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Political Questions in the Federal Judiciary -- A Comparative Study

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The requirement of jurisdictional amount is a limitation on the jurisdiction of federal courts, imposed upon them by the legislature. The courts themselves refuse to take cognizance of some disputes, without being bound to do so by any express provision of law, by classifying them as non-justiciable or political ones.

The problem of political questions has its place not only in federal legal systems. It arises in unitary states and in the life of members of a federal state as well. However, its scope in federal systems is broader. Political questions may be found to exist in disputes as to the right of intervention of the federation into the internal affairs of the member states; as to the conformance by a member state with the federal constitutional requirement of a republican form of government; as to coercion of the member states to observe the federal laws, etc. All such problems have no place in a unitary state.

United States

In the United States, the existence of non-justiciable questions, which should be definitely answered by the executive or the legislative


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1. Thus, e.g., in Reif v. Barrett, 355 Ill. 104, 188 N.E. 889 (1934), the Supreme Court of Illinois gave full effect to Art. 4, Sec. 9 of the state Constitution, providing that "(e)ach house shall determine the rules of its proceedings, and be the judge of the election, returns, and qualifications of its members," and held that a member of the House of Representatives who regularly received a certificate of election, was seated in the legislature, and cast his vote for a statute passed by the House, must be treated by the courts as entitled to do so. The rule stands even if the decision of the House on the qualification of its members was arbitrary or wrong, as the whole matter is beyond further controversy in the courts.

Similarly, in State ex rel. Schorr v. Kennedy, 132 Ohio 510, 9 N.E.2d 278 (1937), it was held that a determination of the General Assembly of the State that emergency existed requiring the enactment of a special law to go into immediate effect upon its passage, was not reviewable by the courts.

For many other examples, see W. F. Dodd, Judicially Non-Enforceable Provisions of Constitutions, 80 U. Pa. L. Rev. 54 (1931).
branch of government, was early recognized. In *Marbury v. Madison*, Chief Justice Marshall said:

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

Thus, the Chief Justice classified the political questions into two categories: first, those which are submitted to the executive (or, we may add, to the legislature) by some specific provision of law, and lie within their discretion; and second, those which are political by nature.

The existence of the first category is rather obvious. In spite of the fact that no provision of law withdrew from the courts authority to pass on certain types of questions, it is only fair, on the part of the courts, to abstain from considering such questions if it may be reasonably inferred that the intention of the Framers of the Constitution, or drafters of the law, was that the decision of one of the two "political" branches of the government be final.

Thus, Art. I, Sec. 5, clause 1 of the Constitution provides that "each House shall be the judge of the elections, returns and qualifications of its own members . . ."). Considering this provision, it is not surprising that in *Colegrove v. Green*, the Supreme Court refused to invalidate the electoral districting of the State of Illinois. However, three Justices dissented on the ground that the Illinois law, by virtue
of which the population in electoral districts ranged from 112,000 to 900,000, abridged the constitutional rights of citizens to be fairly represented in Congress. And in a previous case of *Smiley v. Holm* the Court assumed jurisdiction of a case presenting similar problems. A recent case followed *Colegrove v. Green*.

A similar result was reached by an extensive interpretation of the constitutional provision authorizing Congress "to pay the debts" of the United States. In 1890, Congress enacted a statute by virtue of which producers of sugar were entitled to some "bounties" paid out of the Treasury of the United States. By virtue of the Tucker Act, some producers brought a suit against the United States to get their "bounties." The Court interpreted the term "debts" as covering "payments that are not of right or of any legal claim, but which are in the nature of a gratuity depending upon equitable considerations," and held:

Their recognition depends solely upon Congress, and whether it will recognize claims thus founded must be left to the discretion of that body ... Generally such question must in its nature be one for Congress to decide by itself. Its decision recognizing such a claim and appropriating money for its payment can rarely, if ever, be the subject of review by the judicial branch of the government.

The decision of the political branches of government is final if they act within the scope of their discretion, validly conferred upon them.

Thus, in the early case of *Martin v. Mott*, Justice Story discussed the constitutional power of Congress "to provide for calling forth the militia, to execute the laws of the Union, suppress insurrections, and repel invasions," and a congressional act of 1795 authorizing the President to "call forth" the militia when and where he may judge it necessary. Story reached the conclusion "that the authority to decide whether the exigency has arisen, belongs exclusively to the president, and that his decision is conclusive upon all other persons."

This authority was strictly connected with the problem of common defense and internal security of the Union, and military discipline required that it be not contested by those to which orders were issued.

9. Art. I, Sec. 8(1).
11. *Id.* at 441.
12. *Id.* at 444.
"If a superior officer has a right to contest the orders of the president, upon his own doubts as to the exigency having arisen," said Story, "it must be equally the right of every inferior officer and soldier." 16 He emphasized the constitutional provision making the President the "commander in chief . . . of the militia . . . when called into the actual service of the United States," 17 and continued:

The law does not provide for any appeal from the judgment of the president, or for any right in subordinate officers to review his decision, and in effect defeat it. Whenever a statute gives a discretionary power to any person, to be exercised by him, upon his own opinion of certain facts, it is a sound rule of construction, that the statute constitutes him the sole and exclusive judge of the existence of those facts.18

The discretionary power of the President is particularly broad when he acts in his capacity of Commander-in-Chief, and takes steps necessary to protect the Union. In the Prize Cases,19 the Court said:

Whether the President in fulfilling his duties, as Commander-in-chief, in suppressing an insurrection, has met with such armed hostile resistance, and a civil war of such alarming proportions as will compel him to accord to them the character of belligerents, is a question to be decided by him, and this Court must be governed by the decisions and acts of the political department of the Government to which this power was entrusted. "He must determine what degree of force the crisis demands." The proclamation of blockade is itself official and conclusive evidence to the Court that a state of war existed which demanded and authorized a recourse to such a measure, under the circumstances peculiar to the case. (Emphasis by the Court.)

A legislative reflection of the doctrine that courts do not pass upon the discretionary governmental acts is found in a provision of the Federal Tort Claims Act, excluding from the consent of the government to be sued claims based upon the exercise of "a discretionary function" of a federal employee or agency.20 The broad interpretation of the concept of "discretionary" given by the Supreme Court in Dalehite v. United States,21 was somewhat narrowed in most recent decisions.22

16. Ibid.
17. Art. II, Sec. 2(1).
The question is more difficult when there is no legal provision submitting some types of disputes to the jurisdiction of the political branches of the government. Even then the courts may find that the matter lies within the discretion of a political branch, which precludes them from considering the merits of the dispute. In many cases, the courts find it difficult to classify a question as a justiciable or political one. Very often opinions are delivered by a divided court. Thus, in Coleman v. Miller, the question presented was whether the lieutenant governor of Kansas was a part of the legislative body of that State or not. The Supreme Court was equally split on the decision as to the justiciability of the problem.

The field in which the courts were always reluctant to interfere with the decisions of the political branches of government was the conduct of the international relations of the Union. Art. II, Sec. 2(2) and Sec. 3 of the Constitution vested in the President the duty of making treaties, appointing ambassadors, other public ministers and consuls, and receiving representatives of foreign powers. The Senate (or Congress) has an auxiliary role to that of the President. Actions taken by either of them, in connection with the foreign affairs of the Union, are usually recognized by the courts as final. As early as 1796, Paterson, Justice of the Supreme Court, said in Ware v. Hylton that in those matters, there are "considerations of policy, considerations of extreme magnitude, and certainly entirely incompetent to the examination and decision of a court of justice."

One and a half century later, the case of Chicago & Southern Airlines v. Waterman Steamship Corp. gave the Court an occasion for similar broad statements. The case involved the power of the courts to review orders of the Civil Aeronautics Board on applications of United States citizens for permission to engage in international air transportation. As such orders are subject to approval by the President, the Court held them not to be reviewable by the courts. In a five-to-four decision, the Court emphasized the fact that the Chief Executive, as Commander-in-Chief of the United States armed forces,

24. In United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319 (1936), the Court, speaking about international affairs, said: "In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation. He makes the treaties with the advice and consent of the Senate; but he alone negotiates. Into the field of negotiation the Senate cannot intrude; and Congress itself is powerless to invade it" (emphasis by the Court). In fact, in order to be sure that a treaty will be consented to by the Senate, the President invites, from time to time, some Senators to follow negotiations.
and "The Nation's organ for foreign affairs," must often rely, in his
decisions, on secret reports which cannot be made public and discussed.
The Court continued:

... the very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided
by our Constitution to the political departments of the government,
Executive and Legislative. They are delicate, complex, and in-
volve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare
they advance or imperil. They are decisions of a kind for which
the Judiciary has neither aptitude, facilities nor responsibility and
which has long been held to belong in the domain of political power
not subject to judicial intrusion or inquiry. 27

The dissent of the minority was based on the fact that Congress
provided for judicial review of orders of the Civil Aeronautics
Board, and the situation under consideration should not be held to
be an exception.

Among the most important matters which are thus entirely left to
the determination of the executive or legislative branch, are:

(1) Recognition of new states or governments. In Gelston v.
Hoyt, 28 the Supreme Court stated that there was no better established
doctrine "than that it belongs exclusively to governments to recognise
new states, in the revolutions which may occur in the world; and until
such recognition, either by our own government, or the government to
which the new state belonged, courts of justice are bound to consider
the ancient state of things as remaining unaltered." 29 In subsequent
cases in point, starting with United States v. Palmer, 30 the Court
eliminated from its consideration the decision of the foreign government
involved, and made it clear that it will consider itself bound by the
attitude taken by the United States government.

If a new government is recognized by the United States, its actions
will be given effect by the courts. In the well known cases of United
States v. Belmont 31 and United States v. Pink, 32 the Court went as far

27. Id. at 111.
29. See the interesting case of Kenneth v. Chambers, 48 U.S. (14 How.) 38
(1852), in which the Court decided to consider Texas as a part of Mexico after it
proclaimed its independence, in absence of a declaration of the United States govern-
ment that it recognized the new state of things. The fact that subsequent to the
factual situation which gave rise to the controversy, the independence of Texas was
recognized, and then the new State was admitted to the Union, was held not to have
any retroactive effect.
as to attach extra-territorial effect to Soviet Russia's expropriation
decrees, after its government was recognized. On the other hand,
actions taken by a non-recognized government will be ignored.

(2) Position taken by the United States government in its dis-
putes with a foreign nation particularly as to national sovereignty
over some territories. Said the Court:

The judiciary is not that department of the government, to
which the assertion of its interests against foreign powers is con-
fided; and its duty commonly is, to decide upon individual rights,
according to those principles which the political departments of
the nation have established. . . . We think . . . it is the
province of the court to conform its decisions to the will of the
legislature, if that will has been clearly expressed.

And the Court held grants made by Spain on territories which
were considered by the government of the United States as belonging
to the Union, void.

Similarly, the Court will consider itself to be bound by the deter-
mination of the United States government as to the sovereignty on
territories not claimed by the Union. In Williams v. The Suffolk
Insurance Co., the Court followed the position taken by the govern-
ment in denying that the government of Buenos Aires had sovereignty
over the Falkland Islands, and that it had authority to regulate or
prohibit fisheries at those islands to United States citizens.

Assertion of national sovereignty on land or water by the political
branches of government is a political act and "conclusively binds the
judges" even if it does not give rise to any controversy on the inter-
national scene. Thus, a determination of the President that a guano
island shall be considered as appertaining to the United States gave

33. In Oetjen v. Central Leather Co., 246 U.S. 297 (1918), the Supreme Court
upheld the effectiveness of seizure of some hides in Mexico, owned by a Mexican
citizen; the seizure was ordered by the revolutionary Mexican government of General
Carranza, which was subsequently recognized by the United States. The Court
asserted that "such recognition is retroactive in effect and validates all the actions
and conduct of the government so recognized from the commencement of its existence"
(at 303), and that "what may be done in the exercise of this political power is not
subject to judicial inquiry or decision" (at 302).
34. The Maret, 145 F.2d 431 (3d Cir. 1944); Latvian State S.S. Line v. Mc-
Grath, 188 F.2d 1000 (D.C. Cir. 1951), cert. denied 342 U.S. 816 (1951).
involved the interpretation of the treaty of St. Ildefonso of 1800, by which Louisiana
was ceded by Spain to France, and which was ambiguous as to the boundaries of the
ceded territory. In 1803, the United States purchased the territory from France.
For another case arising out of the same situation and applying the Foster rule, see
jurisdiction to the federal courts to try offenders for crimes committed on the island.\textsuperscript{38}

Recently, the doctrine was extended. In \textit{United States v. California},\textsuperscript{39} the Court held that the "assertion of national dominion over the three-mile belt is binding upon this Court," and recognized the federal government's rights in the resources of the soil under that water area, including oil, against the claims of the State of California. Later, by a Congressional act, claims of the States to the sub-soil in the coastal area were recognized.\textsuperscript{40}

(3) Existence or termination of international treaties. In the early case of \textit{Ware v. Hylton},\textsuperscript{41} Justice Paterson attributed to Congress alone the power to void a treaty if the other party to it violates it. Should Congress make such a declaration, said the Justice, "I shall deem it my duty to regard the treaty as void, and then to forbear any share in executing it as a judge." Otherwise, the treaty must be regarded as "valid and obligatory." Therefore, in \textit{Doe v. Braden},\textsuperscript{42} the Court treated the treaty with Spain of 1819, by which Florida was ceded to the United States, valid in its entirety, as against the contention that its provisions annulling some grants of land made by the King of Spain was invalid as the King could not validly consent to them.

Again, in \textit{Clark v. Allen},\textsuperscript{43} as against the contention that a treaty with Germany was invalidated by the First World War, as Germany "has ceased to exist as an independent national or international community," the Court said:

But the question whether a state is in a position to perform its treaty obligations is essentially a political question . . . We find no evidence that the political departments have considered the collapse and surrender of Germany as putting an end to such provisions of the treaty as survived the outbreak of the war or the obligation of either party in respect to them.\textsuperscript{44}

Conversely, if Congress passes a law inconsistent with an existing international obligation, the courts will apply the law and treat the obligation as terminated. Among many cases in point, the "Chinese

\begin{itemize}
  \item \textsuperscript{38} \textit{Ibid}.
  \item \textsuperscript{39} \textit{United States v. California}, 332 U.S. 19, 34 (1947). In a later suit, the rights of the United States were recognized as against Texas; 339 U.S. 707 (1950).
  \item \textsuperscript{40} The Submerged Lands Act, 67 Stat. 29 (1953). The motions of the States of Alabama and Rhode Island for leave to file complaints challenging the constitutionality of the Act were denied by the Supreme Court; Alabama v. Texas, 347 U.S. 272 (1954), two Justices dissenting. In a per curiam opinion, the Court relied on Art. 4, Sec. 3(2) of the Constitution, vesting in Congress unlimited power "to dispose of any kind of property belonging to the United States."
  \item \textsuperscript{41} \textit{Ibid}.
  \item \textsuperscript{42} \textit{Doe v. Braden}, 57 U.S. (16 How.) 635 (1853).
  \item \textsuperscript{43} \textit{Clark v. Allen}, 331 U.S. 503 (1947).
  \item \textsuperscript{44} \textit{Id} at 514.
\end{itemize}
Exclusion Case," Chae Chan Ping v. United States,46 is well known. The Court held that the power of Congress to exclude aliens from the Union was an incident of sovereignty which could not be surrendered by a treaty. Thus, a statute excluding Chinese laborers, being constitutional, prevailed over existing treaties with China. Undoubtedly, this decision and judgments in other cases to the same effect are unable to extinguish any international obligations of the United States. But this is not a problem with which the courts of the nation are concerned.

(4) Some emergency measures caused by war. Thus, in Commercial Trust Co. of New Jersey v. Miller,46 the Court refused to review an order of the Alien Property Custodian, directing a trust company to transfer to him money and property held by the company on the joint account of an enemy alien and a neutral alien. The Custodian acted under power granted the President by Congress. The Company challenged the determination of the Custodian as to such an account, and contended that anyhow his power should terminate with the Congressional resolution declaring the state of war at an end, and the Proclamation of Peace by the President. The Court held for the Custodian, stressing his broad powers, and emphasizing the finality of the determination of the political branches of government as to the duration of emergency measures. Said the Court:

. . . (T)he power which declared the necessity is the power to declare its cessation, and what the cessation requires. The power is legislative. A court cannot estimate the effects of a great war and pronounce their termination at a particular moment of time, and that its consequences are so far swallowed up that legislation addressed to its emergency had ceased to have purpose or operation with the cessation of the conflicts in the field.47

A similar result was reached in Ludecke v. Watkins,48 where decisions of the President as to the termination of the state of war and as to the exclusion of alien enemies from the United States were held to be "matters of political judgment for which judges have neither technical competence nor official responsibility." Recognition of broad discretion of the political branches of government as to measures necessitated by war towards the citizens of the United States is illustrated by Hirabayashi v. United States49 and Korematsu v. United States.50

47. Id. at 57.
(5) Granting of diplomatic immunity. The determination of the President, or more often of the Secretary of State, as to the status of persons claiming such an immunity is recognized by the courts as binding upon them. In an early case, United States v. Ortega, the United States circuit court said:

The Constitution of the United States having vested in the president the power to receive ambassadors and other public ministers, has bestowed upon that branch of the government, not only the right, but the exclusive right, to judge of the credentials of the ministers so received; and so long as they continue to be recognized and treated by the president as ministers, the other branches of the government are bound to consider them as such.

Of course, the courts will not treat as a diplomat a person representing a state or government which is not recognized by the government of the United States. In other cases, the person claiming immunity should, in order to prevail, secure a statement of the Department of State that he should be recognized as a diplomat. It may be in a form of certificate, letter, affidavit or telegram. Should he be unable or neglect to procure such a statement, he runs the risk that diplomatic status will be denied to him.

The determination of the Department of State is conclusive not only with respect to persons claiming to be accredited in the United States (or to be members of their staff or household), but also with respect to those connected with an international organization. In recent years, the number of cases involving such persons has largely increased due to the establishment of the headquarters of the United Nations in New York.

58. In general, the State Department recognizes the diplomatic character of foreign representatives in the United Nations and of the members of their staff; Friedberg v. Santa Cruz, 86 N.Y.S.2d 369 (1949). As to the staff of the United Nations Secretariat, immunity is granted to high officials; Curran v. City of New York, 77 N.Y.S.2d 206 (1947). It is denied to employees on lower level; United States v. Coplon, 84 F. Supp. 472 (S.D.N.Y. 1949).
Somewhat connected with the field of foreign affairs of the country are relations with the Indian tribes. In the famous case of the *Cherokee Nation v. State of Georgia,* the Supreme Court denied relief to the tribe against a clear violation, by the State of Georgia, of a treaty between the Indians and the United States. Marshall, speaking for the Court, intimated that the controversy presented political rather than legal questions. Clearly, in declining to take jurisdiction of the controversy, the Court was influenced by the certainty that Georgia would completely disregard an adverse decision.

As to questions classified by Marshall as "in their nature political," much doubt may arise. Here, no provision of law may support the refusal of the courts to take jurisdiction of the dispute.

Attempts by the Supreme Court to establish some tests for determining what questions are "in their nature political" failed. They are vague and do not offer any help when a concrete case is faced. Thus, in *Coleman v. Miller,* Chief Justice Hughes said:

In determining whether a question falls within [the political] category, the appropriateness under our system of government of attributing finality to the action of the political departments and also the lack of satisfactory criteria for a judicial determination are dominant considerations.

Obviously, this "test" does not help at all in any concrete situation. Neither does Justice Frankfurter's observation that the Constitution "has many commands that are not enforceable by courts because they clearly fall outside the conditions and purposes that circumscribe judicial action." The best proof that the situation is not "clear" is that most decisions on "political questions" are reached by a split court. The conclusion of Justice Frankfurter that the Constitution "has left the performance of many duties in our government scheme to depend on the fidelity of the executive and legislative action" seems applicable only to cases where the Court can corroborate its denial to take jurisdiction on some constitutional mandate.

Two situations may arise. In one of them there is no dispute as to whether a provision of the law was infringed, and the matter is strictly connected with the functioning of one of the political branches

60. Coleman v. Miller, supra note 23, at 454. Justice W. O. Douglas, in *We the Judges* 56 (1956), admits that political questions are "not susceptible of precise definition."
61. Colegrove v. Green, supra note 5, at 556.
62. Id. at 556.
of the government. In the second, there is a claim that a positive mandate of the law or Constitution was violated.

Problems involving ratification of constitutional amendments belong to the first group. On this matter, in *Coleman v. Miller*, the Supreme Court said that

... the question of the efficacy of ratifications by state legislatures, in the light of previous rejection or attempted withdrawal, should be regarded as a political question pertaining to the political departments, with the ultimate authority in the Congress in the exercise of its control over the promulgation of the adoption of the amendment.

Similarly, some measures taken by the political branches of the government in liquidating the Civil War were held by the Court to present only political issues. In *State of Georgia v. Stanton*, defendants were sought to be restrained from carrying into effect the "Reconstruction Acts," providing for an establishment of military governments in the Southern States. It was contended that the execution of the acts would destroy the corporate existence of the States by depriving them of all the means and instrumentalities whereby their existence might be maintained. The Court dismissed the bill for want of jurisdiction, stating that it called "for the judgment of the court upon political questions, and, upon rights, not of persons or property, but of a political character," as the rights under consideration were those "of sovereignty, of political jurisdiction, of government, of corporate existence as a State."

Likewise, it was held in *The Protector*, that as to the exact date of the beginning and end of the rebellion of the Southern States, it was "necessary ... to refer to some public act of the political departments of the government ... ."

The Constitution is not a statute, it is superior to it; it is the supreme law of the country. Therefore, it seems proper to submit questions involving changes in this law to the legislative branch of the government. It is still easier to agree with the Supreme Court that it is not up to the courts to question the fact that a statute, enacted by Congress, had a wording appearing in text signed by the Speaker of the House, the President of the Senate, and the President of the United States. It cannot be shown, from the journals of either House,
that the act did not pass in the precise form in which it was authenticated.

In the second group of cases, the Supreme Court refuses to take jurisdiction in spite of the fact that plaintiff claims that constitutional provisions were violated.

The largest group of such cases are those involving unrest in the States and the attitude of the federal government towards this situation, either passive or active.

Thus, in the leading case of *Luther v. Borden*, the Supreme Court held, in essence, that the constitutional guaranty granted by the United States to every State in the Union that they will have a republican form of government cannot be enforced in judicial proceedings. The controversy arose in connection with the Dorr rebellion in Rhode Island, in consequence of which the State had, for some time, two constitutions and two hostile governments. Upon request of the government called under the old constitution, President Tyler backed it, and the rebellion was put at an end. Dorr was sentenced to life imprisonment. In an earlier case, the Supreme Court denied a writ of habeas corpus to Dorr for want of jurisdiction, and in *Luther v. Borden* it refused to consider which of the two constitutions of the State was the basic law of Rhode Island, such inquiry belonging "to the political power and not to the judicial."

In order to suppress the rebellion, the President called out the militia; therefore, the situation was in some respects similar to the one under consideration in *Martin v. Mott*; and the Court relied, in part, on that case. But the rules that were laid down in *Luther v. Borden* were further going. Practically, there could be many complications, and the situation could be never remedied if a few years

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69. Art. IV, Sec. 4.


73. In refusing to enjoin the President from setting up military governments in the South, after the Civil War, on the ground that the enabling congressional acts were unconstitutional, the Court said: "Suppose the bill filed and the injunction prayed for allowed. If the President refuse obedience, it is needless to observe that the Court is without power to enforce its process. If, on the other hand, the President complies with the order of the Court and refuses to execute the acts of Congress, is it not clear that a collision may occur between the executive and legislative departments of the government? May not the House of Representatives impeach the President for such refusal? And in that case could this Court interfere, on behalf of the President, thus endangered by compliance with its mandate, and restrain by injunction the Senate of the United States from sitting as a court of impeachment? Would the strange spectacle be offered to the public world of an attempt by this Court to arrest proceedings in that Court?"; Mississippi v. Johnson, 71 U.S. (4 Wall) 475, 500-501 (1866).
after the collapse of the rebellion, the Court declared that the federal
government supported the state government which was not a republican
one. However, theoretically, there seems to be no compelling reason
for the Court to abstain from expressing its opinion.

The reasoning of *Luther v. Borden* was applied in a few later
cases. In *Pacific States Telephone & Telegraph Co. v. Oregon,*74 the
Court was asked to consider the question of whether the enactment of a
state law by popular initiative and referendum, permitted by the Oregon
Constitution, destroyed the republican form of the State’s government.
The Supreme Court of Oregon rejected this contention on the merits,
and the United States Supreme Court declined to review its decision for
want of jurisdiction.75

In some situations, the Court considers that duties imposed by
the Constitution cannot be judicially enforced as they are only of a
“moral” character. Art. IV, Sec. 2(2) and (3) of the Constitution
make it mandatory to the States to deliver escapees from justice or from
service and labor, to the State from which they fled. The constitutional
mandate was supplemented by a Congressional act in 1793. *In The
Commonwealth of Kentucky v. Dennison, Governor of the State of
Ohio,*76 Kentucky brought a suit against Dennison to compel him to
deliver a certain Lago, free man of color, accused of the crime of
assisting a slave to escape. The Court held that the defendant had no
discretionary power as to the performance of his duty to deliver Lago,
but it found that the Congressional words “it shall be the duty” were
“declaratory of the moral duty,” and “not used as mandatory and
compulsory.” 77 The Court added that neither the Constitution nor the
statute did “provide any means to compel the execution of this duty,” 78
and that “(t)he performance of this duty . . . is left to depend on
the fidelity of the State Executive to the compact entered into with the
other States when it adopted the Constitution of the United States
. . . .” 79 Therefore, “there is no power delegated to the General
Government, either through the Judicial Department or any other
department, to use any coercive means to compel him.” 80

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75. See also *Ohio ex rel. Bryant v. Akron Metropolitan Park District,* 281 U.S.
74, 79-80 (1930).
77. *Id.* at 107.
78. *Id.* at 107.
79. *Id.* at 109.
80. *Id.* at 109-110.
With complete sympathy to the cause of Lago, it must be observed that the soundness of the result reached by the Court is subject to serious doubt. Clearly, neither the Constitution nor Congressional acts are moral codes but legal documents. The Court could be unwilling to enforce some legal duties, for good or bad reasons, but it is puzzling to hear that in imposing a clear obligation upon the States, the Framers, and then Congress did not mean what they said, and instead of laying down rules of law, indicated only what the requirements of morals are.

In recent years, the Supreme Court seems to have increased the scope of concept of "political questions." It may be doubted whether this is a desirable development. Wisdom of a broad application of the idea to disputes in which a constitutional provision is claimed to be violated seems doubtful. After all, in the United States the Supreme Court is the guardian of the Constitution and has the most important duty to see to it that it be not violated. Certainly, the Constitution contains many provisions which are political; it regulates the political life of the country in its most outstanding features. But, at the same time, it sets the bases of the legal order of the Union. Every provision of the Constitution is a part of the supreme law of the United States, and therefore has necessarily a legal character. If the Supreme Court has authority to decide, in hundreds of cases it adjudicates, whether the vague clauses of due process or commerce are complied with, there is no obvious reason for which the claims that a much more definite constitutional mandate, such as that the State are to have a republican form of government, was violated, should escape jurisdiction of the Court.81 In a "government of law" as many questions should be considered as legal and justiciable and submitted to the control of the courts as possible.82

On the other hand, it was rightfully observed that the desire to save the executive from embarrassment "may result in real embarrassment by forcing an unwilling executive to commit itself, where a decision by an independent judiciary could be explained away."83 Undoubtedly, such situations frequently arise, particularly in the field of external relations, which lends itself more than any other to the deter-

81. In state courts, this provision is usually treated as enforceable by judicial process; W. F. Dodd, op. cit. supra note 1, at 86. For comments on the view that constitutions are "essentially political in nature," see C. G. Haines, The Role of the Supreme Court in American Government and Politics, 1789-1835, at 12-16 (1944).


mination of the political branches of government. Therefore, "any further shift of control" from the courts away should be stopped.85

In some cases, the characterization of certain questions as purely "political" by the Court is startling. Thus, in Massachusetts v. Mellon,86 a federal statute providing for appropriation of federal money for maternity and infant care was challenged as unconstitutional because it infringed upon the reserved state powers. It seems that the question raised also constitutional legal questions, and could be passed upon by the Court if all other requirements for its judicial determination were met. However, the Court characterized "the naked contention that Congress has usurped the reserved powers of the several States by the mere enactment of the statute" as raising a question which was "political, and not judicial," and therefore was "not a matter which [admitted] of the exercise of the judicial power."87

It seems that in some cases in which the Court declines to take jurisdiction over "political" questions, the most persuasive reason for this attitude can be first its reluctance to get into a conflict with the other branches of government, and the possibility that its decisions would be disregarded. However, some conflicts may happen, and did actually happen, in many other instances when the Court exercised the power of judicial review. Thus, the situation would not be unusual. A second practical consideration is the fact that in many cases, pronouncement of the Court condemning an action taken by one of the political branches of government a considerable period of time later, would bring about a very complicated situation, hardly possible to be taken under control.88 In state practice, it was attempted to rationalize

84. Id. at 92.
85. See also J. P. Frank, Political Questions, in E. Cahn, Supreme Court and Supreme Law 36, 40 (1954): "... [T]he doctrine of political questions ought to be very sharply confined to cases where the functional reasons justify it, and... in a given case involving its expansion, there should be careful consideration also of the social considerations which may militate against it."
87. Id. at 483.
88. See, e.g., Luther v. Borden, supra note 68, at 38. It was asserted that "[n]o matter in what terms the opinions of jurists have been couched, it is apparent that it is the fear of consequences or the lack of adequate data that has impelled the courts to refrain from entering upon the discussion of the merits of prickly issues," and suggested that the Supreme Court should extend the scope of the idea of political questions, so as to cover by this term e.g. social and industrial legislation cases; M. Finkelstein, op. cit. supra note 2, at 363 and 345, and Further Notes on Judicial Self-Limitation, 39 Harv. L. Rev. 221 (1925). But to others, finding of political questions in controversies submitted to the Court is just a construction of the Constitution, similar to what is done in many other cases. "In some instances there is enough uncertainty or generality so that not only past but present and to some extent prophetic theories and notions must enter into the interpretative process. We are dealing with cases of this... class, where the court's jurisdiction or lack of jurisdiction of the whole case or of some subordinate issue therein is governed by provisions of not absolutely patent certainty," M. F. Weston, op. cit. note 2, at 331. For a
the declining of taking jurisdiction of some cases involving alleged unconstitutional action by the courts, by classifying the constitutional provisions into mandatory and directory ones. The first ones are supposedly bound to be observed, and can be judicially enforced, while the others are to be treated as recommendations rather than strict legal rules. In effect, this theory would permit approaching some constitutional provisions in a way whole constitutions are usually approached in Latin American countries. The distinction between the two types of provisions is very difficult and dangerous, and similar provisions of state constitutions received in the courts a different characterization. To remedy the situation, the California Constitution was amended in 1879 by inserting the following clause:

The provisions of this constitution are mandatory and prohibitory, unless by express words they are declared to be otherwise.

A few other States followed the lead.

While, under this classification, “political” questions may be fitted into the category of directory constitutional provisions, the whole concept is broader, and covers mostly procedural rules in enactment of statutes. The federal Constitution is silent on the subject.

Switzerland

The former Swiss system, prior to the Constitution of 1874, was very peculiar. The federal judiciary was practically non-existent, and the federal executive and legislative was invested with the duty to pass on the controversies based on alleged improper acts of federal or cantonal authorities. Even after the establishment of the Federal Tribunal, for a long time its jurisdiction in “public law” cases was very much restricted. “Public law” matters include, in the Swiss system, constitutional and administrative law disputes between the federal authorities and the individuals, and administrative law disputes between the cantons and the individuals. It can be said that under this system, the area of “political” disputes was abnormally broad. Its rationale seemed to be that most of such controversies arise because of a gap in view that “a lack of legal principles to apply to the questions presented” is the most important consideration forcing the courts to decline to take jurisdiction of “political” questions, see O. P. Field, The Doctrine of Political Questions in the Federal Courts, 8 Minn. L. Rev. 485, 512 (1924).

89. W. F. Dodd, op. cit. note 1.


91. W. F. Dodd, supra, at 79.
the law which can better be fitted by a legislator than by a judge.\textsuperscript{92} But even where there was no gap and a constitutional right of a citizen was violated, the body competent to take jurisdiction over the matter was, by virtue of the provisions of the Constitution of 1848, either the federal executive or the legislature, and the Tribunal only exceptionally, when the legislature remanded the cause to the federal judiciary. Under this system, only one instance of such a case reaching the Tribunal ever happened. The practice of conferring judicial functions on the legislature proved to be very unsatisfactory, particularly in view of the fact that political reasons were often the determining factor underlying the decisions.\textsuperscript{93}

In the present Swiss Constitution, the federal executive is still vested with jurisdiction over many "public law" disputes. Art. 102(2) of the Constitution, speaking about the Federal Council, reads as follows:

It insures the observance of the Constitution, the laws and ordinances of the Confederation and the provisions of federal concordats. It takes the necessary measures to this end, of its own accord or upon complaint, in such cases as are not included among those which have to be submitted to the Federal Tribunal in accordance with Art. 113.

Two other constitutional provisions vest judicial functions in the legislature. Art. 85, enumerating matters "within the authority of the two councils" (i.e., the Federal Assembly, composed of the National Council and the Council of States), places within the jurisdiction of the legislature:

(12) Appeals against decisions of the Federal Council relating to administrative disputes (Article 113);

(13) Conflicts of jurisdiction between federal authorities.

From Subsection 12 it appears that the legislative branch of government has appellate jurisdiction in administrative cases which the executive branch decides in the first instance. For a long time, the jurisdiction of the Federal Tribunal in administrative law disputes was extremely limited, and the exclusion from its competence of "(a)administrative disputes to be determined by federal legislation," as provided in Art. 113 of the Constitution, was given a broad scope. Art. 59 of the Judiciary Act of 1874 withdrew from the jurisdiction of

\textsuperscript{92} M. Schoch, Conflict of Laws in a Federal State: The Experience of Switzerland, 55 Harv. L. Rev. 738, 748 (1942).

\textsuperscript{93} A. Souriac, L'évolution de la juridiction fédérale en Suisse 235 (1909).
the Tribunal matters which were regarded by the legislature as purely administrative and political. The idea prevailing in Switzerland for a long time was that every administrative law dispute has a political flavor and should be decided by a political branch of the government. Similarly, complaints alleging violation of the Constitution by administrative acts of the federal authorities went not to the Tribunal, but to the Federal Council. This was a confusion of powers rather than separation of powers.94 The Tribunal's protection against violation of constitutional rights, provided for in Art. 113(3) of the Constitution, was granted only in cases where cantonal, not federal, authorities were involved.95 A situation similar to that in the field of constitutional law existed in the field of administrative law. Gradually, by legislative enactments, the scope of "political" questions to be decided by a political branch of the government narrowed. However, except as to instances expressly reserved to the jurisdiction of the Federal Tribunal, the executive branch of the government still has jurisdiction over "public law" disputes, in the first instance. Sec. 124 of the Judiciary Act of 194396 provides:

Appeals to the Federal Council lie from decisions:

a. Of departments of the Federal Council, if they are not final by virtue of a special provision of law;

b. Of the general board of federal railways, when an appeal to the Federal Council is expressly provided for;

c. Of independent federal agencies of the federal administration which are not organs of the last instance.

The Federal Council is also competent to review decisions and acts of the cantonal authorities in cases of violation of some enumerated provisions of the federal Constitution, such as: Art. 18, clause 3 (equipment and arms of Swiss soldiers); Art. 27, clauses 2 and 3 (elementary public education in the cantons to be compulsory, free, and under the control of lay authorities); Art. 51 (prohibition of activity by the Jesuit order); and Art. 53, clause 2 (control of burial places which is to be vested in lay authorities).97 Most of these "political" questions relate to matters which the Constitution tries to prevent from being connected with religious activities—a sign that in the Swiss mind, religious problems may still be considered as political ones.

94. Id. at 337.
95. It must be remembered that judicial review obtains, in Switzerland, only with respect to acts of cantonal authorities.
96. 95 Bundesblatt I, 167 (1943); 60 Recueil des Lois Fédérales 269 (1944).
97. Sec. 125(1)(a) of the Judiciary Act of Switzerland.
The Federal Council has also jurisdiction over certain cases involving violations of some provisions of international treaties dealing with commercial relations, customs matters, patents, etc. Litigation may reach the Federal Council only after the remedies before the cantonal authorities have been exhausted, if by the law they are not made final, submitted to the jurisdiction of the Federal Tribunal, or placed within the jurisdiction of the military authorities.

By virtue of Sec. 132(1) of the Judiciary Act, appeals from the decisions of the Federal Council in cases provided for by Sec. 125(1) (a) and (c), as well as in cases provided for by other federal statutes, go to the Federal Assembly, the legislative branch of the government. The Judiciary Act has still another clause providing for submission of cases to the authority of the Federal Council, without placing them within the appellate jurisdiction of the Federal Assembly: those instituted against the cantonal authorities for violation of federal statutes "which are not private or criminal law statutes," unless those statutes or the Judiciary Act decide otherwise. Adjudication of conflicts of jurisdiction between cantonal authorities are expressly reserved to the Federal Tribunal.

Thus, in cases of public and administrative law, the Federal Tribunal is not the only judicial organ of the Swiss Confederation. The opposition to any further increase of the jurisdiction of the Tribunal stems from some members of the other branches of government who are reluctant to relinquish powers which traditionally belonged to them.

The two separate "public law" remedies in the Swiss system: the appeal in constitutional law and in administrative law, by which a case could reach a political body of the Confederation, were amalgamated into one even before the Judiciary Act of 1943 was enacted, and this change was retained by the Act.

As pointed out above, Subsection (13) of Art. 85 of the Constitution makes the legislature competent to adjudicate disputes between the two other branches of federal government (and, possibly, between

98. Id. Sec. 125(1) (c).
99. Id. Sec. 125(1).
100. Id. Sec. 126.
101. Id. Sec. 125(1) (b).
102. Id. Sec. 125(2).
104. Staatsrechtliche Beschwerde.
105. Verwaltungsbeschwerde.
106. F. FLEINER-Z. GIACOMETTI, op. cit. note 103, at 922.
two federal courts). Such disputes, by virtue of Art. 92 of the Constitution, are decided in joint session of both chambers, under the chairmanship of the President of the National Council. However, not many conflicts reach the legislature. Many of them are settled by the procedure of exchanging notes by the authorities involved, as provided in the Judiciary Act.

In the old Constitution of 1848, suits between the cantons, and between them and the Confederation, could be withdrawn from the competence of the Federal Tribunal and submitted to the legislature. Such disputes could also be termed as "political."

Argentina

In Argentina, the case of *Luther v. Borden* was cited by the Supreme Court, and the judiciary of that country went very far in refusing to interfere with the action of the executive branch of the government, calling it political whenever they could, and especially when the central government took advantage, rightfully or wrongfully, of the constitutional permission to intervene in the affairs of the provinces "in order to guarantee the republican form of government." This reluctance is understandable in Argentina as well as in other Latin American countries in view of the practical hegemony of the executive branch of the government over the two others.

Besides, it must be emphasized that an important category of disputes: those between the provinces, with respect to their boundaries, escape judicial cognizance and are decided by the federal legislature, a political body. Thus, it could be said that this kind of litigation has the features of a political question, in Argentina. As held in *Carcano v. Santiago del Estero,* all that the Supreme Court of the nation can do is to determine cases involving a boundary dispute where the boundary has been fixed by Congress.

Mexico

The tendency not to take jurisdiction of cases which are likely to result in a row between the judiciary and the federal executive and in

108. Sec. 96(2) of the Judiciary Act.
111. Art. 67(14) of the Constitution of 1853 of Argentina (Art. 68(14) of the Constitution of 1949 of Argentina) vested in Congress the power "to fix" the boundaries of the provinces.
disregarding by the latter of the decisions of the former is most strong in Mexico. Here, the jurists recognize that there are three main branches of law: criminal, private, and political. While the courts have to apply the first two, "to the executive belongs the application of the political laws." And usually, when the federal executive undertakes to construe and enforce the state constitutions in the manner it likes, the courts declare that the controversy is of a political nature and refuse to take cognizance of it.

**Brasil**

Similarly, in Brazil the courts usually abstain from taking the risk of assuming jurisdiction over a case which may be said to involve political issues. That an act of intervention of the Union into state affairs exceeds the limits of judicial cognizance was asserted in a few Supreme Court decisions in 1914 and 1915; however, exceptionally, it occurred that the Court took jurisdiction of controversies the legal character of which was tainted with politics; thus, in 1923, the Court issued a writ to a president-elect of a state, with the view to enable him to accede to his office, although the elections were alleged to be irregular and the federal executive was about to take the matter into its hands.

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115. H. G. James, *The Constitutional System of Brazil* 109-110 (1923); for other examples, see p. 208.