2004

The Secret Life of the Political Question Doctrine

Louis Michael Seidman

Georgetown University Law Center, seidman@law.georgetown.edu

This paper can be downloaded free of charge from:
https://scholarship.law.georgetown.edu/facpub/563

THE SECRET LIFE OF THE POLITICAL QUESTION DOCTRINE

LOUIS MICHAEL SEIDMAN*

"Questions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court."1

The irony, of course, is that Marbury v. Madison, itself, "made" a political question, and the answer the Court gave was deeply political as well. As everyone reading this essay knows, the case arose out of a bitter political controversy,2 and the opinion for the Court was a carefully crafted political document—"a masterwork of indirection," according to Robert McCloskey's well-known characterization, "a brilliant example of Chief Justice Marshall's capacity to sidestep danger while seemingly to court it, to advance in one direction while his opponents are looking in another."3

The purpose of this essay is to explore the many layers of this irony. I will argue that despite all of the premature reports of its demise, the political question doctrine is as central to modern

---

* Professor of Law, Georgetown University Law Center. I am grateful to Lama Abu-Odeh, Vicki Jackson, Neal Katyal, Michael Klarman, Roy Schotland, David Seidman, and Mark Tushnet for comments on a previous version of this article and to Moneen Nasmith for outstanding research assistance.


2. The case came about because of last minute efforts by the defeated Federalists to retain control of the federal judiciary after their defeat in the election of 1800. (The behavior of Federalist judges, especially their enforcement of the controversial Alien and Sedition Acts, had been an issue in the election). In the immediate wake of the election, the Federalist Congress established six circuit courts with sixteen additional judges to be appointed by the outgoing administration. In addition, President Adams appointed forty-two new justices of the peace for Alexandria and the District of Columbia, one of whom was Marbury. The commissions were to be delivered by the Secretary of State — none other than John Marshall, who was serving in this post while also Chief Justice of the United States. Marshall failed to deliver the commission for Marbury and, when the incoming Jefferson administration refused to provide him with the commission, Marbury sued. For standard accounts of these events, see James M. O'Fallon, Marbury, 44 Stan. L. Rev. 219 (1992); William W. Van Alstyne, A Critical Guide to Marbury v. Madison, 1969 Duke L.J. 1, 1-5.

constitutional adjudication as it was to the outcome in *Marbury* at the beginning of our constitutional history. Moreover, the irony at *Marbury's* core continues to haunt the doctrine two hundred years later. Now, as then, application of the doctrine requires courts to resolve political questions—the very activity the doctrine purports to avoid. Now, as then, this contradiction mocks Chief Justice Marshall's confident assertion that "[i]f some acts be examinable, and others not, there must be some rule of law to guide the court in the exercise of its jurisdiction." As we shall see, the effort to make the political question problem into a "doctrine"—to bound it by a rule of law—is a fool's errand. The difficulty posed by political question jurisprudence is not that the court has sometimes politicized law, but that it has never successfully legalized politics.

My argument should not be confused with the claim that the Court is often influenced by politics in the partisan sense, although I must confess that it is hard to extinguish the suspicion that this claim may have been true in 1803, when *Marbury* was decided and may remain true in our own day. For purposes of this paper, however, I mean nothing more by "politics" than a set of criteria for decisionmaking that are outside the domain of constitutional law. My argument, then, is that the Court has never—and never can—develop constitutional rules that control the political judgments, as so understood, that it regularly makes.

Moreover, because political questions operate outside of constitutional law, the political question doctrine must lead a secret life. In theory, the Court's abstention from deciding political questions insulates judges from politics so that they can resolve legal disputes. In fact, a proper understanding of the doctrine fatally undermines Marshall's famous claim that "[i]t is emphatically the province and duty of the judicial department to say what the law is."

It might be thought, therefore, that the political question doctrine supports *Marbury's* modern critics, who would vest constitutional interpretation exclusively in the political branches. It turns out that even though the doctrine undermines *Marbury's* reasoning, it also weakens the argument of *Marbury's* opponents.

In short, the political question doctrine is the most dangerous

5. For convenience, I will abandon the scarequotes in the remainder of this essay. It should be understood nonetheless that I mean to problematize the "doctrinal" character of the political question doctrine.
6. In this sense, my position differs from Mark Tushnet's. See Mark V. Tushnet, *Law and Prudence in the Law of Justiciability: The Transformation and Disappearance of the Political Question Doctrine*, 80 N.C. L. REV. 1203 (2002). I share Tushnet's view that the Court has attempted to doctrinalize political questions. We seem to differ about whether it has succeeded.
concept in all of constitutional law. Despite heroic efforts from all quarters to domesticate it, the doctrine has merely remained underground, from whence it continues to lash out in all directions.

My argument for and elaboration of these conclusions will be organized as follows: the aim of Part One is to disentangle three strands of the doctrine. My claim here is that two of the three strands are relatively unimportant because they are really disguised legal decisions about the merits of constitutional disputes. The only strand that amounts to anything addresses the question whether the Court should obey requirements of the Constitution as those requirements are best understood by the Justices. This strand turns out to amount to quite a bit. Although the literature often refers to it as the "prudential" strand, this label is deeply misleading. In fact, this version of the political question doctrine can serve to support as well as inhibit judicial intervention in political disputes. For example, some commentators have criticized the Court's controversial decision in Bush v. Gore\(^\text{10}\) on the ground that the Court should have invoked the political question doctrine.\(^\text{11}\) These commentators have assumed that invocation of the doctrine would have led to judicial abstention. But as Richard Posner has demonstrated, the best defense of Bush\(^\text{10}\) is that the Court did invoke the doctrine (albeit

---

8. My views are therefore similar to those of Robert Nagel, who wrote over a decade ago that:

Like many dangerous things, [the political question doctrine] has been given a safe appearance and name. But what looks like a slight crack is a fault line. This doctrine, so frequently criticized and discounted, nevertheless, has a tenacious hold on our jurisprudence. After two hundred years of growth and consolidation, the nation's judicial system is an imposing edifice built over a break that looks small but does not go away.


12. I use these words advisedly. I don't mean to suggest that it is a particularly good defense. For my analysis of the problems with both the opinion and the result, see Louis Michael Seidman, What's So Bad about Bush v. Gore? An Essay on Our Unsettled Election, 47 WAYNE L. REV. 953 (2001).
secretly) and that that invocation led to judicial intervention.\(^{13}\)

In Part Two, I argue that this version of the doctrine is much more important to the Supreme Court’s daily work than is commonly supposed. Indeed, it is ubiquitous and irrepressible. If this claim is correct, one might wonder why so many observers of the Court have failed to notice the doctrine’s importance. My answer is that the real political question doctrine cannot speak its own name. Candid recognition of the doctrine’s existence—the doctrinalization of the political question doctrine—turns it into something else. Thus, the doctrine is both ubiquitous and hidden.

Finally, in Part Three, I briefly explore some of the implications of these observations. I conclude that the secret life of the political question doctrine challenges not only Chief Justice Marshall’s argument in *Marbury*, but also the arguments of many of Marshall’s modern critics.

I. THREE VERSIONS OF THE POLITICAL QUESTION DOCTRINE

There is not a single political question doctrine, but three separate doctrines, and the failure to distinguish among the three has produced much confusion. Chief Justice Marshall articulated the first version when he wrote that in cases where “the executive possesses a constitutional or legal discretion, nothing can be more perfectly clear than that [his] acts are only politically examinable.”\(^{14}\) I call this the “faux” political question doctrine because, as many others have observed, the doctrine does no work not already done by substantive provisions of constitutional law.

Some of the most perceptive students of the political question doctrine—most prominently Louis Henkin—have thought that this was all, or virtually all, that the doctrine amounted to.\(^{15}\) However, many other commentators have focused on a second version of the doctrine, which might be labeled the “interpretive authority” theory.\(^{16}\) On this view, the Constitution vests in the political branches final interpretive authority as to the meaning of some constitutional provisions. Unlike the “faux” doctrine, this version does not, in principle, consist of an empty set. Nonetheless, I argue below that in practice the interpretive authority approach almost always collapses into either the first category or the third, which I have labeled the “secret” political question doctrine.

\(^{14}\) *Marbury*, 5 U.S. (1 Cranch) at 166.
\(^{16}\) See, e.g., Barkow, *supra* note 11, at 239. Although he used different terminology, this was, in essence, the view held by Herbert Wechsler. See Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 Harv. L. Rev. 1, 7-8 (1959).
The third approach—the secret political question doctrine—takes seriously the fact that no normative principle can establish its own legitimacy. Hence, even if the answer to a constitutional question is clear, courts must always decide whether they should abide by that answer. Application of this sort of political question doctrine cannot be determined by legal analysis because it concerns an antecedent question about the bindingness of legal analysis. It follows that courts cannot acknowledge in a legal opinion that they are applying the doctrine, because any such acknowledgment would require legal analysis.

A. Faux Political Questions

In his initial formulation of the political question doctrine, Chief Justice Marshall seemed to have believed that application of doctrine was something different from a decision on the merits. Thus, before reaching the merits, he asked whether "the act of delivering or withholding a commission [is] a mere political act, belonging to the executive department alone, for the performance of which, entire confidence is placed by our constitution in the supreme executive; and for any misconduct respecting which, the injured individual has no remedy." 17 Although ultimately concluding that the particular act before him did not fall into this category, he left no doubt that some other unspecified acts did.18

But which acts? Marshall's silence on this point created a puzzle that has lasted two centuries. If, indeed, the Constitution places "entire confidence" in the executive with regard to some acts, then, it would seem, the Constitution is not violated when the President performs those acts. But if there is no constitutional violation, then the President will win the case on the merits and there will be no need to resort to preliminary, political question analysis. Conversely, if the President has violated the relevant constitutional provisions, then the Constitution has not placed "entire confidence" in him, and the political question doctrine therefore fails to shield his conduct from judicial review. In either event, political question analysis is superfluous; precisely the same results follow from straightforward constitutional interpretation.19

17. 5 U.S. (1 Cranch) at 164.
18. After the sentence quoted in text, Marshall added: "That there may be such cases is not to be questioned." Id.
19. The tendency to conflate the political question doctrine with the merits is not limited to the doctrine's defenders. For example, in his book-length attack on application of the political question doctrine to foreign affairs, Thomas F. Franck shifts seamlessly between criticism of judicial abstention and criticism of a substantive constitutional interpretation that leaves the President unconstrained. THOMAS F. FRANCK, POLITICAL QUESTIONS/JUDICIAL ANSWERS: DOES THE RULE OF LAW APPLY TO FOREIGN AFFAIRS 18 (1992).
Two of the Court's most recent decisions concerning the political question doctrine usefully illustrate this familiar point. In *Walter Nixon v. United States*, a former district judge challenged his removal from office following his impeachment by the House of Representatives and conviction by the Senate. His claim on the merits was that he had not been "tried" within the meaning of the Constitution's impeachment clause because the actual trial procedures occurred before a Senate committee rather than the full body. Purporting to avoid the merits of this claim, Chief Justice Rehnquist's majority opinion argued that the case posed a nonjusticiable political question. The Chief Justice relied upon two indicia of political questions earlier identified in *Baker v. Carr*—viz., that there was "a textually demonstrable constitutional commitment of the issue to a coordinate political department" and that there was "a lack of judicially discoverable and manageable standards for resolving it." How does one determine whether these indicia are satisfied? Here is where the shuffle begins. In order to determine whether there is a textually demonstrable commitment and judicially manageable standards, the Court tells us, we must decide what the word "try" means as it is used in the impeachment clause. According to the Court:

The word "try," both in 1787 and later, has considerably broader meanings than those to which petitioner would limit it. . . . [W]e cannot say that the Framers used the word "try" as an implied limitation on the method by which the Senate might proceed in trying impeachments. . . .

We agree with Nixon that courts possess power to review either legislative or executive action that transgresses identifiable textual limits. . . . But we conclude . . . that the word "try" in the Impeachment Trial Clause does not provide an identifiable textual limit on the authority which is committed to the Senate.

It should be obvious that this holding amounts to a determination that Nixon's constitutional rights were not violated. Like many constitutional provisions, the impeachment clause affords Congress discretion—in this case, discretion in its choice of methods by which an impeached official is "tried." Because the Senate's conduct fell within this zone of discretion, Nixon had no

Franck assails "[t]he radical notion . . . that the political discretion of the president in foreign affairs is neither circumscribed by the Constitution nor reviewable by the courts." *Id.* He fails to see that once it is established that the President's political discretion is not constitutionally circumscribed, it hardly matters whether or not it is reviewable by the courts.

ground for complaint. Had the Senate's conduct fallen outside the zone of discretion, it would have "transgress[ed] identifiable textual limits."24 This transgression, in turn, would have meant that there were "judicially discoverable and manageable standards"—viz., the textual limits. Moreover, the textual limits themselves would have demonstrated that there was no textual commitment permitting the Senate to use this method of trying impeachments. Thus, Nixon's case posed a political question only because he lost. If he had had a valid claim on the merits, the political question doctrine would not have shielded it from judicial vindication.

The point is driven home by comparing Nixon to Davis v. Bandemer, where Justice White, writing for the plurality, and Justice O'Connor, concurring in the judgment, argued over application of the doctrine to the problem of partisan gerrymandering.25 In the end, one cannot help but wonder what all the shouting was about.

Justice O'Connor's stated position was that the political question doctrine should shield issues of partisan gerrymandering from judicial review. However, even a superficial reading of her opinion makes clear that she believed this only because she also believed that the practice in question survived judicial review. On her view, "in order to [decide whether the case posed a political question], it is necessary to interpret the Equal Protection Clause."26 As she understood the Equal Protection Clause, "no group right to an equal share of political power was ever intended by the Framers of the Fourteenth Amendment."27 But this is the very sort of judgment on the merits that the political question doctrine is supposed to avoid.

In contrast, Justice White's stated position was that the political question doctrine was inapplicable.28 It was therefore necessary for him to reach the merits. Once he did so, he concluded that the equal protection clause permitted political gerrymandering except in a very narrowly defined class of cases.29 Just as O'Connor's position might be rephrased as a judgment on the merits, so too White's position might be expressed in political question language. So long as state legislatures stayed within the bounds of the rules White prescribed for them, their decisions were

24. Id. at 238.
26. Id. at 148 (O'Connor, J., concurring).
27. Id. at 147.
28. Id. at 122-23.
29. Justice White thought that political gerrymandering was unconstitutional only when there was "evidence of continued frustration of the will of a majority of the voters or effective denial to a minority of voters of a fair chance to influence the political process." Id. at 133.
within their "constitutional or legal discretion" and therefore "only politically examinable." Of course, in this sense every nonmeritorious constitutional case poses a political question. In every constitutional case, the Court must decide whether a political branch has acted within the bounds of the discretion granted to it, and it is always true that if it has, its decision is not judicially examinable. But a doctrine that describes everything describes nothing, so this recharacterization of Justice White's opinion only reinforces the emptiness of political question analysis and serves to justify Justice White's choice to express his views in terms of the merits.

Why, then, does Justice O'Connor use the arcane and indirect vocabulary of political questions to reach a similar set of conclusions? Perhaps the answer lies in another two-century-old hangover from Marbury—the annoying habit of cloaking the exercise of judicial power in the language of self-abnegation. Neurotic tics that survive this long are notoriously difficult to discard, especially when they reinforce useful self-delusions, as this one surely does. If this is, indeed, the source of the modern political question doctrine, then we hardly need worry much about it. As most of us know, some neuroses are relatively benign and not worth the effort to overcome. So long as no one is actually fooled into taking this version of the political question doctrine seriously, we can easily afford to indulge the Court's occasional relapses.

B. The Interpretive Authority Theory

In a well-known article published in 1976, Louis Henkin compared the faux doctrine with what he called "a meaningful political question doctrine."\(^\text{30}\) Such a doctrine, in his view, "would have it that . . . some constitutional requirements are entrusted exclusively and finally to the political branches of government for 'self-monitoring.'"\(^\text{31}\) Unlike the faux doctrine, the version that Henkin described is, at least on first examination, neither benign nor logically deficient. The faux doctrine avoids the merits only by deciding them. In contrast, a "meaningful" doctrine would vest final interpretive authority in a branch of government other than the judiciary. For a court that followed this doctrine, there might be an authentic gap between its political question judgment and its judgment on the merits. Such a court might conclude that the Constitution entitled the plaintiff to relief, but nonetheless stay its hand on the ground that the political branches should have the final "say" when there was disagreement about the meaning of the

\(^{\text{30}}\) Henkin, \textit{supra} note 15, at 599.

\(^{\text{31}}\) \textit{Id.}
Henkin did not deny that such a doctrine might exist in principle. However, after a careful study of all the Court's then extant political question jurisprudence, he was doubtful that it did exist in fact and more doubtful still that it should exist.

One must admire Henkin's resourcefulness and analytic acuity in reinterpreting and dismantling the foundations upon which the political question doctrine supposedly rested. Within only a few years of the article's publication, however, many scholars had concluded that he had managed to overlook most of what constitutional law was about. I speculate below on some explanations rooted in the intellectual history of legal liberalism for this changed perspective. Here, I want to suggest a simpler, terminological explanation. Henkin focused his attention on cases where the Court used the phrase "political question." Had he freed himself from this verbal formalism, he might have noticed that the Court regularly seemed to recognize the final interpretive authority of the other branches without quite saying so.

Consider, for example, *Katzenbach v. McClung*, a case that was still recent enough to be salient at the time when Henkin wrote. In the course of upholding application of the public accommodations sections of the 1964 Civil Rights Act to a local restaurant, against the argument that Congress had exceeded its commerce clause powers, the Court said the following:

> Congress has determined for itself that refusals of services to Negroes have imposed burdens both upon the interstate flow of food and upon the movement of products generally. Of course, the mere fact that Congress has said when particular activity shall be deemed to affect commerce does not preclude further examination by this Court. But where we find that the legislators, in light of the facts and testimony before them, have a rational basis for finding a chosen regulatory scheme necessary to the protection of commerce, our investigation is at an end.

Although the Court nowhere used the phrase "political question," it is hard to make sense of this test without resort to the interpretative authority version of the doctrine. To see why this is so, imagine that Congress had made a mistake – albeit a "rational" mistake – in believing that the antidiscrimination provisions of the Act were necessary to protect commerce. As a substantive matter, the Constitution grants Congress power to protect commerce, not to engage in activity that someone might think protects commerce, but actually does not do so. Thus, as a substantive matter, a

---

32. At least as I understand it, this was Herbert Wechsler's position. See Wechsler, *supra* note 16, at 9.
"rational basis" test seems incoherent. The Court's test makes sense only if one supposes that when there is disagreement about the substance—about what is or is not necessary to protect commerce—Congress has final interpretive authority so long as its judgment is "rational."

Writing a few years after Henkin dismissed the political question doctrine, John Hart Ely and Jesse Choper produced two important syntheses of post-New Deal constitutionalism that emphasized the ubiquity of the McClung-like political questions. Ely offered a political theory of democracy and discrimination that could be read as vesting interpretative authority over the Constitution's ambiguous provisions in the political branches except in circumstances where a defect in the political process prevented a democratic outcome. Choper added to Ely's political insights a richly supported empirical analysis of the built-in political protections for federalism and separation of powers that made judicial intervention superfluous. Taken together, Choper and Ely suggested that vast expanses of ordinary constitutional jurisprudence—from "rational basis" review for many equal protection and due process claims, to most cases involving the reach of congressional power, to famous constitutional chestnuts like Youngstown Sheet & Tube Co. v. Sawyer and United States v. Nixon—could best be understood by viewing them through the lens of political question. These ideas were, in turn, formalized and made more explicit in a seminal article by Lawrence Sager introducing the concept of "underenforcement" and focusing explicitly on the problem of institutional competence as central to the allocation of interpretive authority.

Ely, Choper, and Sager wrote mostly to defend Supreme Court jurisprudence. More recently, however, legal academics critical of the Rehnquist Court have converted the interpretive authority argument from a shield into a sword. As a much more conservative Court has moved to reinvigorate its commerce clause review and reduce the scope of Congress' powers under section five of the fourteenth amendment, scholars such as Rachel Barkow,

37. I use this cumbersome circumlocution advisedly. As I explain below, Ely himself would probably reject this characterization of his work.
38. See Ely, supra note 36, at 14-21, 30-33.
40. See id. at 316-26 (discussing Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952)).
43. See Barkow, supra note 11.
Vicki Jackson," Robert Post and Riva Segal," Mark Tushnet," and Larry Kramer" have faulted the Justices for ignoring the coordinate interpretive authority of Congress.

It is easy to historicize this waxing and waning of the interpretive authority theory so as to explain these shifts as ideological interventions. When Henkin wrote, liberal and leftist academics were still enjoying the afterglow of the Warren Court revolution. For scholars working in this period, it was simply assumed that an “activist” court would promote social progress. Hence, the tendency to dismiss the political question doctrine." Four years later, when Ely and Choper published their books, the change in the political valence of judicial review was too obvious to ignore. Their work can be understood as attempts to shore up the prior accomplishments of the Warren Court, while distinguishing this “good” activism from the “bad” Lochner-like activism that had loomed so large in the past and that was just beginning to threaten the future. By the turn of the century, any lingering hopes for a revival of the Warren Court were long-since dead, and there were, in any event, growing doubts about whether the Warren Court had accomplished much of lasting value. Moreover, the threat of “bad” activism that might dismantle the remnants of the welfare state was much more real. The modern revival of a more generalized defense of the interpretive authority position is therefore hardly surprising.

Suppose, though, that instead of historicizing the interpretive authority position, we attempt to take it seriously on its own terms. Does the position make sense? My own view (offered as one who, uniquely, stands outside of history, of course) is that Henkin was probably right all along, albeit for reasons somewhat different from those that he offered. The difficulty is that the “interpretive authority” position tends to slide into either the “faux” position on one side or the “secret” position on the other. 

48. See, e.g., Fritz W. Scharpf, Judicial Review and the Political Question: A Functional Analysis, 75 YALE L.J. 517, 596 (1966) (arguing that the political question doctrine, “while perhaps not unimportant, is quite limited in its scope of actual and potential relevance” and “has not been permitted to gain a permanent foothold at the core of the Court's constitutional responsibility for the protection of individual rights and for the determination of conflicts of competence.”)
do not want to overstate this point. At least in theory, it is possible to formulate a version of the interpretive authority theory that is independent of the other two. In practice, however, the tendency toward slippage is very strong and not often resisted.

We can see the difficulty by reexamining the Ely and Choper arguments. Consider, first, Ely’s views. I have expressed those views in the language of interpretive authority, but I doubt that he, himself, would have used this language. Instead of a theory for how authority to interpret the Constitution should be allocated, Ely offered his own substantive interpretation.

Ely argued that the great, sweeping, and ambiguous clauses of the Constitution should be read against the backdrop of an overall commitment to democratic political processes.49 It followed from this reading that, as a substantive matter, the Constitution has usually not been violated in the absence of a process defect. Put differently, even if the courts have final authority concerning constitutional interpretation, Ely argued that the courts should interpret the Constitution as granting substantive discretion to the political branches in the absence of a process defect. This position is subtly different from the interpretive authority position, which grants political institutions final authority to interpret the Constitution, even if they interpret it incorrectly.

If my reading of Ely’s position is correct, then the political question problem is relevant to his theory only in its “faux” form. True, the theory leaves broad swaths of political action unamenable to judicial review, but this is so only because, as a substantive matter, these political actions do not violate the Constitution as properly understood (i.e., as concerned primarily with process defects).

Of course, the fact that Ely’s views do not rest upon an interpretive authority analysis does not prove that such an analysis is impossible. However, it turns out to be quite difficult to articulate any version of the interpretive authority theory that does not end up looking a lot like Ely’s position.

In order to avoid slipping into an Ely-like substantive interpretation of the Constitution, interpretive theorists must be agnostic about what the Constitution actually requires. Their point is that—whatever the Constitution “actually” requires—the political branches should sometimes have final authority to “say” what it requires. But is there any practical difference between the Constitution’s meaning, and the meaning given to it by an authoritative interpreter? Interpretive theorists risk falling into what Daryl Levinson has aptly called “rights essentialism.”50

---

49. See ELY, supra note 36, at 11-31.
Rights essentialists ask us to envision rights that exists in an abstract, Platonic sphere that is wholly disconnected from any actual remedy that might make a difference in the real world. As I understand Ely's position, he is not a rights essentialist because the substantive rights he defines, although limited, are judicially enforceable. On the other hand, interpretive authority theorists tend toward rights essentialism because under their theory, rights are taken to exist even though they make no difference in the outcome of real law suits.

Recall that the political question doctrine does work only when, but for the doctrine, the losing party in a law suit would have been victorious. Thus, a judge relying on the political question doctrine must start by asserting that a right has been violated. But it is precisely in the cases where the political question doctrine makes a difference that the judge must also deprive the right of efficacy. Put differently, giving the political question doctrine work to do always means frustrating the work that rights would otherwise do. And if rights do no work, one might fairly ask, what is their point?51

Of course, the fact that the rights are not judicially enforceable does not mean that they are not enforceable at all. Judicially unenforceable rights can have real world consequences if enforced by the political branches. Indeed, scholars who have defended broad interpretive authority for Congress and the President rely on just this point.52 Their claim is that Congress and the President will provide better protection for these rights than courts would.53

Unfortunately, however, this assertion, even if true, does not overcome the rights essentialism objection. The political question doctrine is a judicial creation, and we must therefore evaluate its coherence from the perspective of the judges who created it. The doctrine does work only when, from the perspective of these judges, rights go unenforced. Hence, a judge who fails to reach the merits because of the political question doctrine must believe that there are rights "out there" that retain their status despite the absence of any real world consequences attached to those rights.54 Many

51. See Wayne McCormack, The Political Question Doctrine—Jurisprudentially, 70 DET. MERCY L. REV. 793, 808 (1993) (arguing that "[i]t is the lack of effect on institutionally recognized relationships that makes the political question provision nonlaw, and it is in that sense that ... the courts hold a provision to be nonlaw when they say that it gives rise to a political question.")
52. See, e.g., TUSHNET, supra note 46, at 170-77.
53. I discuss the interpretive authority position from the perspective of these scholars below.
54. Perhaps real world consequences do attach to judicial declarations of rights, even when judges do not enforce them, because the political branches will be influenced by the "advise" provided by judges. My colleague Neal
people will find this view deeply implausible. They will ask what, precisely, is the difference between a world where rights go unenforced and world where there are no rights. If one thinks that there is no difference, then one will also tend to think that there is no difference between a loss suffered because of the political question doctrine and a loss suffered on the merits. The interpretive authority theory thus collapses back into faux political question fallacy.

In order to avoid (or at least mitigate) this problem, most interpretive authority theorists are prepared to recognize judicially enforceable boundaries that limit the interpretive authority of the political branches. Precisely because granting unbounded interpretive authority to Congress would, effectively, eliminate rights that amounted to anything, these theorists want to reduce the sphere within which interpretive authority can be exercised.

These boundaries might be either textual or categorical. Katzenbach v. McClung illustrates the use of textual boundaries. Recall that in McClung, the Court was prepared to grant Congress interpretive authority over the phrase “[t]o regulate Commerce . . . among the several States,” but only so long as its application of the clause was “rational.” Moreover, the Court made clear that it had final authority to determine what counted as “rational.”

Textual boundaries do not render the interpretive authority position altogether meaningless, but they do render it much less significant. Consider again the Nixon case. We have seen that the Court’s actual holding that the impeachment clause granted Congress discretion to choose the method by which Judge Nixon was “tried”—collapses the distinction between application of the political question doctrine and the merits.

How would the interpretive authority version of the doctrine

Katyal has explored this possibility in great depth and with great sophistication. See Neal Kumar Katyal, Judges as Advisegivers, 50 STAN. L. REV. 1709 (1998). Still, I am doubtful that political question judgments often influence political actors to enforce judicially unenforced rights. First, courts that fail to reach the merits because of the political question doctrine rarely give advise. The more usual practice is simply to hold that the case is nonjusticiable without indicating what the court would do if it were able to reach the merits. Second, a court that holds that another branch has final interpretive authority over the matter is saying, in effect, that our system prefers a judgment of that other branch to a judicial judgment. This sort of institutional modesty is not well calculated to cause members of a political branch to doubt their own initial judgment about the matter.

55. Indeed, Chief Justice Marshall himself thought it was deeply implausible. He wrote that “The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.” Marbury, 5 U.S. (1 Cranch) at 163.

56. U.S. CONST. art. I, § 8, cl. 3.
The Political Question Doctrine

2004]

The Political Question Doctrine

455

differ from this holding? A court following the interpretive authority theory would say that the impeachment clause grants to Congress final authority to interpret the word "try" even if its interpretation differs from the Court's reading of the same word. However, the scope of this permissible interpretation is not unbounded. Following McClung, we might say, for example, that the interpretation must be "rational" and that the Court will have the final "say" as to whether the interpretation adopted by Congress is rational or not. Presumably, a "rational" interpretation is one that the word will fairly bear. But if the word "try" is open-textured enough to "rationally" include what Congress did, it would seem to follow that Congress has, once again, not exceeded the textual limits of the impeachment clause. The framers' choice of an open textured word rationally subject to different interpretations in effect granted substantive discretion to the political branches to adopt a variety of different procedures so long as the procedures were within the open texture. But if this is true, the interpretive authority theory, like the faux theory, yet again collapses back into the merits.57

The categorical approach avoids this difficulty by ceding to the political branches substantive categories of interpretive authority.58 For example, it is widely supposed that Congress alone has the authority to decide what counts as the "Republican form of Government"59 guaranteed by Article IV.60 There is substantial support for the position that questions relating to

57. The point holds true even if a word is so open-textured that, as a practical matter, the political branches have complete discretion. For example, Professor Pushaw argues that with regard to certain powers (he lists the veto, impeachment, appointments, and military and foreign policy decisions), the people have "entrusted their federal government representatives with complete latitude" and therefore "by definition the exercise of such discretion cannot violate the Constitution." Robert J. Pushaw, Jr., Judicial Review and the Political Question Doctrine: Reviving the Federalist "Rebuttable Presumption Analysis, 80 N.C. L. Rev. 1165, 1196-97 (2002). Pushaw argues that these areas are appropriate for invocation of the political question doctrine. Id. It should be clear, however, that if we start from Pushaw's premise that the Constitution has not been (indeed cannot be) violated with respect to these powers, the political question doctrine is, once again, doing no work. One might, of course, quarrel with that premise. But we should understand the nature of the quarrel. It is an argument about substantive constitutional interpretation, not about application of the political question doctrine.

58. See, e.g., id. (arguing in favor of a "Hamiltonian" approach that creates a presumption that courts have final interpretive authority, but provides that the presumption can be rebutted with respect to some particular constitutional provisions).


60. U.S. Const. art. IV, § 4.
foreign affairs are political.\textsuperscript{61} For a period, it was thought that enforcement of the Tenth Amendment's protection of state sovereignty was the sole responsibility of the political branches.\textsuperscript{62}

The categorical approach holds that courts have no business deciding whether the political branches act "rationally" when they interpret relevant constitutional language within these categories of cases. Instead, the categories are wholly within the exclusive jurisdiction of Congress and the President. Thus, on a categorical approach, the Court might have held that even if Congress had irrationally interpreted the word "try," the Court should nonetheless stay its hand because the entire subject of impeachment is within Congress' interpretive domain.

There is not an inherent logical fallacy with this approach, but it nonetheless poses two significant difficulties. First, if interpretive authority is not to be completely unbounded, the Court still must have final authority to decide whether the political branches are acting within an appropriate category.\textsuperscript{63} This decision, in turn, involves a question of constitutional interpretation\textsuperscript{64}—a fact that reintroduces textual analysis through the back door.\textsuperscript{65} Suppose, for example, that the stated ground for impeaching a federal judge was that he was an African American. Does this sort of "impeachment" fall within the boundaries of an immune category? If the definition of the category is, itself, a matter of constitutional interpretation, then one would suppose that the Court must bring to bear constitutional provisions relating to race discrimination when defining the category. And


\textsuperscript{63} Thus, as Herbert Wechsler has written: [T]he only proper judgment that may lead to an abstention from decision is that the Constitution has committed the determination of the issue to another agency of government than the courts. Difficult as it may be to make the judgment wisely, whatever factors may be rightly weighed in situations where the answer is not clear, what is involved is in itself an act of constitutional interpretation, to be made and judged by standards that should govern the interpretive process generally.


\textsuperscript{64} As the Court said in Baker:

Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution.

369 U.S. at 211.

\textsuperscript{65} Martin Redish has made a similar point. See Redish, supra note 9, at 1041.
once it does that, it will be obvious to the Court that this sort of "impeachment" is not within the constitutionally delineated boundaries.

My hypothetical example provides a relatively easy case, but the Court has actually decided a harder one. In *Powell v. McCormack*, the House of Representatives, purporting to utilize its Article II power to "be the judge of the ... Qualifications of its own Members," refused to permit Congressman Adam Clayton Powell to take his seat. If one took the categorical approach to interpretive authority seriously, one might suppose that this would be the end of the matter. Yet despite explicit language in Article II that seems to vest interpretive authority in Congress, the Court nonetheless held that it could adjudicate Powell's claim. On the Court's view, in order to determine whether Congress was exercising its exclusive authority, the Court had to interpret the word "Qualifications." This word, the Court said, included only the age, citizenship, and residence requirements of Article I. Since Powell obviously satisfied these requirements, it followed that Congress must have been doing something other than judging his "Qualifications" when it refused to seat him. Therefore, Congress was acting outside the category of cases over which it had interpretive authority, and Powell's claim was justiciable.

I do not mean to suggest that as a matter of pure logic, *Powell* had to be decided in the way that it was. Still, it is easy to see why the Court wanted to reach the merits of his claim. To make the point more explicit, suppose that Congress had made a clearly irrational or disingenuous judgment about Powell's qualifications, concluding, for example, that a few weekends spent in Bimini meant that he was not a "resident" of New York. A Court could hold that this finding was nonjusticiable simply because Congress claimed that it was acting within the category of "qualifications." However, it will inevitably seem to the Court that, whatever it claimed, Congress was not in fact adjudicating the question vested in it by the Constitution. Confronted with this problem, the Court will be under pressure to find that Congress has not acted within the scope of its interpretive authority and, so, to decide the merits.

The second problem arises when one attempts to avoid this difficulty by adopting nontextual, functional grounds for delineating spheres of interpretive authority. This is the project of Choper's book. For Choper, the political branches should be ceded interpretive authority over federalism and separation of powers claims, while the courts should retain interpretive authority over

69. *Id.* at 548-49.
civil liberties claims. Choper does not rely upon textual provisions, like the "Qualifications" Clause of Article I to reach this conclusion. Instead, he adopts a functional approach. Following Herbert Wechsler, he argues that there are "built-in" political guarantees for federalism and separation of powers principles that make judicial intervention unnecessary. In contrast, the political branches cannot be trusted to protect minority rights, so judicial intervention is necessary within this sphere.

Whereas Ely's position folds interpretive authority back into "faux" political questions, Choper's tends toward conflation of the interpretive authority and "secret" versions of the doctrine. The problem for Choper is to defend the criteria for determining whether the political and judicial branches achieve the "right" level of protection for the various principles at stake. For the most part, Choper's book simply avoids this problem. To be sure, he produces a rich variety of empirical data showing the varying extent to which the political branches protect federalism, separation of powers, and individual rights values. But empirical data famously fail to answer normative questions. Choper therefore simply assumes, without much discussion, that the reader will agree with him that the political protections for federalism and separation of powers somehow yield the "right" balance, whereas those for civil liberties do not.

70. See Choper, supra note 36, at 65, 67-68, 175, 263.
71. See Herbert Wechsler, Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government, 54 Colum. L. Rev. 543 (1954).
73. See id. at 68, 185-88, 238-39, 282-95.
74. For example, Choper asserts that "the experience of history strongly suggests that vesting the majority with the ultimate power of judgment, although far from being calamitous, would not sufficiently protect minority rights." Id. at 65. In support of this proposition, Choper cites our experience with slavery, public assistance to church-related schools, internal security, and the socioeconomic rights of racial minorities. Id. at 68. We can put to one side the issue of slavery, where, to say the least, there is no evidence that the courts performed any better than majoritarian institutions. Choper's other examples have force only if one agrees with him on the merits of these disputes. But not everyone does agree. Unfortunately, Choper's book provides no argument supporting his side of the dispute.

Similarly, Choper argues that judicial review of the Constitution's federalism provisions is unnecessary because "the proliferation of national programs has neither led to a centralized autocracy nor resulted in the total concentration of federal power to the exclusion of the individual states." Id. at 186. Here, Choper's rhetoric unfairly prejudices the argument by excluding middle cases. To be sure, if one emphasizes the words "autocracy" and "total" his conclusion is uncontroversial. But one might similarly say that the absence of judicial review of civil liberties claims would not lead to death camps and the gulag. In the civil liberties context, Choper understands that
How does Choper know that this is true? Importantly, the criteria for "rightness" cannot be grounded in the Constitution itself. By hypothesis, the judiciary and the political branches disagree about what the Constitution requires. For Choper to take sides in this dispute would be for him to decide the merits—the very thing that the political question doctrine is supposed to avoid. If the point of Choper's exercise is to devise legal rules that produce constitutionally mandated outcomes, he could do so directly by simply telling us what the Constitution mandates. It follows, I think, that Choper's criteria must be extraconstitutional. Choper has an unarticulated and undefended political position (which he expects the reader to share) that is best achieved by manipulating the jurisdictional responsibilities of the various political branches. Put differently, Choper's political question doctrine leads a secret life. Under the cover of doctrinal respectability, his political question doctrine subverts the core assumptions of constitutionalism by deciding the very political questions it purports to avoid.

C. Secret Political Questions

Choper is not alone in wrestling with a secret political question doctrine. The most famous chronicler of secret political questions was Alexander Bickel. In order to understand both the great strengths and important weaknesses of Bickel's insights, they must be historically and politically located.

Published more than a decade before the work of Ely, Choper, and Henkin, Bickel's best known book,75 was preoccupied with the crisis in judicial legitimacy produced by Brown v. Board of Education.76 In Bickel's world, the Warren Court had not yet achieved iconic status and the outcome of its dramatic intervention in race relations remained very much in doubt. "Massive resistance" was still at its height, the President was not yet firmly committed to a civil rights agenda, and Congress was dominated by southern segregationists.

Faced with uncertain and wavering political support, the Supreme Court charted a cautious path. Whereas the Brown I opinion was marked by sweeping and powerful rhetoric, Brown II77 suggested pragmatism and willingness to compromise. Between Brown II and the publication of Bickel's book in 1962, the Court

---

75. BICKEL, supra note 9.
had remained almost entirely silent, seemingly avoiding the conflict that its own opinion had sparked.\textsuperscript{78} Indeed, in \textit{Naim v. Naim},\textsuperscript{79} a case decided shortly after \textit{Brown}, the Court went to embarrassing lengths to avoid striking down a blatantly racist antimiscegenation statute when doing so would have upset white southern sensibilities.\textsuperscript{80} To many contemporary observers, the result in \textit{Naim} seemed completely lawless and impossible to justify on the basis of principle.\textsuperscript{81}

The Court's behavior during this period produced an intellectual crisis among the liberal legal intelligentsia, still struggling with the legacy of \textit{Lochner} and its repudiation. In the immediate wake of \textit{Brown}, Judge Learned Hand had reopened the old question about whether any form of judicial review was legitimate.\textsuperscript{82} In a famous response, Herbert Wechsler defended judicial review, but only so long as it was "principled."\textsuperscript{83} At the conclusion of his essay, he raised serious doubts about whether \textit{Brown} could be defended on a principled basis.\textsuperscript{84}

As a young legal academic, Bickel was doubtless caught up in the intellectual doubts raised by Hand and Wechsler. But he had also clerked for Justice Frankfurter while \textit{Brown} was being considered and believed that the case had been decided correctly.\textsuperscript{85}

\textsuperscript{78} After issuing a series of per curiam opinions, extending \textit{Brown} to state mandated segregation in fields other than education, see Gayle v. Browder, 352 U.S. 903 (1956); Holmes v. City of Atlanta, 350 U.S. 879 (1955); Mayor of Baltimore v. Dawson, 350 U.S. 877 (1955), the Court intervened only once, responding to outright and very public defiance by Governor Orval Faubus of Arkansas. See \textit{Cooper v. Aaron}, 358 U.S. 1 (1958).


\textsuperscript{80} In a memorandum to his fellow justices concerning \textit{Naim}, Justice Frankfurter, for whom Bickel clerked, made clear his view that the "moral considerations" far outweighed the "technical considerations" in disposing of the case. The "moral" considerations are, of course, those raised by the bearing of adjudicating this question to the Court's responsibility in not thwarting or seriously handicapping the enforcement of its decision in the segregation cases. . . . For I find it difficult to believe that there is a single member of this Court who does not think that to throw a decision of this Court other than validating this legislation into the vortex of the present disquietude would not seriously, I believe very seriously embarrass the carrying out of the Court's decree of last May.


\textsuperscript{81} See, e.g., Wechsler, supra note 16, at 34.

\textsuperscript{82} \textit{LEARNED HAND, THE BILL OF RIGHTS} 15-18 (1958).

\textsuperscript{83} See Wechsler, supra note 16, at 15.

\textsuperscript{84} Id. at 33-34.

The project of Bickel's book, then, was to take into account the arguments that Hand and Wechsler had made, while also defending the Court's Brown and post-Brown stance.

Accomplishing this task required a subtle and complex dialectical argument. On the one hand, judicial review in general and Brown in particular was defensible on the ground that the Court could appropriately protect enduring principles against temporary majoritarian pressure. On the other hand, no society could survive on an exclusive diet of rigid adherence to unwavering principle. It followed that the Court could maintain its principled stance only by unprincipled restrictions on the occasions for declarations of principle. Relying on the much older progressive tradition associated with Brandeis, Thayer, and his own mentor, Frankfurter, Bickel saw the Court's willingness to stay its hand as an important precondition to its legitimacy when it chose to act. It was crucial for the Court to act in principled fashion as, pace Wechsler, it surely had acted in Brown. But in the real world, the Court could only maintain this principled stance if it paid some attention to politics when it decided whether to decide. Hence, Brown I, Brown II and Naim had all been rightly decided.

Bickel's argument had two important corollaries with regard to the political question doctrine. First, it meant that his version of the doctrine, unlike the versions considered so far, had real bite. For Bickel, application of the doctrine involved far more than the mere recognition that the political branches had acted within the discretion the Constitution granted to them. Bickel's version simply resists being domesticated in this fashion. There is... something different about it, in kind not in degree; something greatly more flexible, something of prudence, not construction and not principle. And it is something that cannot exist within the four corners of Marbury v. Madison.

There is, then, nothing "faux" about this political question doctrine. In the struggle between principle and expedience, the doctrine is the mechanism by which courts give expedience its due. The doctrine reflects a profoundly subversive judicial judgment that constitutional adjudication has its limits. Bickel's crucial insight, never fully articulated, is that constitutional law cannot be self-validating. Judges must inevitably make judgments about whether to apply constitutional law. There will therefore be some

86. See BICKEL, supra note 9, at 24-28.
87. See id. at 64.
88. See id. at 70.
89. For Bickel's awkward effort to defend both Brown I, as principled, and Brown II, as expedient, see id. at 244-255. For his defense of Naim, see id. at 174.
90. Id. at 125-26.
cases in which the Court simply should not obey constitutional commands and in these cases, there will be a real gap between the constitutional merits and the result the Court actually reaches.

Had Bickel's analysis stopped there, his work would have been truly radical. However, he attempted to cut off the most destabilizing aspects of his claim with a second corollary that sharply limited the force of the first. Although muscular and meaningful, Bickel's political question doctrine was nonetheless a "passive virtue." It provided arguments for not acting; not a reason for action. Bickel argued for this distinction on the ground that only by not deciding some things could the Court protect the legal purity of the things it chose to decide. Thus,

[T]he techniques and allied devices for staying the Court's hand... cannot themselves be principled in the sense in which we have a right to expect adjudications on the merits to be principled. They mark the point at which the Court gives the electoral institutions their head and itself stays out of politics, and there is nothing paradoxical in finding that here is where the Court is a most political animal. 92

Nothing paradoxical? The real drama in Bickel's book revolves around his ultimately futile effort to persuade us that this seeming paradox can be resolved. The book's failure is perfectly captured by Gerald Gunther's devastating taunt that Bickel insisted on one hundred percent devotion to principle twenty percent of the time. 93 As Gunther powerfully demonstrated, it was difficult to see how the Court could maintain either its reputation for or the reality of apolitical neutrality by engaging in conduct that was concededly political. The political question doctrine could hardly keep the Court out of politics if application of the doctrine, itself, required political judgments.

Gunther's critique leads to the disquieting conclusion that if the passive virtues are to serve their intended function, they can do so only by misleading the country. Bickel must have assumed that the Court could maintain its reputation for apolitical, principled adjudication while still acting politically because the country paid more attention to what the Court decided than to what it chose not to decide. But not doing is, after all, also a kind of doing; for the parties involved in Naim, the Court's

91. Id. at 200.
92. Id. at 132.
94. Indeed, as Professor Scharpf pointed out, a political question determination, unlike other techniques of avoidance such as ripeness, mootness, or standing has an impact far broader than its effect on the immediate parties. When a court uses other avoidance techniques, it holds
disingenuous avoidance of the merits had precisely the same impact as a decision upholding the statute. If the two results differed at all, the difference lay in how the alternative dispositions were (or would have been) perceived. A decision upholding the Virginia antimiscegregation statute would “legitimate” naked racism, whereas a “nondecision,” somehow getting rid of the case on unprincipled grounds, would not. But this difference, if indeed it exists at all, crucially depends upon the public’s failure to understand the actual consequences of what the Court has done or failed to do. The Court was, in effect, betting on Brown creating banner headlines, while Naim slipped unreported through the news sieve.

Bickel’s struggle with the issue of judicial candor is painful and contradictory. In a section of the book discussing Justice Hugo Black’s absolutist views of constitutional interpretation, he addresses the possibility that Black might have overstated his position in order to protect the “right” level of principle from political erosion. If Black is, indeed, creating “an illusion, purposefully fostered,” Bickel is strongly censorious.

To introduce into judicial review the factor of attitude springing from illusion would be gravely to depreciate and damage the process. The process is justified only if it is as deliberate and conscious as men can make it. . . . [T]he Court should not tell itself or the world that it draws decisions from a text that is incapable of yielding them. That obscures the actual process of decision, for the country, and for the judges themselves, if they fall in with the illusion. And it is a menace, to the Court and to the country . . . .

Yet the purity that Bickel sought can be maintained only through the very dissembling that Bickel condemned. The Court could afford to stand on principle in Brown only because it deliberately and self-consciously obscured reality in Naim.

This contradiction, in turn, raises intriguing questions about Bickel’s own candor. Perhaps it is true that the Court can better hide its politics when it refuses to decide than when it decides.

open the possibility that the claim might be adjudicated by different parties suing at a different time. In contrast, a political question determination permanently insulates an area from legal challenge. See Fritz W. Scharpf, Judicial Review and the Political Question: A Functional Analysis, 75 Yale L.J. 517, 537 (1966).

95. Cf. Graham Hughes, Civil Disobedience and the Political Question Doctrine, 43 N.Y.U. L. Rev. 1, 15 (1968) (arguing that a court decision that it has no power to make a determination “is tantamount to a finding that there is a legal liberty for the legislature or executive to perform the challenged act”).

96. See BICKEL, supra note 9, at 69-70. For Gunther’s criticism of this position, see Gunther, supra note 93, at 6-8.

97. BICKEL, supra note 9, at 96.

98. Id. at 96-97.
There may nonetheless be occasions when it can hide its politics well enough even when it decides.\textsuperscript{99} If political necessity is powerful enough, should the Court, on these occasions, abandon its devotion to principle when it acts as well as when it fails to act?\textsuperscript{100} One thing is certain: if Bickel thought that it should, he would never have told us so. For if, indeed, the Court’s politics must remain secret, then it would hardly do for the Court’s defenders to reveal the secret.

These observations are, of course speculative, but the speculation is not altogether groundless. Recall that Bickel defended \textit{Brown} as an example of principled adjudication. So, of course, did all nine Justices of the Supreme Court. Yet we now know from examination of the Justices’ (then) secret conference notes that several of the Justices, including Bickel’s employer at the time (none other than Felix Frankfurter), voted for \textit{Brown} despite extremely serious reservations about the legal justification for the opinion.\textsuperscript{101} Could Bickel have shared these doubts?\textsuperscript{102} If so, he could hardly have publicly acknowledged as much. Honesty about the need for dishonesty is, of course, contradictory, but in the context in which Bickel wrote, contradiction was the least of it. With the Supreme Court under attack by bigots and reactionaries, with racial justice on the line, and with the political and moral imperatives as strong as they have been at any time in the Court’s history, candor would have amounted to self-indulgent moral cowardice. In the face of all this, could it be that Alexander Bickel

\textsuperscript{99} Moreover, as Martin Redish points out, the Court sometimes courts political backlash by refusing to decide, rather than by deciding. See Redish, \textit{supra} note 9, at 1059. (noting that the Court may have expended political capital because of its refusal to decide federalism issues).

\textsuperscript{100} Even if one applies the criteria traditionally associated with the political question doctrine, action may sometimes be more defensible than inaction. Consider, for example, the problem of embarrassment of the United States in its relationships with other governments. As Fritz Scharpf points out, there may be occasions when “the State Department may be much more embarrassed by the necessity to take a stand on questions of this nature than by the need to explain the decisions of American courts to a foreign government.” Scharpf, \textit{supra} note 94, at 582.

\textsuperscript{101} See Michael J. Klarman, \textit{From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality} 303-04 (2004); Tushnet, \textit{supra} note 85, at 188-210.

\textsuperscript{102} A memorandum Bickel wrote for Frankfurter’s benefit, later converted into a law review article, strongly suggests that Bickel entertained doubts as to whether conventional legal materials supported \textit{Brown}. Alexander M. Bickel, \textit{The Original Understanding and the Segregation Decision}, 69 Harv. L. Rev. 1, 61 (1955). The article ultimately defends \textit{Brown}, but concludes somewhat lamely that the equal protection clause allowed moderates and radicals both “to go to the country with language which they could, where necessary, defend against damaging alarms raised by the opposition, but which at the same time was sufficiently elastic to permit reasonable future advances.” \textit{Id}. 
was too principled to stand on principle?

II. DOCTRINE AND THE POLITICAL QUESTION "DOCTRINE"

A. Normalizing Secret Political Questions

We can never know whether Bickel secretly favored the Court's secret politics. What is certain, though, is that the secret political question doctrine played, and continues to play, a vital role in the Court's affairs. Nor is the doctrine merely a "passive virtue." On a regular basis, the Court makes political judgments about the applicability of the Constitution, both when it declines to decide cases and when it decides them.103

On some level, this fact should hardly surprise us. It amounts to no more than a logical truth that a normative system cannot establish its own normative worthiness. Admit it or not, every Justice in every case faces a logically antecedent question before she interprets the Constitution: should I do what the Constitution commands? Two things are plain: first, the Constitution itself cannot answer this question. Second, there will be occasions when the right answer is "no."

These propositions may seem shocking or extreme, yet they are so conventional that we hardly notice the occasions when they guide behavior. Indeed, for reasons I will explain below, they serve their purpose only because we do not notice. In this sense, the recent occasion when the country did notice is aberrational. Many Americans believe that *Bush v. Gore*104 was resolved on the basis of political, rather than legal imperatives. On the least charitable view, the Court was determined to enforce its own version of the "Republican form of government clause," as the (now tired) joke goes. Richard Posner has advanced a much more charitable view. He argues that the case was rightly decided, not because the law somehow required this result but because the Court's decision saved us from a nontrivial possibility of disabling deadlock.105

There are good reasons to doubt that Posner is right about the prospects of deadlock and room for reasonable disagreement about whether even real prospects of deadlock were sufficient reason to justify deviation from law. Still, whatever the merits of *Bush*

103. In this sense, although Gunther's criticism of Bickel hit the mark, Gunther misunderstood the implications of the criticism—at least by my lights. Gunther was right to assert that there was no distinction between political (as opposed to legal) action and inaction. See Gunther, *supra* note 93. Gunther argued that the Court therefore should follow legal principles both when it acted and when it failed to act. *Id.* In contrast, my argument is that the Court cannot avoid political judgments in both situations.

104. 531 U.S. 98 (2000).

105. POSNER, *supra* note 13, 134-45, 186, 188.
itself, it seems indisputable that occasions will arise when the claims of law are outweighed by other moral or political imperatives. Legal scholars who have complained about the Bush Court's putative failure to invoke the political question doctrine have therefore missed the real heart of the dispute about the case. If it was, indeed, wrongly decided, the Court's error lay in too ready a resort to the political question doctrine, rather than in failure to make use of it.

Bush created a tremendous controversy, but, as noted above, the more conventional uses of the doctrine go largely unnoticed. I outline here three examples of the Court's regular reliance on political criteria to decide whether to obey the Constitution.

1. Stare Decisis

The connection between political questions and stare decisis may not be immediately apparent, but it is real nonetheless. When the Court follows prior precedent in a constitutional case, it is, in effect, saying that political judgments should overcome the requirements of constitutional law.

To see the point, consider Planned Parenthood of Southeastern Pennsylvania v. Casey, perhaps the Court's most famous decision defending stare decisis. Much to the surprise of many legal commentators, the Casey Court declined to overrule Roe v. Wade. In its extended and extraordinary discussion of its reasons for this conclusion, the controlling opinion elaborated on a set of criteria for determining whether to abide by a former decision. The Justices emphasized factors like whether there had been reliance on the prior decision, whether it had been overtaken by later factual developments, and whether later doctrinal developments made the earlier decision anomalous. Significantly, the Court made no effort to tie these criteria to constitutional law. Instead, they appear to be judge-made, extraconstitutional norms.

Moreover, at least one of the norms was overtly political in a way that Alexander Bickel would have understood. On the view of the justices signing the controlling opinion, it is essential that the Court act to preserve its own reputation for legitimacy. This reputation is crucially dependent on the country's perception that it is not vulnerable to political pressure. Hence, when the Court is under political attack, it must stand its ground. Paradoxically, the appearance of staunch and apolitical resistance to political pressure is, itself, a political imperative. In Casey, the Court

---

106. See supra notes 10-11 and accompanying text.
108. Id. at 854-55.
109. Id. at 867-68.
held, in effect, that this political imperative was strong enough to tolerate violation of the Constitution.

Of course, the controlling opinion did not say directly that it was departing from constitutional norms. Indeed, a section of the opinion introduced a new defense of the abortion right. Nonetheless, there must have been some reason why the discussion of stare decisis occupied so much space in the controlling opinion. Reliance on stare decisis is necessary only in cases where but for the doctrine, the Court would have followed a different course. It follows that whenever stare decisis makes a difference, the Court is disobeying a constitutional command as the justices then understand that command. Because stare decisis is a doctrine about constitutional disobedience, the Court can hardly rely upon criteria derived from the Constitution to govern its applicability. Instead, the application vel non of stare decisis is a political question.

Some critics of stare decisis have concluded that the doctrine is therefore illegitimate. Of course, these critics are right if criteria for legitimacy can be derived only from the Constitution itself. But why should anyone believe this? Surely, there are at least some occasions when the imperatives of consistency, settled expectations, legitimacy, or simply efficiency justify not revisiting questions that have long been settled. At least this is what virtually every Justice who has served on the Court has believed. So far as we know, these Justices have been able to sleep quite well at night (thank you) despite their regular defiance of their constitutional obligations.

2. Constitutional Remedy

Like stare decisis, the law of constitutional remedy lies outside the bounds of constitutionalism. In Bickel's generation, this point became obvious when the Court turned from the

---

110. Id. at 852 (arguing that abortion protected because pregnant woman's "suffering is too intimate and personal for the State to insist, without more, upon its own vision of the woman's role, however dominant that vision has been in the course of our history and our culture").

111. For just this reason, stare decisis plays no role in the civil law tradition. For civilians, respect for precedent is inconsistent with the primacy of the Code and, therefore, with the rule of law. See John Henry Merryman, The Civil Law Tradition: An Introduction to the Legal Systems of Western Europe and Latin America 36 (2d ed. 1985) (discussing rejection of stare decisis in civil law systems). See also Michel de S.-O.-I'É. Lasser, Judicial (Self-) Portraits: Judicial Discourse in the French Legal System, 104 Yale L.J. 1325, 1335-37 (1995) (discussing "official" French position that judges are prohibited from establishing any rule capable of application in a later case).

substantive requirement of desegregation in *Brown I* to the issue of remedy in *Brown II*. As Bickel acknowledged, when the Court turned to remedy, the issues became practical and political rather than principled and constitutional.

In our own time, the controversy over the fourth amendment exclusionary rule best demonstrates the necessarily nonconstitutional status of remedial doctrine. In recent years, the Court has settled upon a deterrence-based justification for the rule. On this theory, use of improperly obtained evidence is not, itself, an "unreasonable search or seizure" that violates the fourth amendment. Rather, the exclusionary rule is constitutionally compelled in order to deter future violations.\(^\text{113}\)

The Court has regularly used this deterrence-based framework to balance the deterrent efficacy of the rule in various settings against its law enforcement cost, and when it has found that the latter outweighed the former, it has declined to extend the rule.\(^\text{114}\) In the opinion of the Court's many critics, this balancing is deeply unprincipled because it presupposes an undefended value that is attached to each side of the balance.\(^\text{115}\)

What the critics have failed to notice is that this valuing cannot possibly be accomplished within the four corners of constitutionalism. The problem becomes apparent as soon as one acknowledges that no sensible legal system would attempt to reduce the level of fourth amendment violations to zero. A policy, seriously pursued, that attempted this course would require the subordination of all extraconstitutional values to the prevention of fourth amendment violations. In such a world, the exclusionary rule would be the least of it; offending officers would be executed or jailed for life.

There must, therefore, be an optimal level of fourth amendment violation. But what level? Plainly, we cannot look to the Constitution itself to determine the appropriate level of constitutional violation. It follows that judges must create fourth amendment remedies according to criteria that are nonconstitutional. Moreover, any sensible remedy will be constitutionally deficient in the sense that it will tolerate the

\(^{113}\) See, e.g., United States v. Calandra, 414 U.S. 338, 348 (1974) (stating that the exclusionary rule is a "judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved").


continued existence of justified constitutional violations. The decision to impose one remedy rather than another is therefore political in the sense that it balances nonconstitutional values against constitutional commands and allows the former to outweigh the latter when it seems sensible to do so.

3. Doctrinal Elaboration

The prior two examples involve discrete areas of constitutional law. However, the point of the examples can be generalized. As scholars such as Richard Fallon, David Strauss, Henry Monaghan, and Akhil Amar have taught us, constitutional doctrine is separate from and, in an important sense, in tension with constitutional law. In any advanced constitutional system, it will not be possible to apply undiluted constitutional commands to cases as they arise. Instead, judges over time will have to gloss the naked commands with judge-made supplements.

Given this fact, it is not surprising that many of the Court's modern constitutional decisions make no more than passing reference to the document itself. Instead, the U.S. Reports are filled with discussion of the four part Central Hudson test for commercial speech, the various tiers of review in equal protection cases, or the different variety of public fora available for political demonstrations.

Without an understanding of the central role played by the political question doctrine, the existence of this doctrinal overlay can seem quite mysterious. Consider, for example, Dickerson v. United States, where the Court held unconstitutional a congressional attempt to overrule Miranda v. Arizona. In numerous cases decided between Miranda and Dickerson, the Court had held that the Miranda warnings were not required by the fifth amendment, but rather were a judicially created tool designed to enforce the amendment. In Dickerson, the government argued that if Miranda warnings were, indeed, not constitutionally required, the Constitution did not prevent

120. 530 U.S. 428 (2000).
Congress from overriding them. The Court soundly rejected this claim.

Someone who thinks that the Court’s only source of authority comes from the Constitution will have considerable difficulty understanding this result. If the Constitution does not require Miranda warnings, and if the Court’s only power derives from the Constitution, it would seem to follow syllogistically that the Court lacks the power to invalidate a statute permitting the introduction of confessions prohibited by Miranda.

The result in Dickerson makes perfect sense as soon as one acknowledges that the Court also has authority to promulgate doctrine that is supplemental to and different from the commands of the Constitution itself. Doctrine is supplemental to the Constitution because, taken by themselves, the Constitution’s commands are too porous and general to be instantiated in everyday life. For example, as the pre-Miranda Court discovered, the constitutional requirement of noncoercion is a philosophical abstraction that is a poor substitute for the kind of clear rule that lower courts and countless police officials need when they go about their daily work. Doctrinal elaboration is necessary to mediate between legal abstractions on the one hand and the endless complexity and variety of individual cases on the other.

However, constitutional doctrine is also different from, and therefore in real tension with, the Constitution. As I have argued elsewhere, much of the Constitution’s power derives from its majestic incoherence. The ideals of equality, freedom, and dignity that the Constitution embodies are powerful precisely because they can never be given concrete expression. They are contradictory and allusive poetic evocations, not bureaucratic rules. When the Supreme Court converts them into the kind of directives necessary to run the vast bureaucracy that is the United States, the Justices must necessarily be concerned with extraconstitutional issues like administrability, coherence, and comprehensibility.

Constitutional doctrine is therefore both more elaborate and less flexible than the Constitution itself. More importantly for present purposes, the source of constitutional doctrine cannot be the Constitution. This fact is a necessary consequence of the reasons we need doctrine in the first place. If the Constitution were self-implementing we would not need the doctrine; because it is not self-implementing, judges must look outside the Constitution for the tools that will implement it.

123. For discussion of this problem, see Louis Michael Seidman, Brown and Miranda, 80 CAL. L. REV. 673, 742 (1992).
The Political Question Doctrine

B. Doctrine, Secrecy, and Choice

The preceding section is designed to demystify an authentic political question doctrine by demonstrating that the Supreme Court, regularly and without much controversy, disregards constitutional requirements. A natural response to this argument is to point out that it is parasitic on a contestable conception of the boundary between constitutional law on the one hand and politics on the other. A less formal, more capacious definition of constitutional law avoids the charge that the Court regularly disregards this law. For example, if one defines constitutional law as consisting of constitutional doctrine as developed by the Supreme Court, or as itself requiring respect for stare decisis or an appropriate balance between enforcement and nonenforcement of fourth amendment norms, then the Court is obeying, rather than flouting constitutional commands. Conversely, a narrow enough definition of “politics” rescues the Court from the charge that it has confused political with constitutional judgments. For example, if one defines “politics” to mean the kind of partisan politics that elected officials regularly engage in, none of my examples demonstrate that the Court has made political judgments.

Although there is some force to this argument, it mostly misses the point. My position does not depend upon the specification of any particular boundary between constitutional law and politics. Rather, it depends only on the assumption that some such boundary exists. If we define constitutional law to encompass everything that the Supreme Court does, then of course the Court never allows politics to intrude on its constitutional judgments. But a definition of constitutionalism that is this broad deprives the word of any useful meaning. As soon as we entertain the possibility that something lies outside the domain of constitutionalism, then it will inevitably be true that the Court will face a choice between doing what the Constitution commands and doing something else.

For example, suppose one were to say that the Constitution requires a “reasonable” level of enforcement of fourth amendment rights. If what one means by this is simply an “all things considered” judgment about how much enforcement there should be, then of course the level of enforcement is controlled by constitutional law. But constitutional law defined this broadly no longer constitutes a useful analytic category. The Constitution has meaning only if, at least occasionally, it requires that we do something that we would not otherwise have done. And as soon as we narrow the domain of constitutional law so as to give it meaning, courts will be confronted with the problem of whether to do what the Constitution commands or what they otherwise would have done. For example, they will be confronted with the problem
of what level of fourth amendment violation is “reasonable.” This residual category need not consist of politics in the partisan sense. But it is politics in the sense that the outcomes it produces cannot be justified within the domain of constitutionalism. However constitutional law is defined, it will always make sense to allow some violations of that law to go unremedied, and the Constitution cannot, without contradiction, establish when it should be violated.

There is another sense, though, in which the specific examples I have used are within the domain of constitutionalism. The examples look like constitutional law because they are, themselves, heavily doctrinalized. It is thus easy to assimilate them into normal constitutionalism. In contrast, the real political question doctrine can never be completely normalized. This is so because, at bottom, the doctrine reflects the brute and frightening reality of unmediated and uncontrollable choice. The very act of bringing this choice into consciousness denies the existence of choice. As soon as the Justices recognize the possibility of unmediated freedom, they inevitably attempt to justify the path they have chosen. But justification implies structure and limits, and structure and limits are incompatible with raw freedom.

It follows that we can never see the real political question doctrine at work. What we see, instead, is the indirect evidence of its existence, left over from the brief instant between its coming into consciousness and the frantic effort at control. Thus, it is no coincidence that the “law” of stare decisis and remedy is highly developed and structured and that doctrinal elaboration is just that—doctrine. True, we can demonstrate that attempting to root these phenomena in the Constitution yields logical contradiction. It is this contradiction that provides the indirect evidence that there is a real political question lurking below the surface. In contrast, the surface manifestations—phenomena like stare decisis, remedy, and doctrinal elaboration—are just more examples of the repression and denial that is constitutional law.

We can nonetheless catch fleeting and indirect evidence of secret political questions if we focus on the evasive maneuvers undertaken at the moment when the possibility of true choice emerges. A good example is provided by a recent, provocative article by Oren Gross concerning the appropriate legal response to emergencies.125

Writing in the aftermath of the attack on the World Trade Center, Gross carefully examines, and ultimately rejects, the two standard responses to grave national crisis. According to the “Business as Usual Model,” there are no special emergency

powers. Instead, on this view, the system already grants the government adequate powers, and any departure from regular legality endangers the entire constitutional structure.\textsuperscript{126} Gross believes that this model risks "inflexible, dogmatic utopianism."\textsuperscript{127} It is simply a hard fact that governments faced with true emergencies will not abide by ordinary legal norms, and an ostrach-like insistence that this is not, or should not, be true risks hypocrisy and the wholesale pollution of those norms even in periods of normal politics.

The conventional rival to the "Business as Usual Model" is the "Model of Accommodation." According to this model, the government possesses extraordinary legal power to deal with extraordinary circumstances. Properly read, the Constitution requires the maintenance of ordinary norms to the extent that these norms are practical, but also allows for extraordinary measures to the extent that these measures are necessary.\textsuperscript{128} Gross attacks this model because its "flexibility is innately susceptible to manipulation" and because "[c]hanges to the legal system, in times of emergency under [this model] have the tendency to become permanent features beyond the termination of the crisis."\textsuperscript{129}

In place of these conventional approaches, Gross defends an "Extra-Legal Measures Model." According to this model, we should frankly recognize the legitimacy of government officials sometimes violating the law when necessary to avoid catastrophe. Perhaps paradoxically, a straightforward recognition of, and public debate about, extra-legal measures will better protect civil liberties than an attempt to remain within the four corners of our normal constitutional system.\textsuperscript{130} Gross's article is careful, learned, thoughtful, and closely argued. Yet it is ultimately wrongheaded. The basic problem is that he fails to accomplish his principal task: to spell out what a truly Extra-Legal Model would look like and how it would work. Gross gives the game away when he writes, late in the article, that his approach "must be carefully limited and well-restricted lest it be interpreted as permitting official lawlessness."\textsuperscript{131} Pursuant to this requirement, Gross meticulously sets forth a series of rules for the application of the model. Government's may deviate from constitutional norms, but only if (1) the deviation is "aimed at the advancement of the public good,"\textsuperscript{132} (2) it is "openly, candidly and
fully disclosed to the public;\(^\text{133}\) (3) the actions are ratified ex post by the public;\(^\text{134}\) and (4) if the public instead denounces the actions or remains silent, government officials are vulnerable to civil or criminal sanctions.\(^\text{135}\) These rules, Gross insists, "ensure that public officials are not above the law."\(^\text{136}\)

The problem with this formulation should be apparent. If Gross were truly defending extralegal measures, he would hardly worry that his project might be misinterpreted as "permitting official lawlessness" or as placing "public officials . . . above the law." Justifying official lawlessness and placing government officials above the law is the whole point of an Extra Legal Model. Instead of defending extra-legal conduct, Gross has merely redefined what should count as legal.

A useful thought experiment that tests this proposition is to attempt to draft a constitutional amendment that incorporates Gross' proposal. Without going through the exercise here, I will simply assert that any moderately competent lawyer would have little trouble in drafting such an amendment. But if this is true, it follows that Gross has simply proposed an interpretation of the Constitution that incorporates such an amendment. This interpretation is no different from the accommodationist model that he elsewhere attacks. Put differently, Gross has fallen into the faux political question trap. His Extra-Legal Model is not extra-legal at all, but instead a proposal to change the substantive content of constitutional law.

To be sure, there is a way out of this trap, but it only leads into another. Perhaps the point is that government officials should be told that they are acting illegally even if, in some sense, they are not. Like the position that Bickel attacks Justice Black for adopting, and then, perhaps, adopts himself,\(^\text{137}\) Gross wants to manipulate public officials by misleading them. Just as we set a 55 mile per hour speed limit to get drivers to go 60 miles per hour, so too we should pretend that the law is stricter than it in fact is so as to secure an optimal level of compliance.

I must confess that I am unsure whether Gross embraces this argument. There are passages in his defense of the Extra Legal Model that seem to invoke it,\(^\text{138}\) but, as I read him, he also attacks

\(^{133}\) Id.
\(^{134}\) Id. at 1111-12.
\(^{135}\) Id. at 1112.
\(^{136}\) Id.
\(^{137}\) See supra notes 97-101 and accompanying text.
\(^{138}\) Thus, Gross argues that "[t]he knowledge that acting in a certain way means acting unlawfully is likely to have a significant restraining effect on government agents even during the emergency itself. . . . [I]t seems likely that the mere need to cross the threshold of illegality would serve, in and of itself, as a limiting factor against a governmental rush to assume unnecessary powers." Gross, supra note 125, at 1122.
advocates of the Business as Usual Model for relying upon it.139 If Gross does indeed mean to endorse this position, he falls into the same difficulty that Bickel encountered: one cannot both withhold from government officials the knowledge that their conduct is actually lawful, and also candidly admit that one is withholding this knowledge. Gross' acknowledgment that officials should not really be held to the formal legal standards is like a speed limit sign that says "55 miles per hour, but (to tell the truth) we won't actually stop you if you are going 60."

Why has a scholar as perceptive and original as Professor Gross fallen into these difficulties? The answer, I think, is simple. Had he not, he would have had no article to write. There are two problems. I have already spelled out the first of these in the previous paragraph: Gross does not know how to keep a secret. When Bickel faced this dilemma, he remained silent (that is, if my speculation about him is correct). Gross has spilled the beans.

The second problem is more serious. Any article defending the Extra Legal Model requires some description of what it is and some norms for when it can be invoked. But as soon as the model is structured in this way, it ceases to be extra-legal. What makes conduct extra legal is precisely its resistance to rules and norms.140 Without a recognition of this fact, one is led into an infinite regress. In a true emergency, one might ask, are not government officials justified in overriding the rules that Gross establishes for

139. Id. at 1044 (discussing the charge of hypocrisy directed against advocates of The Business As Usual Model).

140. In his insightful analysis of the work of Carl Schmitt, Gross seems to recognize as much. See Oren Gross, *The Normless and Exceptionless Exception: Carl Schmitt's Theory of Emergency Powers and the "Norm-Exception" Dichotomy*, 21 CARDOZO L. REV. 1825, 1841 (2000) (discussing the "normless character of the exception"). Gross strongly criticizes Schmitt, a German political thinker who embraced the Nazi regime, for nihilism because of Schmitt's recognition that "a decision emerges out of nothing, ... does not presuppose any given set of norms, and ... does not owe its validity or its legitimacy to any preexisting normative structure." Id. at 1851-52. Of course, it is for just this reason that we feel the need to repress the possibility of making such decisions. Repression does not make the possibility go away, however.

At the conclusion of his essay, Gross adds these words:

There are times when academics do not enjoy the privilege of not taking sides and not expressing positions. And when they do, their words and actions matter and they stand accountable for them. Carl Schmitt expressed his positions clearly and acted upon them. All those who continue to debate his legacy must remember at all times that this is not some exercise conducted in the ivory towers of academia with which we are involved. It is a matter of life, and even more so, of death.

Id. at 1867-68. Just so. And, one might add (although Gross surely would not), it is precisely for this reason that preexisting legal norms can never fully shield us from the terrible possibility of choice and from moral accountability for the choice we make.
rule violation? But if there are rules that govern this departure, might not those rules, too, be overridden? At the bottom of the chain is the terrifying possibility of unmediated choice that cannot be contained by rules. To describe the circumstances when such choice is appropriate is to insist on the very rules that are being overridden.

If Professor Gross cannot defend an extralegal model within the relative freedom of the law review format, then it is surely expecting too much to suppose that the Justices would defend it in the highly stylized and constricting language of judicial opinions. And, of course, the Justices have not. Perhaps the best example of this failure can be found in the very decisions establishing judicial supremacy. *Marbury* is usually treated as the central pillar of our commitment to law over politics. In fact *Marbury—or at least what Marbury has come to stand for—is a victory of politics over constitutional law.

Consider the supposed obligation of other political actors—lower court judges, the President, or the governor of a state, for example—to follow Supreme Court precedent. As Edwin Meese, among others has pointed out, this obligation elevates hierarchical order over constitutional principle.¹⁴¹ In cases where the Constitution and orders of the Supreme Court conflict, political actors are required to obey the latter rather than the former. There may be good reasons for this requirement. For example, Fred Schauer and Larry Alexander have argued that the demands of predictability and uniformity argue strongly for judicial supremacy.¹⁴² Perhaps they are right, but the important point here is that these demands are not rooted in the Constitution. On the contrary, they provide reasons why the Constitution ought not be followed.

Moreover, the reasons cannot be spoken. It is therefore no surprise that in *Cooper v. Aaron*,¹⁴³ the most famous argument for judicial supremacy, the Court not only failed to notice the conflict between constitutionalism and judicial power; it actually conflated the two.¹⁴⁴ It could hardly be otherwise. The *Cooper* Court could

---

¹⁴⁴. According to the *Cooper* Court, its own interpretation of the Constitution simply *was* the supreme law of the land. *Id.* at 18.

For a more recent example of the conflation, and the contradiction it produces, consider the position of Alabama Attorney General Bill Pryor regarding the removal of a monument to the Ten Commandments from the lobby of the state Supreme Court building. According to Pryor, the Chief Justice of the Supreme Court was within his constitutional rights when he installed the monument. *See For Pryor, Religious and Legal Rights in Conflict*, THE WASH. POST, Aug
not recognize the anticonstitutional nature of judicial supremacy while also insisting on the obligation of all political actors to obey the Constitution. Nor could it paint itself as standing against anarchic and lawless assertions of power while admitting that its own decision amounted to such an assertion.

Still, the fact that choice cannot be described or defended does not mean that it does not exist. There is nothing inevitable about the way that power is exercised. Try as we might to deny the terrifying reality, there is always the possibility of choice. We can never bring this brute fact fully into consciousness, but neither can we ever fully repress it. Like the quantum particles that Heisenberg tried to measure, the political question doctrine can never quite be grasped. We know that it is there, but the effort to capture it transforms it into something tamer and less consequential.

III. POLITICAL QUESTIONS AND JUDICIAL REVIEW

In this brief, concluding section, I want to explore some of the implications my analysis holds for the problem of judicial review. One implication is fairly obvious: the Marbury argument for judicial power, which emphasizes the apolitical nondiscretionary nature of the judicial function, will not withstand analysis. Of course, this is hardly news. To the extent that I have anything important to add to the Marbury debunking industry, it is only that the necessary secrecy of the political question doctrine may explain, even if it does not justify, the logical fallacies in Marshall's opinion.

The second implication is more counterintuitive. The secret political question doctrine undermines not just Marbury's argument, but also the argument of Marbury's critics, who would vest some or all interpretive authority in the political branches.

A. The Marbury Fallacy

Chief Justice Marshall’s strategy in Marbury was to recognize a category of cases as posing political questions and then to bound and marginalize the category with legal doctrine. As the preceding analysis demonstrates, the strategy cannot work. To the extent that the political question doctrine defines a legal category, it is indeed marginal because it contains virtually no cases. Cases apparently within the category are almost always

25, 2003, at A05. Pryor nonetheless also favored the removal of the monument after it was declared illegal by federal courts because “The rule of law means that no person, including the Chief Justice of Alabama, is above the law.” Id. It apparently did not occur to Pryor that “the rule of law” might require giving more weight to the Constitution than to an erroneous judicial interpretation of the Constitution.
better understood as decisions on the merits. To the extent that the category is nonlegal, it cannot be controlled or defined by the law. It is therefore simply a non sequitur to insist, as Marshall does, that “if some acts be examinable and others not, there must be some rule of law to guide the court in the exercise of its jurisdiction.”

Nor will it do to claim that “[i]t is emphatically the province and duty of the judicial department to say what the law is.” One might better assert that it is emphatically the province and duty of the judicial department not to say when it is disobeying the law. In truth, however, the language of “province and duty” are simply out of place. Judges are regularly confronted with ethical choice, and, as Bernard Williams has effectively argued, “province and duty” cannot define the ethical domain.

But although the opinion is not defensible, one can, perhaps, understand what Marshall did in Marbury. Here, we come back to the ironies and contradictions at Marbury’s core. For reasons I have already spelled out, Marshall could not openly acknowledge the politics that drove the result. Marbury did, indeed “make” a political question, and, for just that reason, the explicit, legal answer to that question had to be nonresponsive. Whether the ultimate outcome of Marbury is right or wrong cannot be determined by legal analysis. The answer to that question necessarily lies outside the realm of law.

B. The Problem for Marbury’s Critics

For a similar set of reasons, the political question doctrine poses an important difficulty for Marbury’s modern critics. I have already addressed many of the claims of moderate critics. These critics would reject the kind of judicial imperialism that Marbury has come to stand for, but not a core judicial function to at least sometimes “say what the law is.” As I have already argued, the effort to bound the domain of judicial review without taking a position on the merits of the claims being asserted is extremely difficult and, perhaps, impossible.

The more interesting problem is posed by Marbury’s radical critics. In an influential and important book, my colleague and sometimes coauthor, Mark Tushnet has argued that we should take the Constitution “away from the courts” and vest all interpretive authority in the political branches. I will not advance here anything like the complete analysis that his theory

145. Marbury, 5 U.S. (1 Cranch) at 165.
146. Id. at 177.
147. See Bernard Williams, Ethics and the Limits of Philosophy 7-8 (1985).
148. Tushnet, supra note 46.
deserves. Instead, I will limit myself to a discussion of how that theory intersects with secret political questions.

To some extent, Tushnet’s position on the vesting of interpretive authority is entangled with his views about the merits of constitutional law. Tushnet defends a “thin” substantive Constitution that protects no more than the overall goals of the Constitution’s preamble and the Declaration of Independence. It does not require extended argument to establish that this Constitution is thin, indeed—so thin that like Dashiell Hammett’s Thin Man, it may not exist at all. Virtually any action taken by the political branches could be justified under this version of constitutional law. Because these substantive requirements constrain so little, Tushnet’s position may be reducible to that of defenders of the faux political question doctrine: the political branches are not answerable to courts, but only because courts will find virtually everything that the political branches do within their constitutional powers.

Tushnet concedes that the thin constitution constrains very little, but he denies that it constrains not at all. If his thin constitution indeed yields determinate outcomes, it makes a difference that final judgment regarding those outcomes is vested in the political branches. The natural question that then arises is why one should favor this allocation of power. Tushnet offers a book-length defense, which I will not summarize here. The important point is that this defense cannot be from within constitutional law. As Tushnet candidly acknowledges, it must instead be a political defense, grounded in a set of contestable political goals that are more likely to be accomplished by political actors than by judges. But of course, the trouble with such a political defense is that it will only be persuasive to people who start out sharing the same political position. To the extent that constitutional arrangements are intended to appeal to people with different political positions, Tushnet’s argument is bound to fail.

There is a more serious problem. Suppose we take Tushnet’s political aims as a given. Why would one suppose that tinkering with the distribution of power between courts and legislatures is the best means to achieve those aims? Perhaps Tushnet’s claim is

149. Id. at 11-13.
151. See TUSHNET, supra note 46, at 14.
152. Id. at 129-53.
153. This fact is no less true because the political positions are characterized in terms of “self governance”—a central concern of Tushnet’s book. Self governance, like the thin Constitution itself, is subject to many rational, but contestable interpretations. Institutional arrangements favoring legislatures or courts will be attractive depending upon which contestable interpretation one adopts.
simply empirical. As many other scholars have demonstrated, it is surely true that the Supreme Court, over the sweep of its history, has not usually been a force for the kind of progressive change that Tushnet (and I) favor. But a purely empirical argument provides no reason to suppose that this history need be endlessly repeated. The secret political question doctrine teaches us that judges need only choose differently—or we need only choose to appoint judges who would choose differently—to produce completely different outcomes.

Of course, Tushnet might respond that we are unlikely to have such judges any time soon. He is surely right on that score. But neither are we likely to see the political branches take the Constitution away from the courts any time soon. Political actors who had the will and ability to accomplish this goal would also have the will and ability to appoint judges who would make the goal unnecessary.

Perhaps Tushnet thinks that the problem is not with the kinds of people who become judges, but with the nature of the task they are asked to perform. On this view, it is more than simply an empirical fact that judges have, historically, behaved in a certain fashion. There is something about the legal exercise itself that leads to such behavior. We must therefore take the Constitution away from the courts because the Constitution itself—understood as law—is the enemy. Perhaps the thin constitution is attractive precisely because it is not law in the usual sense, and political enforcement of that constitution is attractive just because it is not legal enforcement.

If this is Tushnet's point, then the attractiveness of his position will turn on one's taste for the competing virtues of freedom and constraint. I have only two points to add to a discussion of this topic. First, judges, as well as politicians, retain the possibility of freedom. Indeed, as I have tried to show, the very assertion of judicial power is an act of unmediated freedom. Second, because this possibility of freedom goes all the way to the bottom, our own choice between judicial and political constitutionalism poses a secret political question.