory classification:

It seems to me that before a court may accept a litigant's assertion of "equity," it must inquire what principles of equity or fairness might genuinely support such a judgment. But apparently the Court does not demand such inquiry, for it has failed to address any equitable considerations that might be relevant to the challenged classification.

*Id.* at 194 (Brennan, J., dissenting).

<sup>137</sup> See *id.* at 188-94 (Brennan J., dissenting).

<sup>138</sup> See *id.* at 194 (Brennan, J., dissenting) ("I would conclude that the members of appellee class have as great an equitable claim to their earned dual benefits as do their more favored co-workers, who remain entitled to their earned dual benefits under [the statute].").

That would have made irrelevant all dispute over the validity of the rationale underlying Congress' classification. Like Justice Brennan, however, the majority assumed that Congress could not draw such a classification without some reason other than political expediency. This assumption is consistent with a broad cross section of Supreme Court doctrine indicating that the Constitution forbids "naked preferences."<sup>139</sup>

Thus, interpreting the Constitution in a case like *Fritz* involves determining whether the statute violates the equal protection clause by allocating resources inequitably. If Justice Brennan correctly perceived the reason for the classification at issue in *Fritz*, that classification was a naked preference and presumably unconstitutional. The majority did not refute his argument. It refused to make a definitive judgment on the constitutional issue that *Fritz* presented: whether equitable considerations justified the classification.<sup>140</sup> Instead, it left that judgment to Congress.

As a result, a member of Congress considering whether to reenact the same provision could not rely on the *Fritz* decision to establish its constitutionality. The constitutionality of the statute would depend on the equitable judgment the Court refused to make. A member of Congress, on the other hand, could not avoid that judgment without betraying her obligation to obey the law.<sup>141</sup>

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<sup>139</sup> See Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689, 1689-90 (1984) (arguing that the constitutional prohibition of naked preferences for one group over another could form the basis of a distinctive conception of the judicial role). A preference must be clothed in "public value" before a legislature may constitutionally enact it into law. See *id.* at 1695. Professor Sunstein argues that much of the Constitution is best interpreted as an effort to prohibit "distribution of resources to one person or group rather than another on the sole ground that those benefited have exercised the raw political power needed to obtain government assistance." *Id.* at 1730. This is a persuasive argument. As illustrated by *Fritz*, the Court writes, at the very least, as though it sees such a general prohibition in the equal protection clause.

<sup>140</sup> The Court suggested a plausible reason that could have motivated Congress. See *Fritz*, 449 U.S. at 177-78 (proposing that Congress could have determined that railroad employees with a "current connection" to the railroad industry, for whom the Railroad Retirement Act was designed, had a greater equitable claim to benefits than those no longer in railroad employment). However, the Court did not make a probing inquiry into the "equity" of the situation in the usual sense of the word.

<sup>141</sup> *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483 (1955), provides another familiar example of Supreme Court use of the rationality standard to avoid judgment of a constitutional issue. It is less apt than *Fritz* for the purposes of this Article, because it involves judicial deference to state rather than federal politicians, but it is still instructive. The district court took the view that an Oklahoma statute, which permitted only optometrists and ophthalmologists, but not opticians, to fit old lenses to new frames or duplicate old lenses without a prescription, was designed primarily to promote the financial interests of optometrists at the expense of opticians. See *Lee Optical of Okla., Inc. v. Oklahoma*, 120 F. Supp. 128, 135 & n.16 (W.D. Okla. 1954).

When the case reached the Supreme Court, Justice Douglas, writing for the Court, proposed several possible public purposes the legislature might have intended in

This example supports the following generalization: When courts abstain from striking down some act of a political branch of government out of deference, they impose a duty of constitutional interpretation on the branch of government to which they defer. A decision to defer, by its own terms, leaves the issue to be resolved elsewhere. When the issue is a question of constitutional interpretation, the political branches must perform the interpretive task.

In responding to this generalization, a proponent of the judicial monopoly assumption might argue that judicial deference does not typically entail nonjudicial interpretation. Perhaps courts resolve distinctly legal questions, so that when they defer, they merely refuse to grapple with nonlegal and noninterpretive "policy" questions. Leaving such questions to the political branches of government does not threaten the judicial monopoly assumption.<sup>142</sup>

A second response to the notion that judicial deference compels constitutional interpretation by the branch to which the court has deferred is to minimize the importance of such nonjudicial constitutional interpretation. If judicial deference plays only a minor role in our constitutional law, the judicial monopoly assumption may reflect that law reasonably well, even assuming that deference leads to some nonjudicial interpretation of the Constitution.

Both of these responses fail to interpret properly the role of defer-

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enacting the statute. See *Williamson*, 348 U.S. at 487. He never determined, however, what that legislative purpose in fact was. A state legislator considering a bill identical to the statute upheld by the Court in *Williamson* could be quite certain that the bill would survive judicial review, but not that it was constitutional. To keep faith with the law, she would have to determine for herself whether the statute served some public value or merely responded to the will of the strong at the expense of the weak.

<sup>142</sup> This argument has played an important part in the political question debate. Commentators who would make the political question doctrine appear aberrant must explain the prominence of judicial deference in our legal culture as evidence of something other than division of responsibility for constitutional interpretation. Professor Redish has done so by distinguishing between "substantive" and "procedural" deference.

[I]t is vital to distinguish between appropriate "substantive" deference—in which the judiciary, while retaining power to render final decisions on the meaning of the constitutional limits, nevertheless takes into account the need for expertise or quick action—and unacceptable total "procedural" deference, where the court concludes simply that resort to the judiciary constitutes the wrong "procedure," because the decision is exclusively that of the political branches.

Redish, *supra* note 4, at 1048-49 (footnote omitted). Professor Henkin uses the terms "ordinary" and "extraordinary" deference to make the same distinction. See Henkin, *supra* note 3, at 599. Substantive or ordinary deference reserves all legal issues for the courts. Procedural or extraordinary deference leaves some such issues to other decision makers. The former is normal and nonthreatening. The latter is aberrant and abhorrent.

ence in our constitutional jurisprudence. When an American court defers to another branch of government, it usually leaves that branch to decide a question that is indistinguishable from those the Court confronts when it does not defer. This undercuts any argument that courts make all legal determinations and defer only with respect to nonlegal issues. Moreover, courts defer to other branches of government with respect to many questions having to do with broad areas of constitutional concern.<sup>143</sup> Such sweeping deference makes implausible any claim that deference is a peripheral or minor part of our constitutional law.

The status of deference in our constitutional jurisprudence is largely a by-product of the collision between constitutional law and legal realism. Some discussion of this collision is essential to demonstrate the extent to which deference entails nonjudicial interpretation of the Constitution.

## 2. Legal Realism and Deference in Constitutional Law

In the 1920s and 1930s, the realists mounted a successful theoretical attack on traditional ways of justifying the exercise of judicial power. They redefined constitutional adjudication, blurring the line between judicial and legislative decision making. As a result of their work, we continue to view most such adjudication as a process of balancing competing interests.<sup>144</sup> This view of adjudication makes it difficult to argue that courts defer only to political judgments concerning policy and make all legal decisions themselves. Such an argument requires a sharp distinction between legal and nonlegal issues. The realist view of adjudication tends to collapse that distinction.

The collapse of that distinction called into question the basis of judicial authority. The traditional view of the judicial function suggests that judges should follow pre-existing rules, not balance competing interests.<sup>145</sup> Accommodating divergent interests is a task for the legisla-

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<sup>143</sup> See *infra* notes 192-96 and accompanying text.

<sup>144</sup> This is the impetus for the proliferation of balancing tests in both the academic literature and court opinions.

<sup>145</sup> As John Ely stated:

In interpreting a statute, in order to decide whether . . . it conflicts with another statute, a court obviously will limit itself to a determination of the purposes and prohibitions expressed by or implicit in its language. Were a judge to announce in such a situation that he was not content with those references and intended additionally to enforce, in the name of the statute in question, those fundamental values he believed America had always stood for, we would conclude that he was not doing his job, and might even consider a call to the lunacy commission.

ture. Many jurists who understood adjudication as a balance of interests concluded that judicial deference to legislative determinations of the proper balance should be the norm. Our courts have not followed this conclusion wherever it led, but it has had a tremendous impact on our constitutional law. It has contributed to the evolution of a constitutional system that divides responsibility for interpreting the Constitution between the courts and the political branches of government. This division leaves broad areas of constitutional law to nonjudicial development. The argument that the judicial monopoly assumption is an adequate account of our modern constitutional law, even if deference entails some nonjudicial interpretation, ignores this division of responsibility for interpreting the Constitution between the courts and the political branches of government.

a. *Realism and the Decline of Formalism*

American legal realism was both an outgrowth of a broad intellectual trend and a practical response to a political problem.<sup>146</sup> In the early part of this century, progressive legal scholars were confronted with courts that blocked a wide range of social welfare legislation<sup>147</sup> as courts argued that the impact of such regulations on common law property and contract rights made them inconsistent with the Constitution.<sup>148</sup>

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J. ELY, *supra* note 131, at 3; see also Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 805 (1983) (arguing that liberal theory requires that judges be constrained, and identifying rules as one type of constraint liberal theorists invoke).

<sup>146</sup> See E. PURCELL, *THE CRISIS OF DEMOCRATIC THEORY* 93 (1973) (“[T]he realists were driven by the twin motives of intellectual discovery and social improvement. They hoped to understand the legal process in a new and more useful manner, and they hoped to see both political and legal reform flow from their discoveries.” (footnote omitted)).

<sup>147</sup> See, e.g., *Adkins v. Children’s Hosp.*, 261 U.S. 525, 554-59 (1923) (striking down minimum wage legislation); *Coppage v. Kansas*, 236 U.S. 1, 26 (1915) (striking down legislation prohibiting “yellow dog” contracts); *Lochner v. New York*, 198 U.S. 45, 54-65 (1905) (striking down maximum hour legislation). All of these and many more regulations felt the judicial pruning shears during this era. Cf. Jacobson, *Federalism and Property Rights*, 15 N.Y.U. L.Q. REV. 319, 319 (1938) (arguing that during this period constitutional arguments frequently cloaked economic interests).

<sup>148</sup> Cf. Sunstein, *Lochner’s Legacy*, 87 COLUM. L. REV. 873, 879 (1987) (“[T]he common law categories were taken as a natural rather than social construct. The status of the common law as a part of nature undergirded the view that the common law should form the baseline from which to measure deviations from neutrality, or self-interested ‘deals.’”). Exercises of judicial review that voided progressive legislation were the most dramatic examples of the impact that legal conservatism had on society. Even outside the constitutional sphere, however, progressive scholars found much to complain about in the performance of their profession. The constitutional arguments that offended them had common law analogues. Traditional ways of thinking about the

Realism emerged in part because a group of progressive legal scholars devoted themselves to destroying the theoretical foundations of the arguments put forward by courts to justify results they found undesirable. To the extent that this explains the motivations of the realists, realism can be usefully described as their response to a political problem. It would, however, be a mistake to see realism solely as a tool of its proponents' political agenda. The realists used the intellectual weapons that they had found in the scholarly arsenal of the time to fight their battle. The weapons they brought to bear are so much a part of our mental apparatus that it is difficult for any of us to escape the force of their principal conclusions.

For purposes of this Article, the most important of the realists' conclusions concern the "bankruptcy" of formal, deductive reasoning as a basis for legal decision making.<sup>149</sup> Their rejection of such reasoning had a devastating effect on traditional arguments for the legitimacy of judicial review. From *Marbury v. Madison* until recent times, formalist assumptions regarding the nature of adjudication were the starting point for all attempts to justify judicial review.<sup>150</sup>

law sometimes obstruct reform of common law doctrines. See, e.g., Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791 (1966) (discussing "the fall of the citadel of privity" in products liability).

<sup>149</sup> Felix Cohen was fond of the bankruptcy image. See Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 823 (1935) ("Any word that cannot pay up in the currency of fact, upon demand, is to be declared bankrupt, and we are to have no further dealings with it.").

<sup>150</sup> Chief Justice Marshall's opinion in *Marbury* set the pattern. The central argument in that opinion is one of necessity:

- 1) The courts have a duty to decide every case properly before them; to perform this duty they must resolve conflicts between the Constitution and other law.
- 2) The Constitution is the supreme law; it must prevail in the resolution of any such conflict. Therefore,
- 3) The courts must have the power to declare invalid any law inconsistent with the Constitution. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176-79. The following passage conveys the thrust of Marshall's reasoning:

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

*Id.* at 177. This argument suffers from a serious gap in logic. The proposition that the Constitution should govern in case of a conflict with a mere statute does not imply that the courts must determine for themselves whether a conflict exists. As Alexander Bickel has pointed out, when Marshall stated that the question in *Marbury* was "whether an act repugnant to the Constitution, can become the law of the land," he had already begged the question. The real issue "was not whether an act repugnant to the Constitu-



The Supreme Court opinions that most incensed progressive legal scholars during the first thirty-five years of this century relied heavily on the same formalist assumptions that supported Chief Justice Marshall's argument in *Marbury*.<sup>151</sup> When the Court struck down legislation as inconsistent with the Constitution, it typically presented its decision as a logically compelled deduction from premises provided by the constitutional text and previous opinions construing that text.<sup>152</sup> In the course of attacking opinions that relied on this technique, the realists destroyed the power of legal formalism. This left judicial review without any persuasive justification and prompted a dramatic retreat from the exercise of review. An attack directed at specific exercises of judicial review had wounded the institution itself.<sup>153</sup>

The realist critique of formal reasoning could only have such a dramatic impact because it was closely allied with developments in dis-

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tion could stand, but who should be empowered to decide that the act is repugnant." A. BICKEL, *supra* note 44, at 3.

Marshall never tells us how courts know there is a conflict or why they should not be bound by a congressional determination that no conflict exists. Only formalist assumptions concerning the nature of adjudication can cover this flaw. Marshall's argument can make sense only if one assumes that the Constitution has a fixed, objective meaning that is apparent to anyone with the professional training and wit to perceive it. This assumption answers the questions Marshall failed to address. Judges know when the Constitution conflicts with a statute because the meaning of each is self-evident. They should determine whether there is a conflict, because they have professional expertise that lifts the scales from their eyes, permitting them to see these self-evident truths.

<sup>151</sup> Marshall's opinion in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), indicates that he was not as unsophisticated as the structure of his opinion in *Marbury* might suggest. In *McCulloch*, Marshall took a broad view of the enumerated powers of the federal government. In doing so, he relied more on "the baneful influence" of a narrow interpretation than on the constitutional text. *Id.* at 415. He justified this approach with his famous statement that "we must never forget, that it is a constitution we are expounding." *Id.* at 407. As Professor Kurland has observed, when a judge refers to this statement, "you can be sure that the court will be throwing the constitutional text, its history, and its structure to the winds in reaching its conclusion." Kurland, *Curia Regis: Some Comments on the Divine Right of Kings and Courts "To Say What the Law Is,"* 23 ARIZ. L. REV. 581, 591 (1981).

<sup>152</sup> For example, in *Allgeyer v. Louisiana*, 165 U.S. 578 (1897), the Court articulated the constitutional basis for the newly minted right to freedom of contract. It gave no hint that the right did not merely follow from the Constitution as night follows day:

The liberty mentioned in [the due process clause] means not only the right of the citizen to be free from the mere physical restraint of his person, . . . but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways . . . to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned.

*Id.* at 589.

<sup>153</sup> See *supra* notes 146-49 and accompanying text.

ciplines other than law. The pragmatic philosophy of John Dewey,<sup>154</sup> the logic and mathematics of Bertrand Russell,<sup>155</sup> and the geometry of George Riemann<sup>156</sup> were all grist for the realist mill. All were elements of a tide in western thought that swept us away from reliance on a priori knowledge.<sup>157</sup> The attack on legal formalism had all the power of that tide behind it.<sup>158</sup>

Edward Purcell called that tide "scientific naturalism." Adherents of scientific naturalism recognized that deduction can prove only consistency of conclusions with premises; its results have no necessary relationship with truth. The choice of premises, to which logic makes no contribution, dictates the conclusion.<sup>159</sup> As Purcell defined scientific

<sup>154</sup> See J. DEWEY, *PHILOSOPHY AND CIVILIZATION* (1931); see also W. RUMBLE, *AMERICAN LEGAL REALISM* 4-8 (1968) (discussing the influence of pragmatism on the realist movement).

<sup>155</sup> See B. RUSSELL, *INTRODUCTION TO MATHEMATICAL PHILOSOPHY* (1919). Felix Cohen acknowledged the debt he and his contemporaries owed Russell and other mathematicians. See Cohen, *supra* note 149, at 824-25.

<sup>156</sup> Riemann developed an alternative to Euclidian geometry that Einstein used to help explain physical phenomena in his general theory of relativity. Riemann's work was a powerful symbol of the limitations on the utility of logic. It stood for the proposition that you can use logic to prove only the consistency of your premises with your conclusions. Non-Euclidian geometry had particular power as a symbol, because Kant made Euclid's system the standard example of a priori knowledge. See E. PURCELL, *supra* note 146, at 47-73. If one can replace even Euclid's axioms with alternative premises and achieve useful results, it seems hard to argue that any deductive system reaches uniquely correct conclusions.

<sup>157</sup> A priori knowledge means "a knowledge intuitively perceived as true concerning both the laws of the mind's operation and the structure of the external world." *Id.* at 50.

<sup>158</sup> Felix Cohen, one of the most articulate spokesmen for the realist movement, was acutely aware of the intellectual debt he owed to ideas developed in philosophy, mathematics, and science. Cohen referred to his legal methodology as "the functional approach." Cohen, *supra* note 149, at 821. He identified his functional approach to law as an extension of the revolt against metaphysical reasoning that had already taken most disciplines by storm. Cohen asked, "[w]hat are the new directions which the functional method will give to our scientific research?" *Id.* at 830. He responded by referring to other disciplines: "In attempting to answer this question for the field of law we may find suggestive precedents in other social sciences." *Id.* He examined such precedents from physics, mathematics, philosophy, anthropology and other fields. See *id.* at 824-34.

<sup>159</sup> Purcell quoted Walter Wheeler Cook, a prominent realist, to illustrate this conclusion:

The logician, he remarked, could state that "All gostaks are doshes, All doshes are galloons." Then, quite properly and flawlessly, the logician could deduce that "All gostaks are galloons." Although the statement was logically unassailable, Cook commented, it proved nothing. Whether all doshes were in fact galloons was certainly questionable; whether there were actually any gostaks in reality was also unknown. Men could know reality only by concrete investigation and experiment. Relying only on logic, "we do not know what we are talking about."

E. PURCELL, *supra* note 146, at 89 (quoting Cook, *Scientific Method and the Law*, 13

naturalism, it also included the following beliefs: "Absolute rational principles did not govern or explain the universe. No a priori truths existed, and metaphysics was merely a cover for human ignorance and superstition. Only concrete, scientific investigation could yield true knowledge."<sup>160</sup>

A formalist approach to constitutional adjudication is at war with these beliefs. Such an approach is based on faith that the words of the Constitution have a self-evident meaning that judges can know a priori and use as a premise for deductions that control specific cases.<sup>161</sup> As scientific naturalism came to dominate the American intellectual com-

A.B.A. J. 303, 304-05 (1927)).

<sup>160</sup> *Id.* at 3.

<sup>161</sup> Professor Unger made a similar point powerfully in his first book. He argued that the modern world view rejects what he calls the "doctrine of intelligible essences," which holds that we can perceive the essence of things a priori. *See* R. UNGER, *KNOWLEDGE AND POLITICS* 32 (1975). Having rejected the doctrine of intelligible essences, we cannot coherently pretend that adjudication is the process of finding meaning in legal texts. *See id.* at 79-81. As Unger writes:

If there are no intelligible essences, how do we go about classifying facts and situations, especially social facts and social situations? Because facts have no intrinsic identity, everything depends on the names we give them. The conventions of naming rather than any perceived quality of 'tableness' will determine whether an object is to count as a table. In the same way, convention rather than nature will dictate whether a particular bargain is to be treated as a contract.

*Id.* at 80. He later reiterates this point more concretely:

The formalist believes that words usually have clear meanings. He adopts, in one mode or another, Augustine's view of language as a series of names that point to things. . . . Rules consist of strings of names, the words that describe the categories of persons and acts to which the rules apply. To the extent that words have plain meanings, it will be clear to what fact situations they apply. . . .

The view of rules and therefore of naming implicit in the formalist thesis depends on the . . . conception of intelligible essences. To subsume situations under rules, and things under words, the mind must be able to perceive the essential qualities that mark each fact or situation as a member of a particular category.

*Id.* at 92-93.

Unger also argues that the source of formalism's incoherence, the rejection of intelligible essences, is a necessary corollary of liberalism. Liberalism, he tells us, rests on rejection of objective values. One can only maintain the subjectivity of values at the cost of rejecting the doctrine of intelligible essences and with it all reliance on a priori knowledge. *See id.* at 79. This aspect of his argument is debatable. *See* R. DWORKIN, *supra* note 6, at 441 n.19. Dworkin argues that liberals do not adopt "any form of skepticism about the possibility that one way of leading one's life can be better or more valuable than another." *Id.* They accept "the entirely different principle . . . that claims about the relative value of personal goals do not provide competent justifications for regulative political decisions." *Id.* at 441. Whatever the merits of Unger's critique of liberalism, his argument about the implications for formalism of denying that we can perceive intelligible essences is difficult to refute. Since a priori knowledge remains out of fashion, this is an important argument.

munity during the first third of this century, the formalist approach became vulnerable. The realists perceived this vulnerability and exploited it. They ridiculed the notion that judges could decide cases by perceiving the meaning of the Constitution and proposed new ways to understand the process of adjudication.<sup>162</sup> The realists recommended that courts face up to their responsibilities and cease manipulating

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<sup>162</sup> Felix Cohen's article, *Transcendental Nonsense and the Functional Approach*, *supra* note 149, is one of the best examples of this argument. Cohen argued that when the Supreme Court struck down a minimum wage law as inconsistent with "due process," its reasoning revealed nothing, because it gave no concrete, nonlegal definition of "due process." To say that the statute was unconstitutional because it deprived plaintiffs of due process added "precisely as much to our knowledge as Molier's physician's discovery that opium puts men to sleep because it contains a dormative principle." *Id.* at 820.

Cohen used this analogy to poke fun at the traditional notion that judges could perceive the general command of the due process clause and deduce the proper resolution of a particular case from that general command. His argument flows directly from the assumptions of scientific naturalism. Judges cannot perceive the commands of the due process clause because the a priori metaphysical truth one must apprehend to do so does not exist. The clause can only have meaning if judges assign a concrete meaning to it. They assign such meaning when they either strike down or uphold legislation challenged under the clause. Any argument that they reach their decision on the basis of the clause's command is circular, because the clause only acquires meaning, if at all, as a result of their decision. Because the court's own reasoning regarding the case determines the "premises" contributing to the meaning of the due process clause, it cannot rely on logic to deductively validate the meaning it derives. *Cf. id.* at 820 (noting that the Supreme Court, in adjudicating due process cases, apparently believes that "what it says three times must be true").

Cohen claimed that the pretense of reaching legal conclusions by apprehending the meaning of a legal text and deducing its implications was pernicious. He nonetheless had some sympathy for the use of traditional language to play a symbolic role in persuasion. "The law is not a science but a practical activity, and myths may impress the imagination and memory where more exact discourse would leave minds cold." *Id.* at 812. Their utility aside, the myths permitted courts to avoid conscious consideration of the real ethical and factual questions they had to resolve before deciding any case. He suggested that the only reason for pretending was to disguise the true basis of decision when it was not "such as could be presented without shame to the public." *Id.* at 820. More than fifty years later, courts are still susceptible to the same criticism. *See infra* notes 278-97 and accompanying text.

Other realists shared important attributes of Cohen's view of adjudication. Karl Llewellyn wrote:

If deduction does not solve cases, but only shows the effect of a given premise; and if there is available a competing but equally authoritative premise that leads to a different conclusion—then there is a choice in the case; a choice to be justified; a choice which *can* be justified only as a question of policy—for the authoritative tradition speaks with a forked tongue.

Llewellyn, *Some Realism About Realism*, 44 HARV. L. REV. 1222, 1252 (1931) (emphasis in original); *see also* J. FRANK, LAW AND THE MODERN MIND 18-20 (1930) (arguing that certainty in the law is an illusion that we cherish because it fulfills a psychological need).

meaningless, metaphysical abstractions:

The realistic judge . . . will not fool himself or anyone else by basing decisions upon circular reasoning from the presence or absence of . . . legal derivatives of the judicial decision itself. Rather, he will frankly assess the conflicting human values that are opposed in every controversy, appraise the social importance of the precedents to which each claim appeals, [and] open the courtroom to all evidence that will bring light to this delicate practical task of social adjustment . . . .<sup>163</sup>

The realists and their fellow travelers were quick to perceive the implications of this view of adjudication for the exercises of judicial review that offended them. If, instead of testing the validity of a statute against the inherent meaning of the Constitution, judges performed "a delicate practical task of social adjustment," then every offensive exercise of review was subject to attack as usurpation of the legislative function. Legislatures, not courts, were supposed to balance "conflicting human values."<sup>164</sup> Courts had no special claim of competence to strike that balance.

Scholars used this argument early in the development of realist thought to criticize cases that obstructed social welfare legislation.<sup>165</sup> These early attempts to apply the realist assault on formal reasoning in criticizing episodes of judicial review drew narrow conclusions. They claimed only that courts could not apply formal reasoning to resolve cases of a particular kind. The focus was on cases considering the validity of social welfare legislation that changed common law rules governing the economy. Once unleashed, however, the antiformalist argu-

<sup>163</sup> Cohen, *supra* note 149, at 842.

<sup>164</sup> See *supra* note 145 and accompanying text.

<sup>165</sup> Progressive scholarship in the 1920s argued that any decision to strike down social welfare legislation as inconsistent with an individual right involved striking a balance between that right and the government's power to legislate for the general good. A balance was inevitable, because no individual right is protected absolutely. See, e.g., Brown, *Police Power—Legislation for Health and Personal Safety*, 42 HARV. L. REV. 866, 897 (1929) ("[O]rdinary legal *dogmata* cease to be of assistance in the deciding of cases. Instead the problem is a severely practical and political one."). Another article, published earlier in the same decade, was even more explicit:

[I]n cases involving the industrial policy of a state or nation the measure of due process approaches very closely to the measure of political wisdom. The function of determining the political policy of the government belongs to the legislature. To adopt the attitude of the court revealed in the cases cited is equal to making the Supreme Court of the United States the supreme legislative body of the country.

Finkelstein, *Judicial Self-Limitation*, 37 HARV. L. REV. 338, 361-62 (1924).

ment refused to be confined within such a narrow compass.

### b. *Post-Realist Conceptions of Judicial Review*

The dominance of scientific naturalism in American intellectual life generally helped the antiformalist argument against judicial review to dominate American constitutional law. The theory that all adjudication involved making a choice between competing interests, and that the judiciary should avoid substituting its choices in balancing these interests for that of a legislature, became a cornerstone of sophisticated constitutional analysis.<sup>166</sup> The most outspoken proponents of this "antiformalist" theory included some of our most able and influential jurists.<sup>167</sup>

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<sup>166</sup> The Supreme Court applied this theory, sometimes with dramatic effect. *Korematsu v. United States*, 323 U.S. 214 (1944), is one of the most stunning examples. In *Korematsu*, the Court upheld the constitutionality of the government's decision to detain Americans of Japanese ancestry during World War II. The Court merely accepted the government's assertion that the detention responded to military necessity. See E. ROSTOW, *THE SOVEREIGN PREROGATIVE* 197 (1962) (stating that the Court acted "without a factual record in which the justification for the act was analyzed"). Justice Black, writing for the majority, said: "[W]e could not reject the finding of the military authorities that it was impossible to bring about an immediate segregation of the disloyal from the loyal." *Korematsu*, 323 U.S. at 219. This reasoning was, no doubt, partly a product of wartime hysteria. It was also, however, a product of the jurisprudential climate of the 1940s. In the wake of the victory over *Lochner*-style substantive due process, deference was the Court's polestar.

<sup>167</sup> The two best examples are Justice Felix Frankfurter and Judge Learned Hand. Justice Frankfurter was so skeptical about the propriety of courts replacing a legislative balance that he doubted the propriety of any judicial review in connection with some of the more open-ended provisions of the Constitution, most particularly the fourteenth amendment. He felt that our constitutional jurisprudence would have been better if "when the Amendment first came before the Court it had concluded that it was too vague, too much open to subjective interpretation for judicial enforceability." See Purcell, *Alexander M. Bickel and the Post-Realist Constitution*, 11 HARV. C.R.-C.L. L. REV. 521, 533 (1976) (quoting a letter from Frankfurter to Learned Hand, dated Feb. 13, 1958).

Taken to its logical extreme, this approach would essentially eliminate judicial review. As *Dennis v. United States*, 341 U.S. 494 (1951), shows, Justice Frankfurter was willing to carry his approach close to its logical extreme. In *Dennis*, Justice Frankfurter concurred in upholding the constitutionality of the Smith Act convictions of organizers of the Communist Party of the United States, but objected to the standard the majority articulated. He argued that constitutional rights are never absolute. See *id.* at 524 ("Absolute rules would inevitably lead to absolute exceptions, and such exceptions would eventually corrode the rules."). Therefore, the constitutionality of the statute must depend on striking a balance between the requirements of national security and a qualified constitutional right to freedom of speech. The Court should not disturb the congressional determination that the requirements of national security mandated the convictions unless it could perceive no rational basis for it:

Free-speech cases are not an exception to the principle that we are not legislators, that direct policy-making is not our province. How best to reconcile competing interests is the business of the legislatures, and the balance they strike is a judgment not to be displaced by ours, but to be

In its heyday, antiformalist theory seemed to demand almost complete abandonment of judicial review. Its adherents recognized that the Constitution's demands are never absolute. Interpretation always involves choosing between competing interests. Making such choices is for politicians, subject only to a very loose requirement that they behave rationally. It follows that all interpretation, up to the point of irrationality, is outside the judicial province.

We could dismiss this extreme argument as a historical curiosity if it were not a necessary logical consequence of premises that most of us accept. Who would deny that formalism is an inadequate theory of constitutional adjudication?<sup>168</sup> The realists pierced the formalist veil and made us see choice as inherent in adjudication. But choice still seems like a legislative function: Judicial abdication seems inescapable.

Courts have not repudiated the argument that choice is an inescapable part of adjudication. They have partially escaped the bonds of the antiformalist argument by qualifying the premise that choice is a legislative function. They have defined areas of constitutional law within which they claim to be better suited than Congress to strike a balance between competing interests. Thus, when a constitutional issue involves the validity of a "suspect classification" or governmental intrusion on a "fundamental right," the courts are willing to replace legislative judgments with their own.<sup>169</sup> They show no such interest in consti-

respected unless outside the pale of fair judgment.

*Id.* at 539-40.

Learned Hand followed the same path to the same conclusion. Judge Hand argued that deciding whether any proposed statute would be beneficial to society "presupposes a choice and all choices depend upon an appraisal of the values and sacrifices to which the contemplated action will give rise." L. HAND, *supra* note 33, at 37-38. He went on to say: "I do not see how a court can invalidate [such choices] without putting itself in the same position and declaring whether the legislature's substitute is what the court would have coined to meet the occasion." *Id.* at 39. He surveyed the circumstances that prompted the Court to substitute its judgment for that of a legislature and concluded that there was no way to "explain when the Court will assume the role of a third legislative chamber." *Id.* at 55. Finally, he suggested that the court had no authority to assume the role of the legislature, "except as a coup de main." *Id.*

<sup>168</sup> See R. SUMMERS, *INSTRUMENTALISM AND AMERICAN LEGAL THEORY* 278 (1973) ("Virtually all agree that to characterize a judge or lawyer's analysis as formalistic is seriously to condemn it.").

<sup>169</sup> Professor Tribe notes this mode of thinking in equal protection cases:

Throughout the . . . post-1937 period, a [model of equal protection] has offered alluring alternatives for constitutional argument, seeking to identify those fundamental aspects of social structure which should be presumptively open to all on equal terms, and those criteria of government classification which are most suspect as likely to reflect habitual reaction and prejudice rather than reflective understanding. . . . [I]t has been possible to give content to this model only through controversial substantive judgments.

tutional questions that involve economic interests.<sup>170</sup>

This disparity between judicial activity on behalf of certain classes of individuals and in favor of certain rights and judicial passivity with respect to other constitutional issues is impossible to justify in terms of the traditional theory underlying *Marbury v. Madison*. Chief Justice Marshall gave us no basis for discriminating among constitutional questions and taking some away from the judiciary. New theories of judicial review sprang up to fill this void and justify the relatively narrow role in interpreting the Constitution that the courts defined for themselves. Constitutional law and theory accommodated itself to a division of functions that reserved judicial interpretation of the Constitution for special circumstances and left many constitutional questions to political resolution.

We have already seen the theoretical debate that preceded this accommodation.<sup>171</sup> Herbert Wechsler's attempt to rehabilitate *Marbury* was a rearguard action in defense of the classical theory. Alexander Bickel put forward a new theory that still dominates constitutional scholarship. His view that courts' constitutional function is to define values and proclaim principles<sup>172</sup> fully accounts for courts' tendency to pay careful attention to some constitutional issues and ignore others. Not every constitutional issue presents a fit occasion for the definition of values and the proclamation of principles.<sup>173</sup> Almost all modern constitutional theorists build on Bickel's view of the judicial role.<sup>174</sup> Rhetoric associated with the old theory, however, survived in descriptions of

L. TRIBE, *supra* note 14, § 11-1, at 770 (footnote omitted).

<sup>170</sup> See *supra* notes 133-41 and accompanying text (analyzing the Court's opinion in *Fritz*). Judges are aggressive about determining and enforcing the requirements of the first amendment, but they leave interpretation of the commerce clause to others. See *infra* notes 178-96 and accompanying text. *Brown v. Board of Education*, 347 U.S. 483 (1954), was the paradigm case that drove the courts back into the business of second-guessing the legislature, at least within a defined sphere. The trend that *Brown* began was foreshadowed in *United States v. Carolene Products Co.*, 304 U.S. 144, 153 n.4 (1938) (posing the question "whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry"). Justice Frankfurter explicitly criticized footnote four of the *Carolene Products* decision in *Dennis*, 341 U.S. at 526-27 (arguing that the "imprecise words" of footnote four have engendered the belief that statutes restricting free expression are not presumptively valid).

<sup>171</sup> See *supra* notes 32-54 and accompanying text.

<sup>172</sup> See A. BICKEL, *supra* note 44, at 24-28.

<sup>173</sup> See *supra* notes 48-51 and accompanying text.

<sup>174</sup> Any theory that recommends judicial activity on behalf of certain preferred values descends from Bickel's work. Most modern constitutional theorists defend some such position. See e.g., J. ELY, *supra* note 131, at 87-88 (arguing for representation-reinforcing review); M. PERRY, *supra* note 98, at 91-145 (arguing for non-interpretive review with respect to human rights issues).



the judiciary's role vis-à-vis these special areas. The judicial monopoly assumption arises out of that rhetoric. In sum, during the first half of this century, lawyers responded to a broad intellectual trend by rejecting the view that courts could decide the constitutional validity of legislation without replacing legislative judgments with their own. This led many of our most thoughtful jurists to wash their hands of most constitutional adjudication, choosing instead to defer to the legislature. In the last 35 years, courts have reoccupied a defined part of the constitutional realm, but this part is much smaller than the whole. Outside of this defined area, Congress and the President exercise almost complete freedom to interpret the requirements of our fundamental law.

### 3. Post-Realist Constitutional Practice

The preceding history shows why the argument that courts defer to political judgments of policy, but decide legal questions for themselves, is untenable. The realists left us without a sharp distinction between legal and nonlegal decisions, a distinction that is essential to that argument.<sup>176</sup> The same history also shows why one cannot dismiss deference as a peripheral part of our constitutional law. The realist view of adjudication led the courts to withdraw from important aspects of constitutional decisionmaking. Examples will help clarify both these points.

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<sup>176</sup> Ronald Dworkin has spent much of his career trying to restore the distinction between the legislative and judicial functions to prerealist clarity. He has argued that judicial decisions should be motivated only by principle, not by policy:

[J]udges neither should be nor are deputy legislators, and the familiar assumption, that when they go beyond political decisions already made by someone else they are legislating is misleading. It misses the importance of a fundamental distinction within political theory, which I shall now introduce in a crude form. This is the distinction between arguments of principle on the one hand and arguments of policy on the other.

Arguments of policy justify a political decision by showing that the decision advances or protects some collective goal of the community as a whole. . . . Arguments of principle justify a political decision by showing that the decision respects or secures some individual or group right. . . .

. . . .  
I propose . . . the thesis that judicial decisions in civil cases, even in hard cases . . . , characteristically are and should be generated by principle not policy.

Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057, 1058-60 (1975).

Dworkin's powers of persuasion are considerable, but his view of adjudication has not yet replaced that with which the realists left us. Formalism is more difficult to replace than Dworkin would have us believe. See R. UNGER, *supra* note 161, at 92 ("[T]he destruction of formalism brings in its wake the ruin of all other liberal doctrines of adjudication.").

a. *Distinguishing Legal and Nonlegal Decisions*

If deference means that the same issue courts would have resolved had they asserted themselves gets resolved politically, the argument that judicial deference reserves all legal issues for judicial resolution is untenable. In post-realist American practice, that is precisely what deference means. As a result, judicial deference to Congress or the executive branch typically leaves a constitutional issue to nonjudicial resolution. A distinction among such exercises of deference can only be one of degree.<sup>176</sup> The more sweeping the deference, the broader the field it leaves for nonjudicial interpretation.<sup>177</sup> Comparing the questions courts decide in an area of constitutional law in which they are active with similar issues they leave to political resolution in an area in which they are passive will make this point concrete. Such a comparison reveals the problems with any attempt to distinguish deference that leaves questions of interpretation to political resolution from deference that does not.

The first amendment has been the basis of a great deal of judicial activity. Doctrine in the area of restrictions on dissemination of dangerous ideas exemplifies the courts' approach toward constitutional issues when they exercise their power to resolve them.

Most discussions of the first amendment proceed as though first amendment doctrine began with Justice Holmes' opinion in *Schenck v. United States*.<sup>178</sup> That opinion represents a break with what went before, but what went before is instructive. Nineteenth-century free speech analysis turned on an a priori determination of whether the conduct restrained was "speech" within the meaning of the first amendment. Courts distinguished between speech and abuse thereof, and they left legislatures free to restrain the latter. "Opinions constantly reiter-

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<sup>176</sup> Although Professor Redish distinguished between substantive deference that reserves legal issues to the courts and procedural deference that leaves such issues to nonjudicial resolution, *see supra* note 142, he, too, seems to recognize that the distinction is largely a matter of degree: "It might be argued that authorizing the judiciary to engage in 'substantive' deference effectively allows the legislative and executive branches the same freedom of operation that I have opposed in rejecting . . . 'procedural' deference." Redish, *supra* note 4 at 1049 n.96. At one point Redish argues that some decisions presented as substantive deference are procedural in all but name, *see id.* at 1037-39, but he seems oblivious to the threat this insight poses to his distinction between substantive and procedural deference. He merely indicates that, although the distinction may be one of degree, it is important because "the fundamental purposes of judicial review" are served as long as the judiciary maintains a "floor of protection." *Id.* at 1049 n.96. As Redish himself has noted, however, even substantive deference commonly removes that floor. *See id.* at 1037-39.

<sup>177</sup> Some of the deference our courts practice sweeps very broadly indeed. *See infra* notes 186-95 and accompanying text.

<sup>178</sup> 249 U.S. 47 (1919).

ated that the First Amendment . . . [did] not protect 'license' or the 'abuse' of speech."<sup>179</sup> Casting the issue in these terms had the virtue of suppressing any question regarding the propriety of having judges resolve the question.

Realism made this approach to the first amendment as implausible as it made every other effort to interpret the Constitution on the basis of a priori knowledge. Justice Holmes' opinion in *Schenck* conformed first amendment doctrine to the realist view of adjudication. According to Justice Holmes, the constitutional question concerned the extent to which the speech at issue posed a threat.<sup>180</sup> Constitutionally, Congress could prohibit any speech "of such a nature as to create a clear and present danger that [it] will bring about the substantive evils that Congress has a right to prevent."<sup>181</sup> Under this test, first amendment analysis became a process of striking a balance between the danger posed by the speech at issue and the constitutional value of freedom of speech.

This "clear and present danger" standard has had a checkered career. Some justices have even sought to revive the nineteenth-century a priori approach.<sup>182</sup> But the structure of the Supreme Court's analysis of restraints on dangerous speech has remained what *Schenck* made it.<sup>183</sup>

<sup>179</sup> Rabban, *The First Amendment in Its Forgotten Years*, 90 YALE L.J. 514, 523-24 (1981).

<sup>180</sup> See *Schenck*, 249 U.S. at 52. *Schenck* concerned the constitutionality of convictions under the Espionage Act of 1917 for obstructing military recruiting by circulating a pamphlet that attacked the moral and constitutional validity of conscription. See *id.* at 48-49.

<sup>181</sup> *Id.* at 52.

<sup>182</sup> Justice Douglas sought to distinguish simple speech, which the Court should protect, from "speech brigaded with action," for which government-imposed restrictions are appropriate. See *Brandenburg v. Ohio*, 395 U.S. 444, 456 (1969) (Douglas, J., concurring). Justice Douglas' distinction was an effort to resurrect the a priori approach. Justices also rely on an a priori approach when they distinguish between ordinary speech and behavior that is "mainly conduct and little speech" in order to describe behavior the government can regulate. See, e.g., *Cohen v. California*, 403 U.S. 15, 27 (1971) (Blackmun, J., dissenting) (finding the case to involve a clear example of conduct that may be regulated, rather than protected speech).

<sup>183</sup> Since *Brandenburg*, the Court has struck down governmental restraints on dangerous speech, see *Hess v. Indiana*, 414, U.S. 105, 109 (1973) ("[S]ince there was no evidence . . . that his words were intended to produce, and likely to produce *imminent* disorder, those words could not be punished by the State on the ground that they had a 'tendency to lead to violence.'" (emphasis in original) (quoting *Hess v. State*, 260 Ind. 427, 429, 297 N.E.2d 413, 415 (1973) (quoting *Whited v. State*, 256 Ind. 386, 391, 269 N.E.2d 149, 152 (1971)) (emphasis deleted by Indiana *Hess* court)) except speech that is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action," *Brandenburg*, 395 U.S. at 447; see also *Hess*, 414 U.S. at 108 (quoting the same language from *Brandenburg*); 3 R. ROTUNDA, J. NOWAK & J.N. YOUNG, *TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE* § 20.15, at 64 (1986) (stating that *Hess* "indicates that the Court is serious and literal in its application of the test proposed in *Brandenburg*"). This formula has not, however, changed the nature of first amendment inquiry. It merely expresses a judgment

For our purposes, the important point is that the validity of a governmental restraint on dangerous speech depends on whether the risk the speech poses outweighs the constitutional value of free speech.<sup>184</sup> It was once respectable to argue that courts should leave this determination to legislatures.<sup>185</sup> It is now broadly accepted, however, that such a determination is one for the courts.

It is difficult to distinguish such a determination regarding the "dangerousness" of speech from the judgments courts avoid when they consider cases asserting that Congress has enacted legislation beyond the scope of its constitutional powers. Commerce clause doctrine provides a convenient illustration of this.

In the early part of this century, courts decided commerce clause questions by determining whether what Congress sought to regulate was commerce<sup>186</sup> or affected commerce directly.<sup>187</sup> The assumption un-

about the point at which the danger of the speech outweighs the values embodied in the first amendment. In other words, both *Schenck* and *Brandenburg* prescribe balancing. The only difference is that *Schenck* directs courts to balance on an ad hoc basis and *Brandenburg* seeks to constrain them by balancing at the outset. This difference may be significant for some purposes, but for purposes of this Article, the important point is that some sort of balancing is involved in deciding first amendment cases.

John Ely put forward the interesting argument that there is a significant difference between the approach in *Brandenburg*, which he terms an "unprotected messages" approach, and that in *Schenck*, which he terms a "specific threat" approach. See J. ELY, *supra* note 131, at 110. Ely indicated that an "unprotected messages" approach is much more likely to lead courts to protect speech in difficult times than an ad hoc approach such as the "clear and present danger" test. See *id.* at 105-16; see also Gunther, *Learned Hand and The Origins of Modern First Amendment Doctrine: Some Fragments of History*, 27 STAN. L. REV. 719, 721-22 (1975) (discussing the relationship between the "clear and present danger" standard, and the "incitement" standard). Ely argues that, to protect speech, judges must define limited categories of unprotected speech and strike down any limitations on speech that fall outside the categories. Even if this argument were persuasive, nothing in Ely's analysis indicates that the analytical structure of the Court's approach to the first amendment would be radically different from Justice Holmes' approach in *Schenck*.

<sup>184</sup> It is a reflection of the hold scientific naturalism has on our minds that we have difficulty conceiving of the issue in any other terms.

<sup>185</sup> Justice Frankfurter's opinion in *Dennis v. United States*, 341 U.S. 495 (1951), shows this. See *supra* note 167. The view that the legislature's determination as to the need for controlling speech should be authoritative once commanded a majority of the Court. See, e.g., *Whitney v. California*, 274 U.S. 357, 371 (1927) (affirming a conviction under a state syndicalism act for membership in a communist political party); *Gitlow v. New York*, 268 U.S. 652, 668 (1925) (affirming a conviction for criminal anarchy for publishing a socialist newspaper).

<sup>186</sup> See, e.g., *Hammer v. Dagenhart*, 247 U.S. 251, 272 (1918) (striking down a child labor law on the ground that it regulated manufacturing and "the making of goods and the mining of coal are not commerce").

<sup>187</sup> The Court took this approach in *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), striking down part of the National Industrial Recovery Act on the ground that it exceeded the commerce power. The Court held, among other things, that the act reached transactions that did not affect interstate commerce directly. See *id.* at 546; see also *Carter v. Carter Coal Co.*, 298 U.S. 238, 308 (1936) ("The

derlying this approach is familiar: Judges can distinguish a priori between commerce and noncommerce and between direct and indirect effects.

The twentieth century intellectual climate proved just as inhospitable to these distinctions as it did to the distinction between speech and abuse thereof. Like first amendment doctrine, commerce clause doctrine departed from the a priori approach, with *NLRB v. Jones & Laughlin Steel Corp.*<sup>188</sup> marking the turning point. The Supreme Court rejected arguments based on its earlier, categorical exclusion of "manufacturing" from "commerce."<sup>189</sup> Instead, the Court held that Congress had the power to protect commerce against any threat, including intrastate labor unrest. It noted, however, that the congressional power over intrastate activities was not unlimited:

[I]f [intrastate activities] have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control. Undoubtedly the scope of this power . . . may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them . . . would effectually obliterate the distinction between what is national and what is local. . . . The question is necessarily one of degree.<sup>190</sup>

The Court's approach in *Jones & Laughlin Steel* makes congressional power under the commerce clause turn on whether or not Congress is regulating activities with a sufficiently "substantial" relation to interstate commerce. Whether the relation is substantial depends on striking the proper balance between the state and federal interests in-

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word 'direct' implies that the activity or condition invoked or blamed shall operate proximately—not mediately, remotely, or collaterally—to produce the effect. It connotes the absence of an efficient intervening agency or condition.”)

<sup>188</sup> 301 U.S. 1 (1937). In this case, the Court considered the constitutionality of the NLRA. The plaintiff claimed that Congress lacked the power to regulate industrial relations between a manufacturer and its employees. This argument rested on a series of cases following the a priori approach that had defined commerce to exclude manufacturing.

<sup>189</sup> *Compare id.* at 34, 40 (The Court rejected “the proposition that manufacturing in itself is not commerce” because “the fact that the employees here concerned were engaged in production is not determinative. The question remains as to the effect upon interstate commerce of the labor practice involved.”) with *United States v. E.C. Knight Co.*, 156 U.S. 1, 11-12 (1895) (discussing the need to distinguish “commerce” from “manufacture” in order to maintain the distinction between the state’s “police power” and the federal power to regulate interstate commerce).

<sup>190</sup> *Id.* at 37 (citation omitted).

volved, and subsequent cases under the commerce clause show that the courts will not strike this balance.<sup>191</sup> They leave that task to the political branches of government.

The issue the Court considers inappropriate for judicial resolution in commerce clause cases is startlingly similar to the question it reserves to itself in first amendment cases. Both involve determining the extent to which federal power can intrude upon a constitutionally protected value, speech or federalism, without violating the Constitution. One cannot designate the question courts decide in first amendment cases as "legal" and the question they avoid in commerce clause cases as "non-legal" without relying on a meaningless tautology: A question is legal if resolved authoritatively by a court; it is nonlegal if resolved by any other decisionmaker. Either both questions involve constitutional interpretation or neither does.

#### b. *The Importance of Judicial Deference*

Commerce clause doctrine also provides a concrete example of the extent to which judicial deference is an important part of our constitutional law.<sup>192</sup> That example is a serious embarrassment for anyone who would argue that deference is a peripheral enough part of that law to be compatible with the judicial monopoly assumption. The Court's permissive approach to ascertaining the scope of congressional commerce power makes the political branches of government responsible for developing one of the central aspects of our constitutional law. It leaves the federal government free to displace state law and to ignore state interests in any area remotely related to economic activities, without

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<sup>191</sup> See, e.g., *Wickard v. Filburn*, 317 U.S. 111 (1942) (holding that the question whether crops grown for home use have a substantial effect on commerce is a matter for Congress to determine); see also *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964) (upholding Congress' authority to determine that a hotel can have a substantial effect on interstate commerce and is therefore subject to the nondiscrimination requirements of the Civil Rights Act of 1964); *Katzenbach v. McClung*, 379 U.S. 294 (1964) (same, for a restaurant).

<sup>192</sup> *Williamson v. Lee Optical*, 348 U.S. 483 (1955), which I have already discussed, represents another sweeping deferential doctrine. For a discussion of judicial deference to the legislature, see *supra* notes 131-43 and accompanying text. Courts defer to almost any legislative determination that an interference with financial interests is supported by the constitutionally required justification. Thus, a claim of unconstitutional interference with such interests is most unlikely to get a hearing in court. The political branches of government are left to define the scope of the Constitution's protection for property. *But see* *Allied Steel Co. v. Spannaus*, 438 U.S. 234, 248-51 (1978) (striking down economic regulation under the contract clause over a vigorous dissent by Justice Brennan); Kmiec & McGinnis, *The Contract Clause: A Return to the Original Understanding*, 14 HASTINGS CONST. L.Q. 525, 544-45 (1987) (asserting that the Burger Court partially revived the contract clause by raising the standard of review and invalidating statutes under the clause for the first time since the 1940s).

fear of judicial intervention. In effect, the Court refuses to play any significant role in defining the relationship between the states and the federal government. If one overlooks a single, short-lived backsliding episode,<sup>193</sup> the Court has been remarkably consistent about staying above the fray on federalism questions. Because federal-state relationships are a major area of constitutional concern,<sup>194</sup> this judicial aloofness leaves the political branches of government with broad responsibility for developing our constitutional tradition.<sup>195</sup>

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<sup>193</sup> See *National League of Cities v. Usery*, 426 U.S. 833, 845-52 (1976) (holding that the commerce clause does not permit Congress to require state governments to comply with certain provisions of the FLSA with respect to certain employees). Although the decision was subsequently overruled in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), Justice Brennan's dissent in *National League of Cities* gives abundant evidence that the case was anomalous. See *National League of Cities*, 426 U.S. at 856-81 (Brennan, J., dissenting). Scholarly criticism of the *National League of Cities* opinion reinforced this view. See, e.g., Alfange, *Congressional Regulation of the "States Qua States": From National League of Cities to EEOC v. Wyoming*, 1983 SUP. CT. REV. 215, 216-17 (calling scholarly criticism of *National League of Cities* justified); Barber, *National League of Cities v. Usery: New Meaning for the Tenth Amendment*, 1976 SUP. CT. REV. 161, 162 (stating that the *National League of Cities* opinion shattered the previous orthodox interpretation of the tenth amendment); Michelman, *States' Rights and States' Roles: Permutations of "Sovereignty" in National League of Cities v. Usery*, 86 YALE L.J. 1165, 1192 (1977) (stating that the *National League of Cities* opinion is an "outrageous" presentation of a "falsification" of the only considerations that might support the result). The concept that the political branches of government are the guardians of federalism is so ingrained in our legal culture, see Wechsler, *The Political Safeguards of Federalism: The Rôle of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 559 (1954), that one prominent scholar explained *National League of Cities* as a "cue" to Congress that it must judge its "own actions to see if they conform to the limits and restraints placed on them by the Constitution," P. BOBBITT, *CONSTITUTIONAL FATE* 192 (1982).

<sup>194</sup> Justice Powell's dissent in *Garcia* includes an eloquent description of federalism's place in our constitutional order:

In our federal system, the states have a major role that cannot be preempted by the National Government. As contemporaneous writings and the debates at the ratifying conventions make clear, the States' ratification of the Constitution was predicated on this understanding of federalism. Indeed, the Tenth Amendment was adopted specifically to ensure that the important role promised the States by the proponents of the Constitution was realized. . . . The Framers believed that the separate sphere of sovereignty reserved to the States would ensure that the States would serve as an effective "counterpoise" to the power of the Federal Government. . . . [B]y usurping functions traditionally performed by the States, federal overreaching under the Commerce Clause undermines the constitutionally mandated balance of power between the States and the Federal Government, a balance designed to protect our fundamental liberties.

*Garcia*, 469 U.S. at 571-72 (Powell, J., dissenting).

<sup>195</sup> Donald Morgan recognized the extent of congressional responsibility for constitutional interpretation. He noted that "there are innumerable actions which Congress has legal power to take which fundamental principle would nevertheless counsel against." D. MORGAN, *supra* note 5, at 36. Such actions raise "broad" questions of interpretation." *Id.* He also noted that "[c]ourt reinterpretation of clauses granting fed-

Deference as American courts practice it leaves important categories of constitutional issues to nonjudicial resolution. As a result, no theory of American constitutional law can maintain that the judiciary has a monopoly on constitutional interpretation without ignoring too much of the relevant data. To say that the judiciary should have such a monopoly is to state a utopian ideal. Nothing could be further from the reality of our constitutional practice.<sup>186</sup> Any claim that the political question doctrine fails to fit that practice because it seeks to define limits on the scope of judicial review is nonsensical.

#### IV. THE NORMATIVE CLAIM FOR EXPANSIVE JUDICIAL REVIEW AND OUR CONSTITUTIONAL TRADITION

Critics of the political question doctrine are not completely disarmed by a showing that exceptions to the rule of judicial review are consistent with our constitutional tradition. A critic who reads Professor Dworkin with care might argue that we should adopt the judicial monopoly assumption despite its poor fit with that tradition. Dworkin tells us that an interpretation that performs poorly along the dimension of fit may nonetheless be the "right" interpretation if it has enough appeal as a matter of political morality.<sup>187</sup> In keeping with this view, some critics use the cataclysmic consequences assumption as part of an implicit argument that sound political morality requires absolute judicial control over constitutional interpretation, even if we must strain to make such absolute control fit our constitutional tradition.<sup>188</sup> Such an

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eral powers to Congress, and to some degree of those concerning executive-legislative relations, has eliminated many questions of literal interpretation and converted them into broad questions." *Id.* at 341. With respect to such questions, Congress "faces the task of independently searching constitutional principles." *Id.*

<sup>186</sup> Professor Redish is one of the few proponents of the judicial monopoly assumption who seems to recognize this. He sees the inconsistency between that assumption and commerce clause doctrine, but he is willing to argue that this inconsistency means the Supreme Court has gotten the doctrine wrong. In a recent article, he and a coauthor propose that the Supreme Court take a far more active role in "interpreting and enforcing the Constitution's federalism provisions." Redish and Drizen, *Constitutional Federalism and Judicial Review: The Role of Textual Analysis*, 62 N.Y.U. L. REV. 1, 5 (1987). The commerce clause is the "federalism provision" to which they direct most of their attention.

<sup>187</sup> As Dworkin has stated:

[A]ny plausible theory of interpretation . . . will call for some cross influence between the level of fit at which the threshold is fixed and the substantive issues involved. If an interpretation of some string of cases is far superior "substantively" it may be given the benefit of a less stringent test of fit for that reason.

Dworkin, "Natural" Law Revisited, 34 U. FLA. L. REV. 165, 172 (1982).

<sup>188</sup> See *supra* notes 83-84 and accompanying text.



argument can be summarized as follows: The alternative to universal judicial review is lawlessness; lawlessness is to be avoided at all costs; we cannot, therefore, tolerate any exceptions to judicial review.<sup>199</sup>

### A. *Defending the Cataclysmic Consequences Assumption*

There are at least two arguments that can be used to justify the cataclysmic consequences assumption. First, one could argue that it follows from the correct definition of law that only rules courts enforce impose legal obligations on the political branches of government. This might give substance to the charge that the alternative to judicial review is lawlessness. Second, one could argue that the behavior of the political branches of government is, in fact, lawless in the absence of judicial supervision. If Congress and the President pay no attention to constitutional concerns that are unlikely candidates for judicial vindication, then the cataclysmic consequences assumption accurately reflects our system.

#### 1. Postulate 1: Only Judicially Enforceable Rules Impose Legal Obligations on the Political Branches

Professor McCormack seems to take the first approach.<sup>200</sup> He suggests that positivist jurisprudence leads to the conclusion that the political branches of government can have no obligations under the Constitution except those obligations the courts enforce.<sup>201</sup> He repeatedly argues that without judicial enforcement, constitutional provisions are merely "hortatory," not legal at all.<sup>202</sup> Professor McCormack's use of the

<sup>199</sup> The flaw in this argument is its first premise. Lawlessness is not the necessary alternative to judicial review. Far less is at stake when the courts exempt certain issues from judicial review than the critics suppose.

<sup>200</sup> See McCormack, *supra* note 3, at 634.

<sup>201</sup> "At least with regard to constitutional constraints, law must exist apart from the enforcers, because there can be no such thing as unenforceable law. To this degree, we are all positivists . . ." *Id.*

<sup>202</sup> As Professor McCormack states:

The notion that the Constitution imposes duties that are not enforceable may be in keeping with some modern strands of legal philosophy. But it markedly changes the Constitution from a positive check on government into a set of hortatory directives that "We the People" may be quite incapable of enforcing.

*Id.* at 596 n.8 (citation omitted). McCormack recognizes that a provision of the Constitution that the courts will not enforce may retain some "debate value", but he suggests that this value is not significant. He says that although members of Congress can still argue that an unenforceable provision should control, "nobody is likely to take the argument very seriously if the Court has already declared the provision to be nonenforceable." *Id.* at 599. This assumption is, at least, debatable. See *infra* notes 211-13 and accompanying text.

phrase "the concept of law" in his title implies a reference to H.L.A. Hart.<sup>203</sup> This is as close as he comes to citing specific jurisprudential support for the argument that legal obligation can arise only from judicially enforceable rules. Professor Hart's theory, however, does not support Professor McCormack's argument.

One of Professor Hart's many contributions to positivist jurisprudence was a sophisticated description of the normative aspect of legal obligation.<sup>204</sup> His positivist predecessors had depicted law as "orders backed by threats given by one generally obeyed" and not accustomed to obeying any other authority.<sup>205</sup> This view is often associated with John Austin.<sup>206</sup> For Austin, legal obligation arises from the threat of sanctions that lie behind a legal command. His critics pointed out that his definition of law contains no normative element; it matches a bandit's extortion as well as the most benign acts of the most representative legislature.<sup>207</sup> Professor Hart refined the positivist view of law to account for the normative element in our understanding of legal obligation and thus distinguish between these situations. Professor Hart's theory of legal obligation is more complex than Austin's.<sup>208</sup>

Professor Hart argues that societal understandings about what rules we are obligated to obey—not the mere threat of force—are the basis of legal obligation. This view of law implies no necessary connection between organized sanctions and legal obligation. Professor Hart made this point explicit, stating that "once we free ourselves from the

<sup>203</sup> See H.L.A. HART, *THE CONCEPT OF LAW* (1961).

<sup>204</sup> See R. DWORKIN, *TAKING RIGHTS SERIOUSLY* 19-20 (1977).

<sup>205</sup> H.L.A. HART, *supra* note 203, at 24.

<sup>206</sup> See R. DWORKIN, *supra* note 204, at 21.

<sup>207</sup> As Dworkin observed:

[C]ritics began to realize that Austin's analysis fails entirely to account for, even to recognize, certain striking facts about the attitudes we take toward "the law." We make an important distinction between law and even the general orders of a gangster. We feel that the law's strictures—and its sanctions—are different in that they are obligatory in a way that the out-law's commands are not.

*Id.* at 18-19.

<sup>208</sup> Professor Hart's theory may or may not be more useful, depending on the purpose to which one puts a theory of obligation. As a definition of that which is essential to a legal system, Austin's model remains at least defensible.

Austin's model of law is an effort at definition. It claims that the essence of law is coercion and that other features are not essential. . . . This claim that law is coercive is compatible with the existence of a normative attitude among some people; indeed, even the idea of an order backed by a threat entails at least one normative (uncoerced) attitude on the part of the person or persons doing the ordering.

P. SOPER, *A THEORY OF LAW* 26 (1984). Thus, Austin could respond to Hart that a normative attitude is "no more essential to law than cushions or rockers are essential to chairs." *Id.* at 22.

. . . conception of law as essentially an order backed by threats, there seems no good reason for limiting the normative idea of obligation to rules supported by organized sanctions."<sup>209</sup> Judicial enforcement is just one kind of organized sanction. If Hart's theory provides no basis for making sanctions a prerequisite of obligation, it cannot support an argument that only rules enforced by courts can give rise to legal obligation.<sup>210</sup>

Even if Professor Hart is wrong and some coercive sanctions are essential to law, it does not follow that every legal rule must be enforceable in court before it can bind the government. Judicial enforcement of restrictions on the political branches of government is hardly a coercive sanction. Ultimately, "[t]he judiciary . . . has no influence over either the sword or the purse. . . . It may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments."<sup>211</sup> The commands of a court are themselves merely "hortatory" when addressed to Congress or the President. If coercive sanctions are essential to law, then no law binds the political branches of government, regardless of whether the courts stand ready to enforce constitutional restrictions on their activities.

The judiciary can, however, focus public disapproval on unlawful acts by the political branches of government. This capacity to mobilize public opinion may give it some leverage against the other branches of government, but there is no reason to think lawless acts by government officials can never provoke public outrage in the absence of a court ruling. Government officials are typically under pressure from public opinion to obey the law with or without judicial involvement.

*United States v. Nixon*<sup>212</sup> provides an example. Professor Redish uses this case to illustrate the political risks to government officials of ignoring judicial decisions concerning the requirements of law. He points out that "President Nixon could not have seriously considered ignoring the Court's conclusion that he must supply his tapes to Congress, because the political costs would have been too high."<sup>213</sup> This conclusion seems right. Ultimately, however, the political costs to Nixon of retaining the tapes would likely have been the same even if the Court had not become involved. Disobeying the Court would prob-

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<sup>209</sup> H.L.A. HART, *supra* note 203, at 213.

<sup>210</sup> See *supra* note 203 and accompanying text.

<sup>211</sup> THE FEDERALIST NO. 78, at 465 (A. Hamilton) (C. Rossiter ed. 1961).

<sup>212</sup> 418 U.S. 683 (1974).

<sup>213</sup> Redish, *supra* note 4, at 1054. In fact, the Court concluded that Nixon had to supply his tapes to the special prosecutor. See *Nixon*, 418 U.S. at 713. This detail does not, however, detract from Redish's point.

ably have led to impeachment; refusing to deliver the tapes in the absence of any court order could easily have had the same result.

There is nothing so fearsome about a court order that we should assume government officials are much more wary of violating the Constitution when the courts may scold them for it than when public outrage is the only sanction. This discredits any attempt to distinguish between binding provisions of the Constitution and those that are merely "hortatory" based on the degree of judicial enforcement they enjoy.

## 2. Postulate 2: The Behavior of the Political Branches is Lawless in the Absence of Judicial Supervision

Even if judicial sanctions are not logically necessary to ensure lawful behavior of government officials, the cataclysmic consequences assumption might reflect the reality of American constitutional practice. The political branches of our government might behave as though the requirements of the Constitution are coextensive with the constitutional requirements that courts enforce. If congressional and executive branch officials disregard all constitutional values that the courts will not implement, the cataclysmic consequences assumption is valid.

This concession does not open much of a window to the proponents of that assumption. There is little evidence that the political branches of government concern themselves with the Constitution only under threat of judicial enforcement. In fact, there is substantial evidence to the contrary.

Scholars rarely bother to construct an argument that the political branches of government are constitutionally irresponsible.<sup>214</sup> When they do, however, their arguments typically begin and end with the criticism that the political branches of government do not behave like the judiciary.<sup>215</sup>

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<sup>214</sup> Bald statements that they are, however, are common. See, e.g., Fiss, *The Supreme Court 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 9-10 (1980) ("Legislatures . . . are not ideologically committed or institutionally suited to search for the meaning of constitutional values, but instead see their primary function in terms of registering the actual, occurrent preferences of the people—what they want and what they believe should be done.").

<sup>215</sup> Dean Brest notes that "Congress possesses many of the resources necessary for informed constitutional decisionmaking." Brest, *Congress as Constitutional Decisionmaker and Its Power to Counter Judicial Doctrine*, 21 GA. L. REV. 57, 98 (1986). He argues, however, that it uses those resources badly. The thrust of his argument is that Congress is not set up sufficiently like a court. "Although it would be unreasonable to expect Congress to act just like a court, a comparison with adjudication highlights some of Congress' weaknesses." *Id.* Brest uses this argument to support his point that Congress is not responsible enough for constitutional matters, that it cannot properly contradict the Supreme Court's resolution of a constitutional question: "Until and

Judge Abner Mikva made an argument of this sort in a recent article. He drew a sweeping conclusion:

[C]onstitutional decisions, if they are being made at all, are being made by the Supreme Court. While constitutional rhetoric occasionally finds its way into the legislative history of a statute . . . for the most part the legislators are motivated by a desire to enact any particular piece of legislation that fills the perceived needs of the moment.<sup>216</sup>

Judge Mikva based this conclusion on three examples of congressional deliberations concerning constitutional issues.<sup>217</sup> He conceded that Congress debated each of the issues at some length, but that did not prompt him to qualify his conclusion.

Judge Mikva's first example was the extension of the provisions of the Fair Labor Standards Act to state and local government employees.<sup>218</sup> Judge Mikva complains that Congress did not "conduct an independent constitutional review"<sup>219</sup> of the legislation, and thus failed to consider the constitutional concerns that led the Supreme Court to strike down part of the FLSA in *National League of Cities v. Usery*.<sup>220</sup> He acknowledges, however, that "opponents of the extension protested that it represented an 'unjustified intrusion upon areas of state sovereignty.'" <sup>221</sup> This is a constitutional objection; indeed, it is precisely the rationale of the majority opinion in *National League of Cities*.<sup>222</sup> After admitting that Congress considered this constitutional issue, Judge Mikva can preserve the utility of his example only by arguing that those who raised the sovereignty objection claimed merely that the intrusion on the states was unwarranted, not that it was unconstitutional. This is a verbal quibble. It merely proves that members of Congress in

unless Congress develops systematic and trustworthy procedures of constitutional decisionmaking, Congress may not counter the Court's decisions . . ." *Id.* at 103. I have no dispute with this point. My thesis is that the argument concerning congressional irresponsibility cannot support the broader point that the political branches of government are not to be trusted with any aspect of constitutional interpretation.

<sup>216</sup> Mikva, *How Well Does Congress Support and Defend the Constitution?*, 61 N.C.L. REV. 587, 606 (1983).

<sup>217</sup> See *id.* at 590-91.

<sup>218</sup> See *id.* at 591-93 (citing 29 U.S.C. §§ 201-219, 255, 260 (1976 & Supp. IV 1980)).

<sup>219</sup> *Id.* at 593.

<sup>220</sup> 426 U.S. 833 (1976).

<sup>221</sup> Mikva, *supra* note 216, at 592 (quoting HOUSE COMM. ON EDUCATION AND LABOR, FAIR LABOR STANDARDS AMENDMENTS OF 1973, H.R. REP. NO. 232, 93d Cong., 1st Sess. 94 (minority views)).

<sup>222</sup> See *National League of Cities*, 426 U.S. at 842 (stating that "there are limits upon the power of Congress to override state sovereignty").

debate do not express themselves in exactly the same terms employed by judges in opinions.

Judge Mikva's other examples also fail to support his conclusions.<sup>223</sup> In each case he describes a vigorous congressional debate that aired relevant constitutional issues, and concludes with the non sequitur that the debate demonstrates Congress' constitutional irresponsibility.<sup>224</sup> His most damaging allegations are that Congress failed to reach the same result that the Supreme Court reached later,<sup>225</sup> that the lower courts had already reached,<sup>226</sup> or that he prefers.<sup>227</sup>

<sup>223</sup> His other two examples are congressional consideration of the legislative veto provision in amendments to the Administrative Procedure Act and enactment of section 3576 of the Organized Crime Control Act of 1970. See Mikva, *supra* note 216, at 593, 600. In examining the legislative veto matter, Judge Mikva quoted Senator Schmitt, who argued for the legislative veto in spite of *Consumer Energy Council of America v. FERC*, 673 F.2d 425, 448-51 (D.C. Cir. 1982) (holding the legislative veto to be unconstitutional). Senator Schmitt criticized the court's opinion as grounded in "an idealized conception of the separation of powers that is neither historically accurate nor has, until now, been actually applied to overturn an act of Congress." Mikva, *supra* note 216, at 597-98 (citing 128 CONG. REC. S2578 (daily ed. Mar. 23, 1982) (statement of Sen. Schmitt)). Judge Mikva also cites statements that urge the Senate to find the veto an unconstitutional substitute for genuine congressional supervision of administrative agencies, see *id.* at 599 n.62, yet he concludes: "On the matter of constitutionality, the debates, to the extent they took place, are filled with self-serving conclusory congressional discussion, the value of which is not easy to determine," *id.* at 600.

In discussing his third example, Judge Mikva acknowledges that the Senate Committee on the Judiciary relied heavily on extensive expert testimony concerning the constitutionality of the Organized Crime Control Act. See *id.* at 601. He also acknowledges that this testimony played a role in congressional debate. See *id.* at 603. Judge Mikva nonetheless regards his examples as support for his sweeping conclusions. See *id.* at 606.

<sup>224</sup> Not everyone seems to agree with Judge Mikva. See Fisher, *Constitutional Interpretation by Members of Congress*, 63 N.C.L. REV. 707, 708 (1985) (maintaining "that Congress can perform an essential, broad, and ongoing role in shaping the meaning of the Constitution").

<sup>225</sup> With respect to the Fair Labor Standards Act, Judge Mikva seems upset that Congress reached a result different from the Court's result in *National League of Cities*. He says that *National League of Cities* "came as a complete surprise to Congress." Mikva, *supra* note 216, at 591. Of course, as Louis Fisher pointed out, "[i]t also came as a surprise to constitutional scholars and to the four dissenting Justices." Fisher, *supra* note 224, at 733.

<sup>226</sup> Judge Mikva's criticism of congressional deliberations regarding the legislative veto seems to be related to Congress' failure to follow a D.C. Circuit decision. See *supra* note 223.

<sup>227</sup> Judge Mikva's reaction to Congress' decision to enact the Organized Crime Control Act seems colored by his vehement opposition to the bill as a Representative. As a Member of the House, Representative Mikva made caustic contributions to the debate: "This bill is another dreary episode in the ponderous assault on freedom . . . . [I]t rips off large chunks of the Constitution . . . . [I]t is a repressive shotgun which shoots down innocent and guilty with equal diffidence." H.R. REP. NO. 1549, 91st Cong., 2d Sess. 181 (1970), reprinted in 1970 U.S. CODE CONG. & ADMIN. NEWS 4007, 4076-77 (dissenting views of Rep. Conyers, Rep. Mikva, and Rep. Ryan).

## B. Evidence of the Constitutional Responsibility of Government Officials

Nobody has outdone Judge Mikva in arguing that the political branches of government ignore constitutional values. The absence of a better demonstration of political irresponsibility should, by itself, raise doubts about the political behavior alleged to warrant the cataclysmic consequences assumption. But there is also substantial affirmative evidence showing the falsity of this view of political behavior.

The continued vitality of the states as governmental entities provides the most compelling evidence that the political branches of the government do not routinely trample constitutional values. Congress and the President act as guardians of the federal system. For fifty years the judiciary has not supervised the manner in which they perform that function.<sup>228</sup> Although the scope of federal activities has grown dramatically, the states have survived, and states appear to be in no danger of extinction.<sup>229</sup> New forms of federal and state cooperation have arisen that preserve a role for the states even in some areas of intense federal activity.<sup>230</sup> Anyone arguing that the judicial whip is the only thing that keeps the political branches of government from discarding all constitutional restraints will have difficulty explaining the continuing health of federalism in the United States.

An example of congressional concern for state prerogatives arose during the adoption of the Federal Rules of Evidence.<sup>231</sup> By 1973, the Advisory Committee had prepared a draft of proposed rules that the Supreme Court had approved and forwarded to Congress.<sup>232</sup> The adop-

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<sup>228</sup> See *supra* notes 193-95 and accompanying text.

<sup>229</sup> Stuart Eizenstat argued recently that the "states are, more clearly than at any point in the last 50 years, the centers of innovation and creativity, while policy making in Washington is an utter shambles." Eizenstat, *Adapting Federalism within the Present Constitutional Structure*, in ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, IS CONSTITUTIONAL REFORM NECESSARY TO REINVIGORATE FEDERALISM? 13, 13 (1987).

<sup>230</sup> For example, the states administer federal grant-in-aid programs. This has allowed each state some discretion in shaping the programs as they apply within that state's borders. Thus, states have been free to implement some form of work or job training requirements for mothers receiving Aid to Families with Dependent Children. Innovations of this kind have been models for proposed federal legislation. See S. 1511, 100th Cong., 1st Sess. (1987) (Family Security Act of 1987); H.R. 1720, 100th Cong., 1st Sess. (1987) (Family Welfare Reform Act of 1987).

<sup>231</sup> Pub. L. No. 93-595, 88 Stat. 1926 (1975) (codified as amended at 28 U.S.C. app. (1982 & Supp. IV 1986)).

<sup>232</sup> Under the Rules Enabling Act, 28 U.S.C. § 2702 (1982), the draft was to take effect on July 1, 1973 unless Congress acted to forestall this result. Congress did just that, passing a statute requiring an affirmative vote of both houses to bring the new rules into effect. See Act of Mar. 30, 1973, Pub. L. No. 93-12, 87 Stat. 9.

tion process was derailed, principally because of the draft's provisions concerning privileges. These provisions would have created a uniform body of federal privilege law applicable in federal court even in actions based on state law. Some members of Congress had substantive objections to the scope of the protection the draft extended to certain privileges.<sup>233</sup> The most important objection to the draft, however, was that it displaced too much state law.<sup>234</sup> Congress redrafted the proposed rules. The new draft, which ultimately took effect, specifically directed federal courts to adopt state rules of privilege in cases applying state law.<sup>235</sup>

The Senate Judiciary Committee report on the redrafted version of the rules makes clear the rationale for this provision:

Federal law should not supersede that of the States in substantive areas such as privilege absent a compelling reason. This reflects the view that in civil cases in the Federal courts, where a claim or defense asserted is not grounded upon a Federal question, there is no Federal interest in the application, or in its resolution, of a uniform law of Federal privilege strong enough to justify departure from State policy.<sup>236</sup>

This argument would be less significant if it reflected a judicially enforceable limit on the power of Congress to displace state law with federal rules of evidence. The Advisory Committee had concluded, however, that the Supreme Court would erect no barrier to imposing federal rules of privilege even in cases applying state law. The Committee read *Hanna v. Plumer*<sup>237</sup> to hold that any arguably procedural

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<sup>233</sup> See Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693, 694 (1974) ("The narrowness of the husband-wife privilege provided and the virtual elimination of the doctor-patient privilege were thought to threaten personal privacy. The refusal to recognize any sort of newsman's privilege was seen by many as a threat to the freedom of the press." (footnotes omitted)).

<sup>234</sup> See *Proposed Rules of Evidence: Hearings Before the Special Subcomm. on Reform of Federal Criminal Laws of the House Comm. on the Judiciary*, 93d Cong., 1st Sess. 154-58 (1973) (statement of Hon. Arthur J. Goldberg); *id.* at 171-73 (statement of Charles R. Halpern and George T. Frampton, Jr., on behalf of the Washington Council of Lawyers); *id.* at 246 (testimony of Henry J. Friendly, Chief Judge, Court of Appeals for the Second Circuit); *id.* at 330-331 (testimony of Robert W. Warren, Att'y Gen., Wis., and President-Elect, Nat'l Assoc. of Att'ys Gen.); *id.* at 495 (statement of Stuart H. Johnson, Jr., practicing lawyer).

<sup>235</sup> See FED. R. EVID. 501 ("[I]n civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness . . . shall be determined in accordance with State law.").

<sup>236</sup> S. REP. NO. 1277, 93d Cong., 2d Sess. 3, *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 7051, 7053 (footnote omitted).

<sup>237</sup> 380 U.S. 460 (1965).



rule is valid and applicable in such cases.<sup>238</sup> Any rule governing the extent to which a court can compel a witness to give testimony is at least arguably procedural. Congress reasonably could have concluded that the states had no judicial shield against assertion of federal power to displace state privilege law in federal court.<sup>239</sup>

Despite the judicial precedent that would have supported congressional approval of the proposed rule, such a reallocation of power from the states raised a constitutional issue, which Congress resolved in constitutional terms. It did so by refusing to arrogate power to itself by enacting a uniform federal rule, preferring instead to preserve the states' prerogatives to define such rules. Constitutionally responsible behavior of this sort is inconsistent with the assumption that the political branches of government will always ignore any constitutional restraints on their power that the courts are not prepared to enforce.

Other aspects of the political branches' constitutional behavior give further evidence that their respect for the Constitution is not entirely dependent on prodding from the judicial oracle. They have reached complex constitutional accommodations with each other without any assistance from the judiciary. In doing so they have shown a sensitivity to constitutional concerns that contradicts the cataclysmic consequences assumption—an assumption that tells us that such concerns carry no weight in nonjudicial deliberations. Constitutional accommodations by the political branches prove that they can both give weight to constitutional concerns and assess their relative weight with skill.<sup>240</sup>

For example, courts played no role in the process by which Congress and the President reached a careful balance of constitutional concerns in connection with legislative vetoes.<sup>241</sup> Such vetoes are a unilateral legislative action, which seems to be an affront to the Executive

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<sup>238</sup> See FED. R. EVID. 501 advisory committee's note ("Regardless of what might once have been thought to be the command of *Erie R. Co. v. Tompkins* as to observance of state created privileges in diversity cases, *Hanna v. Plumer* is believed to locate the problem in the area of choice rather than necessity." (citations omitted)). If *Hanna* itself did not reach such a broad holding, *Hanna* in combination with *Sibbach v. Wilson*, 312 U.S. 1 (1941), did. See Ely, *supra* note 233, at 739 ("The case the Committee should have cited was *Sibbach*, which . . . seems a fairly clear precedent for the validity of the proposed privilege provisions.").

<sup>239</sup> This exactly matches the courts' approach to the scope of most congressional powers, such as the commerce power. See *supra* notes 186-92 and accompanying text.

<sup>240</sup> The observation that this skill may reflect only a fine balance of political power between Congress and the Executive should not affect this argument. The burden of the cataclysmic consequences assumption is to show that the political branches do not take constitutional concerns into account when they reach decisions. If those concerns are balanced in their deliberations, it is of no importance that political reality caused this to occur. The important thing is that it did occur.

<sup>241</sup> See L. FISHER, CONSTITUTIONAL CONFLICTS BETWEEN CONGRESS AND THE PRESIDENT 162-70 (1985); Fisher, *supra* note 224, at 734-39.

and may undermine separation of powers. Nonetheless, some flexible legislative device, like this veto, for maintaining control over the administrative state seems essential for effective separation of powers under modern conditions. Many, if not most, commentators find the political accommodation of these conflicting considerations superior to the one the Supreme Court ultimately reached.<sup>242</sup>

There are neither jurisprudential nor empirical grounds for concluding that the alternative to judicial enforcement of all constitutional norms is lawlessness.<sup>243</sup> This does not mean that our system would necessarily be better if the judiciary abstained from consideration of all constitutional issues. It means only that the system need not be vastly worsened every time the judiciary abstains from consideration of a constitutional issue. This conclusion discredits the strongest normative argument for the proposition that the judicial monopoly assumption is the best interpretation of our constitutional tradition despite its poor fit with that tradition.

## V. TOWARD A MEANINGFUL DEFINITION OF POLITICAL QUESTIONS

Critics of the political question doctrine have failed to make out a case for abandoning the doctrine as inconsistent with the basic principles of our constitutional law. Thus far, we have seen that our tradition

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<sup>242</sup> See, e.g., Javits & Klein, *Congressional Oversight and the Legislative Veto: A Constitutional Analysis*, 52 N.Y.U. L. REV. 455, 465 (1977) (stating that “[t]he legislative veto is an efficient means of resolving the tension between the executive’s need for elasticity of action and the legislature’s need to check that action”); Strauss, *Was There a Baby in the Bathwater? A Comment on the Supreme Court’s Legislative Veto Decision*, 1983 DUKE L.J. 789, 791-92 (noting that the legislative veto is useful as “an instrument of the continuing political dialogue between President and Congress, on matters having high and legitimate political interest to both”); Tribe, *The Legislative Veto Decision: A Law by Any Other Name?*, 21 HARV. J. ON LEGIS. 1, 27 (1984) (referring to the Court’s “lack of restraint in destroying ‘an important if not indispensable political invention’”).

<sup>243</sup> The argument that the political branches are not always lawless in the absence of judicial supervision does not imply that their decision-making processes are flawless. There is an extensive literature focusing on deviations from our idealized view of the legislative process as majoritarian deliberation. See, e.g., Fitts, *The Vices of Virtue: A Political Party Perspective on Civic Virtue Reforms of the Legislative Process*, 136 U. PA. L. REV. 1567, 1579-84 (1988) (discussing problems caused by the influence of special interest groups on the legislative process). Perhaps the most obvious “distraction” is the power of special interest groups to warp legislative deliberations. Important as these defects are, they do not deflect my attack on the cataclysmic consequences assumption. Indeed, Congress’ responsiveness to special interests is the primary reason it can be trusted to protect certain constitutional norms. For example, the power of state governments as a special interest group in the politics of the federal government gives Congress most of its sensitivity to federalism. See Wechsler, *supra* note 193, at 559.

does not mandate that courts resolve all constitutional issues. Nor is the prospect of nonjudicial resolution of some constitutional issues so frightening that judicial resolution is always desirable. It remains to address the critics' argument that neither courts nor commentators have given the political question doctrine any meaningful content.

### A. *Traditional Definitions of "Political" Questions*

The criteria that Justice Brennan identified in *Baker v. Carr*<sup>244</sup> seem hopelessly inadequate for the task of distinguishing between cases courts should dismiss on political question grounds and cases for which judicial review is routine.<sup>245</sup> Specifically, a "textually demonstrable constitutional commitment"<sup>246</sup> of an issue to another branch of government cannot be decisive. It is difficult to formulate an argument that the text mandates a commitment of any issue we would otherwise consider "legal" to the political branches of government. Moreover, the Supreme Court rejected the strongest argument of that sort in *Powell v. McCormack*.<sup>247</sup> Nor can a lack of "judicially discoverable . . . standards"<sup>248</sup> prevent review without casting doubt on all the Court's controversial decisions interpreting the due process and equal protection clauses.<sup>249</sup> The other criteria Justice Brennan offered for identifying political questions are equally inadequate for similar reasons;<sup>250</sup> they all seem to apply to many cases in which judicial review is the norm.

<sup>244</sup> 369 U.S. 186 (1962).

<sup>245</sup> See *id.* at 217 (quoted *supra* text accompanying note 21).

<sup>246</sup> *Id.*

<sup>247</sup> 395 U.S. 486 (1969). For a discussion of *Powell*, see *supra* notes 22-24 and accompanying text; see also *Morgan v. United States*, 801 F.2d 445, 447 (1986) ("It is difficult to imagine a clearer case of 'textually demonstrable constitutional commitment' of an issue to another branch of government . . . than the language of Article I, section 5, clause 1 . . ." (citation omitted)), *cert. denied*, 107 S. Ct. 1359 (1987).

<sup>248</sup> *Baker*, 369 U.S. at 217.

<sup>249</sup> Professor Redish made this point in replying to Alexander Bickel's argument that the political question doctrine should permit courts to avoid issues that are "intractable] to principled resolution." A. BICKEL, *supra* note 44, at 184. Redish wrote: "If we were really to take seriously the 'absence-of-standards' rationale, then we would once again be proving considerably more than most of us had intended, for a substantial portion of all constitutional review is susceptible to the same critique." Redish, *supra* note 4, at 1047.

<sup>250</sup> In light of all the policy decisions courts make, it is hard to imagine a policy determination "of a kind clearly for nonjudicial discretion." *Baker*, 369 U.S. at 217. It is also hard to imagine what would make one instance of overturning the decision of a coordinate branch of government more disrespectful than another. To say there is "a need for unquestioning adherence to a political decision," *id.*, is just another way of saying there should be no judicial review, without giving any reason for that result. Finally, whenever the judiciary overturns a political decision, there will be conflicting pronouncements, but because the judicial pronouncement is authoritative, the conflict should not be too embarrassing.

The justifications offered by the commentators have not been notably more effective. We have already seen the rationale Professor Bickel put forward to support the political question doctrine<sup>251</sup> and Professor Redish's response to it.<sup>252</sup> Professor Bickel's work remains the most influential academic defense of the political question doctrine. As Professor Redish points out, however, Professor Bickel's version of the political question doctrine seems vulnerable to the same criticisms that undercut Justice Brennan's version.

The difficulty of finding a meaningful distinction between political questions and other constitutional issues evaporates if we replace the judicial monopoly assumption with a better interpretation of our constitutional practice. The remainder of this Part will describe such an interpretation and show how it helps give the political question doctrine meaningful content. It will also defend the proposed interpretation by arguing that it both fits our tradition and comports with political morality.

### B. A "Shared Responsibility" Model of Constitutional Interpretation

Part III of this Article argued that the judicial monopoly assumption fails to fit our practice by showing that we make important exceptions to the rule of judicial review. As that argument suggests, a better model of our practice would recognize that our system divides responsibility for constitutional interpretation between judicial and nonjudicial decision makers. To be complete, therefore, this alternative model must define the sphere within which each actor is responsible for constitutional interpretation.

Developing this alternative model in detail is beyond the scope of this Article, but it is not difficult to describe the rough outline of the sphere within which the courts consider themselves responsible for constitutional interpretation. Protecting oppressed individuals from abuses of government power is the core of that sphere.<sup>253</sup> Courts see a special

<sup>251</sup> See *supra* notes 44-54 and accompanying text.

<sup>252</sup> See *supra* notes 69-73 and accompanying text.

<sup>253</sup> See *United States v. Carolene Products, Co.*, 304 U.S. 144, 153 n.4 (1938) (stating that "prejudice against discrete and insular minorities . . . may call for a . . . more searching judicial inquiry"); J. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS* 127-28, 169-70 (1980) (arguing that judicial review is primarily for preserving individual rights against the government); J. ELY, *supra* note 131, at 73-104 (discussing Supreme Court protection of the right of individuals to participate in representative government); Redish, *supra* note 4, at 1058 ("I would surely concur that the Court's most important function in engaging in judicial review is the protection of individual rights."); Monaghan, Book Review, 94 *HARV. L. REV.* 296, 308 (1980)

role for themselves in guaranteeing individual rights, and they severely limit their activities in constitutional areas that give them little opportunity to play that role.<sup>254</sup> Thus, they make no attempt to affect the constitutional balance between the state and federal governments.<sup>255</sup> Moreover they avoid most issues concerning the proper balance of power between Congress and the President.<sup>256</sup> This pattern of abstinence reflects a judgment that the political branches of government can balance responsibly the factors relevant to resolving questions of federalism and separation of powers.<sup>257</sup> In sum, the courts abstain from judicial review in any case that does not involve their core function if the political branches of government seem worthy of being trusted with the issue presented by the case.

Interpreting our system as dividing responsibility for constitutional exegesis in this manner resolves the difficulty of finding a meaningful distinction between political questions and issues appropriate for judicial resolution. The former are different from the latter because they fall outside the sphere of responsibility for constitutional interpretation that the courts claim for themselves. Classifying issues as political questions is one way that courts can mark the boundaries of that sphere.<sup>258</sup>

Courts need not treat every issue that falls outside their sphere as

(reviewing J. CHOPER, *supra*) ("Choper's view that the central role of the Court is to protect individual liberties is a widely shared premise of modern constitutional theory.").

<sup>254</sup> Compare *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) (employing a rational basis test in reviewing economic legislation) and *supra* notes 131-41 & 188-92 and accompanying text (discussing the Court's passive approach to economic questions) with *Carolene Products*, 304 U.S. at 152-53 n.4 (suggesting the Court apply heightened scrutiny when necessary to protect insular minorities) and *supra* note 253 and accompanying text (noting the widespread view that the primary responsibility of courts is to protect individual rights).

<sup>255</sup> See *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 552 (1985); *supra* notes 193-94 and accompanying text; see also Wechsler, *supra* note 193, at 558-60 (explaining that the Framers did not emphasize the function of the Court in checking national authority).

<sup>256</sup> See Monaghan, *supra* note 253, at 302 (stating that a "nonjusticiability approach [to separation of powers cases] has strong roots in the actual pattern of our constitutional history"); *infra* notes 260-64 and accompanying text (discussing separation-of-powers cases). But see *Bowsher v. Synar*, 478 U.S. 714 (1986) (finding the assignment of executive functions to a legislative officer to be an unconstitutional breach of separation of powers); *INS v. Chadha*, 462 U.S. 919 (1983) (finding unconstitutional a unicameral legislative veto of administrative action).

<sup>257</sup> See *Garcia*, 469 U.S. at 552 ("State sovereign interests . . . are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power."); Wechsler, *supra* note 193, at 558 ("[T]he national political process in the United States . . . is intrinsically well adapted to retarding or restraining new intrusions by the center on the domain of the states.").

<sup>258</sup> This argument does not imply that all decisions invoking the political question doctrine are correctly decided. I am defending the far narrower point that not all cases relying on the political question doctrine are wrongly decided.

a political question; they have other devices for marking the boundaries of their primary sphere of responsibility. For example, courts have marked federalism issues as outside that sphere by defining congressional powers so broadly that every legal challenge to federal intrusion on state prerogatives is futile.<sup>269</sup> Nonetheless, the political question doctrine has played an important role in delimiting judicial responsibility for constitutional interpretation.

The political question doctrine has had a particularly important effect in separation-of-powers cases.<sup>260</sup> *Goldwater v. Carter*<sup>261</sup> illustrates this effect; it also reveals the basis for the judicial abstinence that the political question doctrine represents.<sup>262</sup> In *Goldwater*, Justice

<sup>269</sup> See *supra* notes 193-95 and accompanying text.

<sup>260</sup> This is also the area in which the doctrine can probably be most useful to courts deciding future cases. Other justiciability doctrines, such as standing, have also been useful in separation-of-powers cases, because many of these cases can only come before the courts in nontraditional forms. See, e.g., *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208 (1974) (holding that present and former members of the Armed Forces Reserve lack standing to challenge the Reserve membership of Members of Congress as violating the incompatibility clause of the Constitution).

Nothing in my argument commits me to the absolutism with which Dean Jesse Choper argued against judicial review of cases involving federalism and separation of powers. See J. CHOPER, *supra* note 253. My argument is narrower: I do not claim that such review can never be appropriate, only that it is often inappropriate. The courts should use the political question doctrine to dismiss cases in which review is inappropriate.

The general scheme of divided responsibility for constitutional interpretation suggests meaningful ways to distinguish cases in which review is appropriate from those in which it is not. This scheme, unlike Dean Choper's, leaves room for judicial review of a separation-of-powers claim in cases having some special need for judicial guidance. There might be such a need, for example, if Congress and the President were engaged in a confrontation over some separation-of-powers question. Thus, a case challenging a presidential decision to wage a "covert" war in defiance of a congressional ban on funding for that war may be appropriate for judicial resolution, even if a challenge to the constitutionality of waging war with congressional cooperation, but without a formal declaration, is not. Compare *Ramirez de Arellano v. Weinberger*, 568 F. Supp. 1236 (D.D.C.) (holding nonjusticiable a private citizen's challenge to the U.S. Government's use of private land in Honduras for military purposes), *aff'd on other grounds*, 724 F.2d 143 (D.C. Cir. 1983), *rev'd on reh'g*, 745 F.2d 1500 (D.C. Cir. 1984) (en banc), *vacated and remanded*, 471 U.S. 1113 (1985), *aff'd on other grounds*, 788 F.2d 762 (D.C. Cir. 1986) with *Orlando v. Laird*, 443 F.2d 1039 (2d Cir. 1971) (holding nonjusticiable a challenge to the constitutionality of the Vietnam War, in the absence of a formal congressional declaration of war, because of congressional cooperation in the prosecution of the war). Dean Choper concedes that "[a]n attractive argument may be made" that in the event of an "escalating" clash between the political branches, "the Court should intercede to preserve our constitutional equilibrium." J. CHOPER, *supra* note 253, at 298. But he dismisses the significance of his concession by arguing that such clashes hardly ever occur. In the unlikely event that such a clash were to occur, he says, the judiciary could do little to defuse it. See *id.* at 298-308. He may be right, but it seems to me that the judiciary can play a role in many situations short of the apocalyptic confrontation Choper envisions.

<sup>261</sup> 444 U.S. 996 (1979).

<sup>262</sup> *Goldwater* involved a challenge to President Carter's decision to terminate a

Rehnquist and three other justices stated that a challenge by members of Congress to the President's unilateral cancellation of a treaty presented a political question. Justice Rehnquist justified his conclusion in part by stating that Congress had resources for protecting itself from overreaching by the Executive and did not need judicial assistance.<sup>263</sup> Justice Rehnquist concluded that there was no justification for including such a case within the sphere of judicial constitutional responsibility.<sup>264</sup> This conclusion exemplifies the meaning I attach to the political question analysis.

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mutual defense treaty with Taiwan without consulting Congress. Justice Rehnquist concurred in the decision to vacate and remand the case, but, in a statement joined by three other justices, argued that the question whether the Constitution requires such consultation prior to termination was nonjusticiable. He reasoned that no express language in the Constitution covered this question, and no hard and fast rule would be appropriate: "In light of the absence of any constitutional provision governing the termination of a treaty, and the fact that different termination procedures may be appropriate for different treaties . . . the instant case in my view 'must surely be controlled by political standards.'" *Goldwater*, 444 U.S. at 1003 (Rehnquist, J., concurring in the judgment) (quoting *Dyer v. Blair*, 390 F. Supp. 1291, 1302 (N.D. Ill. 1975)).

<sup>263</sup> See *id.* at 1004 (Rehnquist, J., concurring in the judgment). Justice Rehnquist distinguished *Goldwater* from *Youngstown Sheet Tube Co. v. Sawyer*, 343 U.S. 579 (1952), by arguing that Congress "has resources available to protect and assert its interests." *Id.* (Rehnquist, J., concurring in the judgment). Because the private litigants in *Youngstown* had no such resources, it was appropriate for the Court to act on their behalf in that case, but remain passive in *Goldwater*. This touches on the same concerns that motivated Justice Powell, who concurred in *Goldwater* on the ground that the case was not ripe for review. See *Goldwater*, 444 U.S. at 997 (Powell, J., concurring). He indicated that the case could have become ripe for review "[i]f the Congress, by appropriate formal action, had challenged the President's authority to terminate the treaty." *Id.* at 1002 (Powell, J., concurring in the judgment). Thus, both Justice Powell and Justice Rehnquist indicated that the Court should refrain from deciding *Goldwater*, because Congress had the power to protect itself against the President's assertion of executive authority, but had chosen not to exercise that power. This argument has strong roots in our constitutional tradition. In James Madison's words, each branch of government "has the constitutional means and personal motives to resist the encroachments of the other." THE FEDERALIST, No. 51, at 321-22 (J. Madison) (C. Rossiter ed. 1961).

<sup>264</sup> In *Orlando v. Laird*, 443 F.2d 1039 (2d Cir. 1973), the Second Circuit held that it could not decide whether congressional cooperation with the Executive in prosecuting the Vietnam War was sufficient to satisfy the constitutional requirement of congressional authorization to make war. The court explained that "there are no intelligible and objectively manageable standards by which to" reach a decision on that point. *Id.* at 1043. There was, however, nothing unique about *Orlando* in this respect. Most constitutional adjudication proceeds in the absence of "objectively manageable standards." The court's unwillingness to decide what form congressional authorization to make war must take cannot be merely a result of its fear of making a subjective choice. The court also must have decided that there was no pressing need for it to make such a choice, as Congress was in an excellent position to make that choice for itself. It expressed a choice by cooperating with the President in the prosecution of the war and refraining from any protest about the absence of a formal declaration of war. Thus, the court determined that *Orlando* fell outside its proper sphere of activity. The court used the political question doctrine as the legal clothing for that judgment.

Certainly, as the critics have pointed out, the traditional justifications for the political question doctrine do not make this meaning clear. If the courts adopt the approach recommended here, however, they should have little difficulty formulating better justifications in future cases.

To this point, I have argued indirectly, by criticizing the alternative interpretation of judicial review, that courts should adopt a divided responsibility approach. It remains to argue for this approach directly. Doing so entails applying the same tests that Parts III and IV applied to the judicial monopoly assumption: 1) Does it fit our constitutional tradition and 2) Does it provide a good justification for that tradition as a matter of political morality?

### C. *Examining the Shared Responsibility Assumption's Fit with Our Constitutional Tradition*

The argument that the proposed divided responsibility assumption fits our constitutional tradition is the mirror image of the argument that the judicial monopoly assumption does not.<sup>265</sup> Every aspect of our tradition and practice that is incompatible with that assumption fits comfortably with the model of shared responsibilities described above. The numerous "misfits" between our tradition and the judicial monopoly assumption identified in Part III are ample evidence of a good fit between the divided responsibility model and our tradition.

### D. *The Normative Appeal of the Shared Responsibility Assumption*

Articulating a normative defense for the model of shared responsibility requires greater attention. Even if one rejects the cataclysmic consequences assumption, the judicial abstinence required by the model is troublesome. If judges leave a particular constitutional issue to others, they may have to accept a resolution of that issue that they consider wrong. Why should a judge confine herself within a system that forces her to accept such errors?

#### 1. Traditional Defenses of Judicial Abstinence

Most commentators who have tried to answer this question focus on the threat of public reaction to judicial activism. The courts must not try to do more than the people will permit them to do. If courts do

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<sup>265</sup> See *supra* notes 86-196 and accompanying text (Part III).



not limit their own role, the people will limit it for them. By limiting themselves, the courts can ensure that their most important functions are not impaired. Dean Jesse Choper advanced the most elaborate argument of this sort.<sup>266</sup> He argued that the judiciary needs to conserve its "institutional capital" for the protection of individual rights, which it can do by abstaining from consideration of cases that raise issues of federalism or separation of powers.<sup>267</sup> This argument has drawn more than its share of criticism. Some commentators argue that the courts have no need for such circumspection. The courts are firmly entrenched; they need not worry about public rejection. They can do as they please without fear of reprisals. In fact, their power grows as they exercise power.<sup>268</sup>

Other commentators claim that Dean Choper overestimated the extent to which the courts' "capital" is transferable from one context to another.<sup>269</sup> They suggest that the public, when it cares about the Court's activities at all, cares only about the result the Court reaches. Citizens rejoice at an outcome with which they agree; they sometimes react with anger to decisions with which they disagree; most of the time they do not react at all. There is no reason to believe that refusing to decide categories of cases that do not raise strong emotions in most people will help the Court survive negative reaction when it reaches a result many people find abhorrent.

These criticisms may not demolish Dean Choper's defense of judicial abstinence, but they undermine it. The courts have offended large segments of the American people without provoking a revolt. Moreover, it seems implausible to suggest that the Court would be better insulated from the reaction to *Roe v. Wade*<sup>270</sup> if it refused to decide *Bowsher v. Synar*.<sup>271</sup> What follows is an attempt to outline a better defense of judicial abstinence, one that is not so vulnerable to those criticisms.

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<sup>266</sup> See J. CHOPER, *supra* note 253, at 169 (arguing that the Supreme Court should refrain from deciding cases having to do with separation of powers and federalism because its activity in those fields had "expended large sums of institutional capital").

<sup>267</sup> See *id.*

<sup>268</sup> See J. ELY, *supra* note 131, at 48 ("[P]ublic persons know that one of the surest ways to acquire power is to assert it").

<sup>269</sup> See, e.g., Redish, *supra* note 4, at 1058 ("It is by no means intuitively clear that the Court could effectively 'store' its capital with the public for unpopular individual rights decisions by avoiding review in non-individual rights cases."); Monaghan, *supra* note 253, at 301 ("[N]o solid basis exists for believing that the Court's modern federalism decisions contribute *anything* significant to the grievances [felt against the Court].")

<sup>270</sup> 410 U.S. 113 (1973).

<sup>271</sup> 478 U.S. 714 (1986); see also *infra* notes 287-93 and accompanying text (discussing *Bowsher*).

## 2. An Alternative Rationale for Judicial Abstinence

Our constitutional law is a battlefield for two incompatible myths. One is the "myth of politics," which tells us that political decisions are legitimate because they reflect the will of the people. The other is the "myth of law," which tells us that the courts ensure that all the other constitutional players obey the rules of the game. The problem is that any attempt by the courts to see that Congress and the President obey the rules of the game denigrates the myth of politics by taking decisions away from the representatives of the people. Conversely, any limit on the power of the courts to do so denigrates the myth of law.<sup>272</sup>

Our remote predecessors used formalism to reconcile these myths, but it is no longer possible for most of us to believe that courts can enforce the rules of the game against the political branches of government without assessing the substantive merits of their decisions in the process.<sup>273</sup> As a result, no logical accommodation of these myths is possible.<sup>274</sup>

Instead, we accommodate them in emotional terms. Courts are active in those areas of constitutional law in which their mythology has the greatest rhetorical power. They are inactive in areas in which their

<sup>272</sup> As Bickel observed:

Democratic government under law—the slogan pulls in two opposed directions, but that does not keep it from being applicable to an operative polity. If it carries the elements of explosion, it doesn't contain a critical mass of them. Yet if the critical mass is not to be reached, there must be an accommodation, a degree of concord between the diverging elements.

A. BICKEL, *supra* note 44, at 27-28.

<sup>273</sup> Commentators have tried to construct models of judicial review that permit courts to avoid such assessments. Every such model, however, has failed to achieve its purpose. The most prominent example is John Ely's model of judicial review. Ely proposed that courts should police the political process to ensure that it is open and that it does not disadvantage certain groups out of prejudice. *See* J. ELY, *supra* note 131, at 74-75. Focusing on the legislative process, he said, would permit courts to abstain from assessing the substantive merits of the outcomes that it produces. *See id.* at 101-04. Identifying a flawed process, however, is impossible without considering the merits of the challenged outcome. *See* Brest, *The Substance of Process*, 42 OHIO ST. L.J. 131, 141 (1981) (arguing that laws based on stereotypes injure the dignity of individuals); Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063, 1064 (1980) ("[I]t is not difficult to show that the constitutional theme of perfecting the processes of governmental decision is radically indeterminate and fundamentally incomplete."). To design models that permit courts to exercise judicial review without assessing the substantive merits of the challenged legislation is like designing perpetual motion machines—exciting, but futile. *See* Brest, *supra*, at 141-42 (stating that process-based theories "are to constitutional theory what the perpetual motion machine is to science").

<sup>274</sup> *See* Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 YALE L.J. 1063, 1063 (1981) ("I shall argue that the controversy over the legitimacy of judicial review in a democratic polity . . . is essentially incoherent and unresolvable.").

mythology is weak and the myth of politics is strongest.<sup>275</sup> The rhetorical appeal of the myth of law is at its strongest in cases involving allegations of government oppression of the powerless,<sup>276</sup> and courts have been most active in cases with some link to that paradigm. The rhetorical power of that myth is weakest in cases involving the proper balance of power between state and federal government or between the legislative and executive branches of the federal government. The political process seems capable of resolving most such issues satisfactorily with-

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<sup>275</sup> This way of resolving a legal question may be unsettling to anyone schooled in a scientific world view. Our intellectual training makes us yearn for the kind of certainty in legal reasoning that formal logic seems to produce in geometry. Once we accept that courts should vary their involvement in constitutional interpretation without a logical basis for doing so, we have abandoned the quest for such certainty. But nonlogical, rhetorical solutions to legal problems seem natural once we adopt the view that law is a social discourse. That view makes our legal practice a branch of rhetoric. Professor White describes both rhetoric and law as grounded in a kind of knowledge that is "not scientific or theoretical but practical, experiential." See J. WHITE, *Rhetoric and Law: The Arts of Cultural and Communal Life*, in HERACLES' BOW: ESSAYS ON THE RHETORIC AND POETICS OF THE LAW 40 (1986). He describes this knowledge and how we use it as follows:

This knowledge is . . . not reducible to rules . . . rather it is the knowledge by which we learn to manage, evade, disappoint, surprise, and please each other . . . This knowledge is not provable in the scientific sense, nor is it logically rigorous. For these reasons it is unsettling to the modern scientific and academic mind. But we cannot go beyond it, and it is a mistake to try. In this fluid world without turf or ground we cannot walk, but we can swim. And we need not be afraid to do this—to engage in the rhetorical process of life—notwithstanding our radical uncertainties, for all of us already know how to do it. By attending to our own experience, and that of others, we can learn to do it better if we try.

*Id.* This view of law has many antecedents. It is particularly in debt to the work of Chaim Perelman. See generally C. PERELMAN, *THE REALM OF RHETORIC* (1982) (discussing the reasoning that underlies values). For a critique of Perelman's work that argues that his "new rhetoric" rests on apologetic assumptions about law and its place in society, see P. GOODRICH, *LEGAL DISCOURSE* 111-124 (1987).

<sup>276</sup> The hearings on Robert Bork's nomination to the Supreme Court illustrate the variable power of the myth of law. Judge Bork made the mistake of arguing in print that the myth of politics should prevail in almost every case, regardless of the sort of issue the case presents. See Bork, *Neutral Principles and Some First Amendment Problems*, 47 *IND. L.J.* 1 (1971). Judge Bork argued that courts could not legitimately strike down a law making use of contraceptive devices criminal, see *Griswold v. Connecticut*, 381 U.S. 479 (1965), any more than they could strike down an antipollution ordinance, because there was no distinction between the two issues:

Every clash between a minority claiming freedom and a majority claiming power to regulate involves a choice between the gratifications of the two groups. . . . Why is sexual gratification nobler than economic gratification? There is no way of deciding these matters other than by reference to some system of moral or ethical values that has no objective or intrinsic validity of its own . . . .

Bork, *supra*, at 9-10. The widespread hostility that this position generated is a measure of the strength the myth of law retains. It also indicates how context-specific that strength is. See *supra* notes 253-54 and accompanying text.

out judicial intervention. The issues themselves are too technical to support effective rhetoric about the judicial role in preserving our liberties.<sup>277</sup>

The essence of judicial duty is to decide cases in accord with the law. Our constitutional law mandates accommodation of both constitutional myths. Deciding cases in accord with the rule of law entails maintaining the delicate balance between those two myths.<sup>278</sup> A judge who refuses to give the myth of politics its due is refusing to perform her duty. It follows that judges should maintain their pattern of abstinence whether or not that pattern helps shield them from a real danger of backlash.

Two recent Supreme Court opinions having to do with separation of powers indicate the force of this moral argument. In each case the Court went to great lengths to avoid confronting the choices underlying its decision. Instead, it relied on formalism, presenting its decisions as compelled by the clear meaning of the Constitution. The Court's use of such a tattered fig leaf in each case indicates that the members of the majority were ashamed of making choices and unwilling to leave them naked.<sup>279</sup> If the Court cannot present its decision without shame, it must be because the justices sense a breach in their duty to respect the myth of politics.<sup>280</sup>

*INS v. Chadha*<sup>281</sup> provides one example. In *Chadha*, the Court considered the constitutionality of provisions for a one-house legislative veto of administrative actions. It concluded that such vetoes were legislative action, which require bicameral congressional action and presi-

<sup>277</sup> *But see* *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 572 (1985) (Powell, J., dissenting) (“[F]ederal overreaching under the Commerce Clause undermines the constitutionally mandated balance of power between the States and the federal government, a balance designed to protect our fundamental liberties.”).

<sup>278</sup> This obligation to respect the myths has little to do with the relationship of either to reality. A judge is obligated to respect the myth of politics, not because it reflects the true nature of Congress and the Executive, but because any competent interpretation of our constitutional law must demand such respect. A great deal of the discussion about the extent to which our political process lives up to its representative ideals is, therefore, irrelevant to the concerns of constitutional theory. *See, e.g.*, Parker, *The Past of Constitutional Theory—and its Future*, 42 OHIO ST. L.J. 223, 248-254 (1981) (criticizing the “process-oriented” theories of Choper and Ely).

<sup>279</sup> This inference is reinforced by the observation that the Court knows full well how to approach a separation of powers issue forthrightly when it has no cause to be ashamed of the choices it makes in doing so. *See infra* note 294 (discussing *Morrison v. Olson*, 108 S. Ct. 2597 (1988)).

<sup>280</sup> *Cf.* Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Inconsistency?*, 72 CORNELL L. REV. 488, 526 (1987) (suggesting that formalism “serves as a proxy for a functional approach for Justices perhaps unwilling to trust . . . themselves . . . with the difficult and contextual analyses that functionalism requires.”).

<sup>281</sup> 462 U.S. 919 (1983).

dential approval. The Court began its analysis by observing that "[e]xplicit and unambiguous provisions of the Constitution prescribe and define the respective functions of the Congress and of the Executive in the legislative process."<sup>282</sup> It went on to conclude that Congress could only perform legislative functions bicamerally and with presentment to the President.<sup>283</sup> It saw no question whether the veto at issue involved a legislative function.<sup>284</sup>

In dissent, Justice White castigated the majority for ignoring the practical justifications for the legislative veto. He stressed the need for such a flexible device in order to permit Congress to retain some control over administrative agencies in an age of sweeping delegations of legislative authority to such agencies.<sup>285</sup> Justice White was the first of many to voice this criticism of the Court's reasoning. A number of academics provided variations on the same theme—that the Court relied on a brand of formalism that was discredited a generation ago.<sup>286</sup>

*Bowsher v. Synar*<sup>287</sup> provides a similar example. In *Bowsher*, the Court considered the constitutionality of the Gramm-Rudman-Hollings deficit reduction plan.<sup>288</sup> According to the Court, the plan assigned certain executive responsibilities to the Comptroller General.<sup>289</sup> Because the Comptroller General is a legislative officer, subject to removal by Congress, the Court held the plan unconstitutional: Separation of powers would not permit the legislative branch to assign an executive function to itself.<sup>290</sup> Once again, Justice White's dissent took the lead in criticizing this reasoning.<sup>291</sup> Unlike the majority, "his major goal [in separation of powers cases] is to police the concept of checks and bal-

<sup>282</sup> *Id.* at 945.

<sup>283</sup> *See id.* at 954-55, 958.

<sup>284</sup> *See id.* at 958.

<sup>285</sup> *See id.* at 968 (White, J., dissenting) ("Without the legislative veto, Congress is faced with a Hobson's choice: either to refrain from delegating the necessary authority . . . or in the alternative, to abdicate its lawmaking function to the Executive Branch and independent agencies.").

<sup>286</sup> *See, e.g.,* Strauss, *supra* note 242, at 794-801 (criticizing the *Chadha* Court for "eschewing" functional analysis and merely "asserting" that the act of Congress at issue was a legislative one requiring bicameral action and presentment to the President.); Tribe, *supra* note 242, at 17 (speculating that "*Chadha* represents a return to a form of constitutional exegesis that simply proclaims intelligible essences more than it purports to explain or justify philosophical or practical premises").

<sup>287</sup> 478 U.S. 714 (1986).

<sup>288</sup> Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99-177, 99 Stat. 1038 (codified as amended at 2 U.S.C. §§ 901-922 (Supp. IV 1987 & West Supp. 1988)).

<sup>289</sup> *See Bowsher*, 478 U.S. at 726-27.

<sup>290</sup> *See id.*

<sup>291</sup> *See id.* at 759 (White, J., dissenting) (characterizing the majority's view of separation of powers as "distressingly formalistic").

ances, not to become formalistically preoccupied with elaborating definitions of the separation theme.<sup>292</sup> Once again, others have followed suit in commentary.<sup>293</sup>

The consensus of these criticisms is that the Court chose to employ a discredited mode of reasoning rather than assessing the comparative weight of the competing constitutional concerns at issue in *Chadha* and *Bowsher*. The Court should not be driven to such an unsatisfactory choice by an overly expansive view of its role in our constitutional system. If it cannot confront an issue directly, it should not resolve it,<sup>294</sup> as Dean Choper suggested.<sup>295</sup> This is advice the Court has heeded in some

<sup>292</sup> Sargentich, *The Contemporary Debate About Legislative-Executive Separation of Powers*, 72 CORNELL L. REV. 430, 485 (1987).

<sup>293</sup> See, e.g., Banks & Straussman, *Bowsher v. Synar: The Emerging Judicialization of the FISC*, 28 B.C.L. REV. 659, 677-79 (1987) (criticizing the *Bowsher* majority's characterization of the Comptroller General's duties as reminiscent of the argument by assertion in *Chadha*); Strauss, *supra* note 280, at 520 (arguing that, although Justice White had the better approach in *Bowsher*, emphasizing function over the formalism of the majority, he did not carry through this argument as fully as was required).

<sup>294</sup> The Supreme Court established in *Morrison v. Olson*, 108 S. Ct. 2597 (1988), that it can face at least some separation-of-powers issues directly. In *Morrison*, the Court considered the constitutionality of the special prosecutor provisions of the Ethics in Government Act of 1978, Pub. L. No. 95-521, § 601, 92 Stat. 1824, 1867-73 (codified as amended at 28 U.S.C. §§ 591-598 (1982 & Supp. IV 1986)). The Act provides for appointment of independent counsel to investigate and prosecute certain government officials. The Act charges a specially constituted court with responsibility for appointing such counsel and limits the power of the President to remove them. The Court rejected a separation of powers challenge to this arrangement without making much effort to hide behind a veil of formalism. See *Morrison*, 108 S. Ct. at 2620-21. The Court recognized that the Act restricted executive action in some respects, but indicated that the restriction was not enough to justify striking down the provision and frustrating the congressional effort to ensure disinterested investigation of alleged executive branch misconduct. See *id.* at 2621-22. In reference to the Act's limitations on presidential removal of independent counsel, the Court said:

[T]he congressional determination to limit the removal power . . . was essential, in the view of Congress, to establish the necessary independence of the office. We do not think that this limitation as it presently stands sufficiently deprives the President of control over the independent counsel to interfere impermissibly with his constitutional obligation to ensure the faithful execution of the laws.

*Id.* at 2620.

The *Morrison* opinion does not, however, indicate that since it decided *Bowsher* and *Chadha*, the Court has become comfortable with altering politically engineered solutions to separation of powers questions. In *Morrison*, unlike *Bowsher* and *Chada*, the Court left the other branches of government as it found them. Thus, in *Morrison*, the Court had no occasion for the shame that seems to have led it to shroud its actions with formalism in *Bowsher* and *Chada*. Ascertaining whether or not the Court can properly reject a politically engineered solution without resorting to formalism, must await a future case or controversy.

<sup>295</sup> See *supra* notes 266-67 and accompanying text.

instances<sup>296</sup> and would do well to heed in others. The political question doctrine is one tool it can use to put that advice into practice.<sup>297</sup>

### CONCLUSION

In recent years, most commentators who have considered the political question doctrine have attacked it either as an anomaly with no proper place in American jurisprudence or as a mirage that will disappear if we stare at it hard enough. Because they have based their criticisms on an implausible judicial monopoly assumption, however, these commentators have failed to show that the political doctrine question is inconsistent with our constitutional tradition.

On the contrary, the political question doctrine is an integral part of that tradition; it is largely concerned with distinguishing cases in which courts will exercise their power of judicial review from those in which they will not. In our system of government, the three branches of the federal government share responsibility for interpreting the Constitution. In general, the courts' role is to protect the oppressed from abuses of government power. They refrain from exercising review in cases far removed from that paradigm. We should understand the political question doctrine as a device for projecting this shared responsibility scheme into areas where no substantive doctrine puts it into effect.

Judicial abstinence, in this sense, is not a threat to the rule of law;

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<sup>296</sup> In *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), for example, the Court decided that the issue of what defines "traditional governmental functions" could not be resolved in a satisfactory way. Accordingly, it abandoned an approach to federalism questions that depended on such a definition. *See id.* at 537-47.

<sup>297</sup> One can argue that using the political question doctrine for this purpose is greatly preferable to formulating a substantive doctrine that eliminates meaningful judicial review. Ordinarily, when courts leave an issue to the political branches of government, they should admit that they are doing so. If courts wrap their abstinence in a substantive doctrine, they are more likely to mislead some members of Congress into believing that any governmental action that gets past the courts is constitutional. A frank statement that an issue is not for judicial resolution is more likely to make Congress and the President aware of their responsibility for constitutional interpretation of those issues.

[I]f we are wrong [legislators] say, the courts will correct it. If what I have been saying is true, the safe and permanent road toward reform is that of impressing upon our people a far stronger sense than they have of the great range of possible harm and evil that our system leaves open, and must leave open, to the legislatures, and of the clear limits of judicial power; so that responsibility may be brought sharply home where it belongs . . . . Under no system can the power of courts go far to save a people from ruin; our chief protection lies elsewhere. If this be true, it is of the greatest public importance to put the matter in its true light. . .

Thayer, *supra* note 87, at 155-56 (footnote omitted).

constitutional norms can be meaningful even without judicial enforcement. Moreover, abstinence with respect to certain constitutional issues is a necessary implication of the rule of law. Our law requires that courts contain the conflict between the myth of law and the myth of politics. Without relying on formalism, they can maintain a balance between those two myths only by limiting the exercise of judicial review.

In the last analysis, the legitimacy of judicial review depends on a shared sense that judges should enforce the Constitution in order to preserve our fundamental liberties. Any exercise of judicial review that seems far removed from this purpose will provoke charges of judicial usurpation. The political question doctrine allows courts to remove themselves from areas in which they do not belong so that they may focus on the important tasks our system alots to them. By doing so, they can avoid calling the legitimacy of their actions into question.