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POLITICAL QUESTION DOCTRINE AND ALLOCATION OF THE FOREIGN AFFAIRS POWER

Linda Champlin* and Alan Schwarz**

INTRODUCTION

Although not discernible to the naked eye, it has been held, and is generally agreed, that the United States, as a sovereign, has the full panoply of foreign relations power possessed by all sovereigns. Whether this full blooded power is implied or "emergent" from the scant constitutional text, or is extra-constitutional in origin, is more an exercise than a problem, since all players begin with the assumption that the power exists. To proclaim its sovereign existence, however, begs the important question of its allocation between the organs of national sovereignty: The President and the two Houses of Congress. Although the allocation question is as old as the Constitution, the Supreme Court has made little effort to supply answers and has

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recently indicated an even further reduction in that role.\

What could, and should have been the principal merit determination of a generation — the constitutionality of the Vietnamese War — was "ducked" in a series of political question summary decisions. As this is being written, several political question controversies are boiling. The President has suggested that Congress (principally the Democrats) "lost" Lebanon because its threats to withdraw American forces under the allegedly unconstitutional War Powers Resolution destroyed the credibility and hence impaired the safety of the Marine presence. Secretary of State Schultz has stated that the Act substantially impairs the effectiveness of America's foreign policy and asks if there is some way to determine its constitutionality. Meanwhile, Congress demands that the United States Israeli embassy be moved from Tel Aviv to Jerusalem. The President suggests that he would veto any such legislation; arguably, embassy location is derived from the exclusive Presidential power of recognition. Congressmen murmur about cutting off funds from a Tel Aviv-based embassy. Simultaneously, controversy concerning the President's power to commit forces in Latin America and the Persian Gulf brews and festers. It seems incredible that after two hundred years of life under a written constitution which delineates governmental power and its allocation, and which creates a Supreme Court to definitively determine controversies about power and its allocation, the most basic questions concerning allocation of the foreign affairs power remain unanswered.

The judicial hands-off policy is principally accomplished through the political question doctrine, whereby the Court either declines to hear such matters, or accepts, without its own independent determination, the resolution by the coordinate branches of federal

power or by one of them. Although it has been cut back in other areas,\footnote{See Powell v. McCormack, 395 U.S. 486 (1969) (question of whether duly elected Congressman could be denied his seat by a vote of the members not a political question); Baker v. Carr, 369 U.S. 186 (1962) (equal protection challenge to state legislative apportionment ruled justiciable).} the doctrine is thriving and growing in its application to the foreign relations power.\footnote{See cases cited supra notes 3-5.} In a recent decision, a Court plurality said that it would not review the issue of who had the power to withdraw the United States from a treaty, leaving that question for resolution by a political struggle between the coordinate branches.\footnote{Goldwater v. Carter, 444 U.S. 996 (1979).} The most frequent reason given for the hands-off approach is that the constitution does not supply criteria for judicial resolution of the controversy.\footnote{See id. at 1003; Atlee v. Laird, 347 F. Supp. 689 (E.D. Pa. 1972) (no standard regarding the existence of war and the division of power between the President and Congress, suggesting that Congress could act if it wanted control), aff'd sub nom. Atlee v. Richardson, 411 U.S. 911 (1973); Mitchell v. Laird, 488 F.2d 611 (D.C. Cir. 1973) (no standards to determine whether President was acting consistent with his obligation to extricate U.S. forces from Indochina); DaCosta v. Laird, 471 F.2d 1146 (2d Cir. 1973) (whether President may order the Secretaries of Defense, Army, Navy and Air Force to mine ports and harbors of North Vietnam and to continue air and naval strikes on military targets in North Vietnam is non-justiciable political question); Orlando v. Laird, 443 F.2d 1039 (2d Cir. 1971) (no standard by which to determine what form Congressional participation must take in "making" war), cert. denied, 404 U.S. 869 (1971).} It seems surprising that a court frequently able to fully dress a textually nude equal protection or substantive due process clause, feels so helpless when confronted with the at least scantily clad constitutionally delineated foreign relations power. That surprise is heightened when the Court suggests that the doctrine will be invoked on account of lack of substantive criteria on suit of a plaintiff with barely adequate standing, but might not be invoked on suit of another plaintiff with a clearer injury.\footnote{See infra text accompanying notes 91-92, 135.} Something more than lack of criteria is clearly at work.

Judicial hands-off might be justified in some foreign relations controversies, but the Court should be aware that a hands-off policy is not cost free, particularly in separation of power claims. We do not contend that the substance of foreign policy decisions will necessarily be improved under an allocation regime discovered or created by the Court. That obviously depends upon the particular regime created or discovered. But there is more involved than the effectiveness of a given foreign relations allocation structure. As indicated, under one political question variant the Court validates and protects...
a coordinate branch decision that might well be unconstitutional; in the other, it keeps hands entirely off, allowing resolution of a controversy, presumably governed by a constitutional norm, to be decided by the power clash of coordinate branches. In the latter situation, disorder is maximized, yet order may be particularly necessary in foreign affairs. Indeed, as we shall discuss, order is the principal justification for the doctrine.

In both situations, another important value is compromised: Legitimacy itself. It may be argued that politicization of the foreign affairs power is no better or worse than the garden variety struggle between the branches on domestic policy, but the foreign relations clashes encouraged by the political question doctrine are of a different order. The judicially determined allocation of domestic political power between the branches does not avoid stalemate, divisiveness and disorder. These are inherent in a system of checks and balances. Both the President and Congress have powers that can and are used to undercut or influence the decision of the other branch. Congress, for example, can refuse to appropriate funds to implement decisions of the President which are clearly within his power to make. This can produce disorder, but the divisiveness is contained because the ground rules are understood and agreed upon. When the ground rules are not agreed upon, as in the Steel Seizure\(^18\) or Impoundment disputes,\(^19\) the Court discovers or creates them.

The political question doctrine, invoked in foreign affairs, also involves disputes about the constitutional ground rules, about legitimacy. Here, however, unlike the domestic context, the Court usually\(^20\) does not establish the constitutional ground rules; it conscientiously avoids doing so. It was argued, for instance, that President Johnson not only adopted a wrong policy on Vietnam, but also that he was acting illegitimately, as a usurper. And a handful of Congressmen proposed a resolution to impeach President Reagan based on their claim that he was acting beyond his constitutional power in Grenada.\(^21\) How many others were awaiting the result of the invasion and the resultant polls to determine whether they should join?

\(^{20}\) The Court will establish constitutional ground rules where it believes the constitutional standards are clear. See Immigration & Naturalization Serv. v. Chadha, 462 U.S. 919 (1983).
The President, in implementing a foreign policy initiative without a complete legislative sign-off, runs a double risk. First, he faces the completely appropriate risk that the initiative will fail and he will be politically responsible for that failure. But, secondly, whether or not it fails, but especially if it fails, he risks being accused of usurpation, of illegitimacy. Given the nature of the political question doctrine, the charge cannot be proved or disproved. It will probably be forgotten if the policy is successful. It will provoke continuous and ugly rancor if the policy fails. Abetted by the Court’s refusal to provide ground rules, foreign affairs allocation controversies are now fertile grounds for divisiveness, based not only on the substance of policy, but on its very legitimacy.

This Article attempts to show that the political question doctrine has been misunderstood and misused by the courts. It is our position that the doctrine, properly construed, has only one application: Judicial protection of a coordinate branch decision, which may or may not be constitutional, where the value of creating finality for that decision is more important than its constitutionality. The doctrine should have essentially no application outside of foreign relations and, although theoretically applicable to some foreign affairs controversies, its practical utility even in that area should be negligible. Specifically, the courts should refrain from invoking the doctrine in any case that involves an allocation claim.

I. THE DOCTRINE

While a number of factors have been suggested as creating a political question, only two, lack of clear standards for judicial determination and the need to attribute finality to coordinate branch decisions, have been consistently and coherently articulated by the courts. Finality is a basis for finding a political question. Absence of standards should not be. The distinguishing feature of a true political question is in the nature of the disposition. It is frequently asserted that a political question is non-justiciable. Actually the court’s disposition of a true political question is assumption by the court of the validity of the political decision due to an overwhelming need for finality. Correctly understood, the “lack of standards” cases are sim-

22. A challenge to an impeachment conviction is a possible exception. It is possible that art. 1, § 3, cl. 6 of the Constitution will be construed as an unreviewable textual commitment to the Senate. See infra note 32. If not, a court might well conclude that the consequences of judicial interference with an impeachment conviction is worse than the possibly unconstitutional conduct in arriving at the conviction.
ply merit determinations of constitutionality. They are neither instances of non-justiciability nor assumptions of constitutionality.

A. What Makes a Question "Political"?

When a court dismisses a case on political question grounds, it is generally understood to have avoided making a merit determination of the constitutional issue. If so, it has taken an extreme position, for it has abdicated its most important function — Constitutional review. The circumstances that should cause a court to so rule have been much discussed. Theoretical as well as functional definitions of the political question doctrine have been advanced, and various factors thought to be relevant to the political question have been identified and discussed. The list of factors set out by Justice Brennan in *Baker v. Carr* has become the standard.

Prominent . . . is found a textually demonstrable constitutional

23. The two outstanding theoretical positions on the political question doctrine are those of Herbert Wechsler and Alexander Bickel. For Wechsler, the political question result is a constitutional interpretation that the matter has been committed solely to another agency of government.

[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 that 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. That, I submit, is *toto caelo* different from a broad discretion to abstain or intervene.

Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 Harv. L. Rev. 1, 9 (1959). Bickel rejects Wechsler’s view that the political question doctrine is a “usual” constitutional interpretation, writing that “[t]here is something different about it, in kind, not in degree, from the general ‘interpretative process’; something greatly more flexible, something of prudence, not construction and not principle.” Bickel, *The Supreme Court, 1960 Term—Forward: The Passive Virtues*, 75 Harv. L. Rev. 40, 46 (1961). For Bickel, the doctrine’s basis is:

the court’s sense of lack of capacity, compounded in unequal parts of the strange-ness of the issue and the suspicion that it will have to yield more often and more substantially to expediency than to principle; the sheer momentousness of it, which unbalances judgment and prevents one from subsuming the normal calculations of probabilities; the anxiety not so much that judicial judgment will be ignored, as that perhaps it should be but won’t; finally and in sum (“in a mature democracy”), the inner vulnerability of an institution which is electorally irresponsible and has no earth to draw strength from.

Id. at 75.

24. Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 Yale L.J. 517 (1966); Henkin, *Is There a “Political Question” Doctrine?* 85 Yale L.J. 597 (1976). Professor Henkin concludes that there is no political question doctrine. According to Henkin, issues which have been held or suggested to be political questions are explicable in more usual terms, principally failure to state a claim or equitable discretion.

commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.26

In the same opinion Justice Brennan quotes from Coleman v. Miller,27 again defining the political question: "In determining whether a question falls within [the political question] category, the appropriateness under our system of government of attributing finality to the action of the political departments and also the lack of satisfactory criteria for a judicial determination are dominant considerations."28 An examination of Justice Brennan's six factors reveals that they are only a more detailed explication or examples of the two categories set out in the quote from Coleman, i.e., need to attribute finality to the political decision and lack of standards.

The finality value encompasses several strains. The basic concept is that the political course taken, even if unconstitutional, is preferable to change when the consequences of change are intolerable. When acting as a sovereign in its relations with other sovereigns, it may be of the utmost importance that the United States speak with a single voice. Certainty and constancy may be crucial. Information that is and should remain secret may be relevant to the decision. Justice Brennan's fifth and sixth factors, "an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question,"29 express these finality concerns.

Lack of criteria is more difficult to understand and will be subsequently fully explored.30 It is apparent, however, that at least two of Justice Brennan's other four factors are variations of the lack of criteria theme. "[L]ack of judicially discoverable and manageable

26. Id. at 217.
27. 307 U.S. 433 (1939).
29. Id. at 217.
30. See infra text accompanying notes 39-61.
standards . . . or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion,”\textsuperscript{31} clearly refer to lack of criteria. The remaining two factors are somewhat less obvious, but at least one fits comfortably within Coleman’s lack of criteria prong. “[T]he impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government,”\textsuperscript{32} is either meaningless or another expression of lack of standards. Whenever a court decides the constitutionality of a federal governmental activity, it is arguably expressing a lack of the respect due a coordinate branch of government. It is not plausible that Justice Brennan meant to say that all challenges to actions of a coordinate branch are political questions. Courts consistently review federal actions on constitutional grounds.\textsuperscript{33} Therefore, implicit in the statement is the idea that only review of certain coordinate branch activities shows disrespect. Justice Brennan does not tell us when review shows disrespect. It is hard to imagine any situation, other than when the court lacks standards.\textsuperscript{34}

Justice Brennan’s first factor, “a textually demonstrable constitutional commitment of the issue to a coordinate political department,” is arguably distinct from the two Coleman categories. Insofar as there is explicit language in the constitutional text clearly denying judicial review of a given decision of a coordinate department, the basis of non-interference or acceptance and protection by the court would differ from absence of standards and the need to attribute finality to the political decision. In such a situation, if there be one, the framers for their own reasons — the need for finality, lack of standards, the importance of respect, or whatever — removed a subject from judicial review. So be it. The Court, however, has not, at least not yet, based its decision that a given question was political on the existence of clear textual language denying judicial review over that matter. On the contrary, it has strained to avoid such a reading even where the text arguably would support it.\textsuperscript{35} Since the Court is

\textsuperscript{31} 369 U.S. at 217.
\textsuperscript{32} Id.
\textsuperscript{33} Even if it is only when the court would decide the activity is unconstitutional that lack of respect comes into play, there are numerous such cases, including, of course, Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).
\textsuperscript{35} See Powell v. McCormack, 395 U.S. 486 (1969). In Powell, the relevant constitutional language of article I, § 5, that “[e]ach House shall be the Judge of the Elections, Returns and Qualifications of its own Members,” was not interpreted to preclude judicial review. The Court declared unconstitutional the House of Representatives’ refusal to seat Congress-
supposed to do, and only to do, what the Constitution commands, any decision that a question is political is ultimately the consequence of a conclusion of textually demonstrable constitutional commitment of final decision to another instrumentality. But since it is the Court that determines what the text clearly says, and since the Court has not yet ever determined that the text clearly denies judicial review, a decision that a question is political has been based, and one suspects will continue to be based, solely on one or both of the *Coleman* criteria. If they are present the question will be deemed political even where the text is unclear. If not present, no textual language arguably denying review will be deemed sufficiently clear.

Justice Brennan may have had this in mind when he said in *Baker* that the constitutionality of the action of a state, as opposed to Presidential or Congressional action, could never be a political question. Why not? Did Brennan carefully peruse the various constitutional provisions relating to state decisions and conclude that none clearly deny judicial review, or did he conclude that none of the factors that may make a question political inhere in state actions and that therefore the text will be interpreted as exempting none of those decisions from judicial review? If the latter, then Brennan is not only functionally nullifying the clear textual commitment factor, he is also probably telling us that only one of the two *Coleman* factors is

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really significant. There is absolutely no *a priori* reason why the criteria applicable to a state's action may not be as unmanageable as those applicable to a federal action. Indeed, they are frequently the very same criteria. If, nonetheless, state action cannot create a political question, it must be because the overwhelming need for finality, which alone justifies use of the doctrine, exists only in respect of federal action. While the Court has raised the political question banner in other contexts, it is our contention that overwhelming need for finality probably only exists in respect of federal action in foreign affairs.

B. Absence of Standards: Domestic Affairs

Textual commitment is a conclusion arrived at by independent means, not a separate reason for finding something to be a political question. If no independent reason exists for invoking the doctrine, the text will not be interpreted to deny judicial review; if an independent reason does exist, the text will be interpreted to deny review or the Court will abstain solely on the basis of that reason regardless of the textual language. Hence, textual commitment adds nothing to the political question doctrine. According to the *Baker* formulation, then, we are left with finality and lack of criteria as the sole bases for invocation of the doctrine. Finality has never been used as a basis in a purely domestic controversy, and, possibly excepting review of a presidential impeachment trial, presumably never will be. Put simply, in the domestic context, finality is never more important than constitutionality. Under the *Baker* formulation the sole remaining reason for invoking the political question doctrine is "lack of criteria for court resolution," and the few domestic cases utilizing the doctrine are based on this rationale.

Examination of domestic cases invoking the political question doctrine demonstrates that they are really simply merit determinations of constitutionality. The most famous lack of criteria case is *Coleman v. Miller*. There, plaintiff sought to enjoin Kansas from recording its ratification of the child labor amendment on the ground that it had previously been rejected by Kansas and that too much time had elapsed before that state's eventual ratification. The Court dismissed on political question grounds, stating that there was a lack of satisfactory criteria for a judicial determination. What does that

39. *See infra* text between notes 109 and 110.
40. 307 U.S. 433 (1939).
41. *Id.* at 453-54.
mean? Professor Henkin suggests that Coleman is based on the determination that since the Constitution states no time limitation on the amending process, there are no such constitutional limits; hence Kansas acted constitutionally and the claim should simply have been dismissed on the merits as a failure to state a claim. According to Henkin, it is unnecessary and confusing to dredge out that bizarre vehicle — the political question doctrine — to accommodate the simple merit dismissal of a non-claim. If, however, there clearly were no limits on the amending process, it would seem strange to talk about a lack of criteria; in that event, there would be a very clear criterion, mandating validation. Therefore, it is possible that the Court believed that there might be some limits — at some point, for example, time lapse or various rejection-acceptance or acceptance-rejection patterns might offend an implicit constitutional requirement of consensus — but that there was a lack of manageable criteria necessary to define that precise point.

So understood, any such implicit amendment process limitation differs little, if at all, from traditional constitutional inquiry. Most litigated constitutional limitations are precisely of that variety: Whether a search is reasonable, whether a confession is compelled, whether aid to religion is an establishment, are all, at the margin, similarly lacking clear guidelines for resolution. Indeed, some, like whether a non-explicated right is sufficiently fundamental to warrant constitutional protection, are considerably more amorphous. At the edge, most constitutional standards are unmanageable, and resolu-

42. The Constitution provides that:
The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid . . . as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress . . .

U.S. Const. art. V.

43. See Henkin, supra note 24, at 613.

44. Id.

tion is often accomplished by a presumption of constitutionality. So, too, with an implicit consensus limitation. Sometimes the congressionally prescribed ground rules for an amendment’s adoption are clearly consistent with an implicit consensus limitation, sometimes they clearly are not, and sometimes it is difficult to determine because “consensus” blurs at the edges. In those last situations we will presume constitutionality; we will defer to other institutions, we will dismiss for failure to state a claim. Hardly novel doctrine; hardly the kind of stuff that should call forth bizarre vehicles.

The only other clear political question dismissals relating exclusively to domestic matters are the guarantee clause cases. In the political question doctrine area where everything seems to be qualified, vague, contradictory or just plain nonsense, an oasis of clarity exists — claims arising under the guarantee clause are today, without qualification or exception, labeled political questions. It is only relatively recently, however, that guarantee clause claims have been so treated. Prior to Pacific States Telephone and Telegraph Co. v. Oregon, most guarantee clause claims were adjudicated on the merits. Although no challenge succeeded, the claims were not dismissed as political questions, but because the challenged activity was constitutional. Before and after Pacific, guarantee clause claims typically challenged a particular aspect of governmental structure, such as an initiative and referendum or denial of sufferage to women, as being incompatible with republican form. Prior to Pa-

46. There are a few other domestic cases in which the Supreme Court has indicated that the question presented was political, but in none is the dismissal squarely based on that doctrine. See Gilligan v. Morgan, 413 U.S. 1 (1973); O’Brien v. Brown, 409 U.S. 1 (1972) (per curiam). Colegrove v. Green, 328 U.S. 549 (1946), which had been dismissed as a political question, was effectively overruled by Baker, 369 U.S. at 234.

47. “The United States shall guarantee to every State in this Union a Republican Form of Government. . . .” U.S. CONST. art. IV, § 4.


49. 223 U.S. 118 (1912).

50. For a listing of these cases, see Henkin, supra note 24, at 609-10 n.36.


54. Luther v. Borden, 48 U.S. (7 How.) 1 (1849), is the first case in which the political question doctrine was raised in the context of a guarantee clause challenge. The claim in Luther arose in the context of the Dorr Rebellion in Rhode Island. The plaintiff insisted that the charter government had been displaced by the Dorr government which had been ratified by
cific the Court held that the particular structure did not violate republican form; after *Pacific* the Court held the matter to be a po-

a majority of the people of the state. The Court refused to consider the merits of the plaintiff's claim, concluding that under the guarantee clause, "it rests with Congress to decide what government is the established one in a state." *Id.* at 42. The Court cited several bases for its conclusion: (1) the President's recognition of the charter government as the executive power of the state, *id.* at 44; (2) the lack of standards for determining whether the form of government was republican, *id.* at 45-46; and, (3) the disruptive effect of voiding the actions of a state government as unrepublican, *id.* at 44-47. For a further discussion of *Luther* see *Baker*, 369 U.S. at 218-22.

The first factor, the President's validation, is insufficient to preclude judicial intervention. There is no exclusivity language to support it; the guarantee clause states that the U.S. shall guarantee a republican form of government, never specifying which branch. U.S. CONST. art. IV, § 4. Deference could be functionally based. Resolution of internal unrest demands prompt action and might require armed federal intervention, and the judiciary could provide neither. See Note, *A Niche For the Guarantee Clause*, 94 HARV. L. REV. 681, 682-83 (1981). If the claim in *Luther* had been raised during the period of upheaval, finality concerns might justify noninterference. However, the claim was in fact presented after a new, indisputably valid government was in place.

The second factor that the Court cited was absence of standards to determine whether the government was republican. There was no basis on which the Court could conclude that the challenged government was not republican in form. In other words, the charter government was not unconstitutional. In this regard *Luther* is merely an example of failure to state a cause of action.

The third basis for noninterference speaks to the disruptive effects of voiding acts of an unrepublican government. The Court noted:

[If this court is authorized to enter upon this inquiry . . . and it should be decided that the charter government had no legal existence during the period of time above mentioned, — if it had been annulled by the adoption of the opposing government, — then the laws passed by its legislature during that time were nullities; its taxes wrongfully collected; its salaries and compensation to its officers illegally paid; its public accounts improperly settled; and the judgments and sentences of its courts in civil and criminal cases null and void, and the officers who carried their decisions into operation answerable as trespassers, if not in some cases as criminals.

*Luther*, 48 U.S. at 38-39. The Court could not avoid these consequences by limiting itself to granting prospective relief, as the Court subsequently did in the apportionment cases (*e.g.*, *Reynolds v. Sims*, 377 U.S. 533 (1964)), because the plaintiff sought only compensation for past acts. A new, indisputably valid government was in place, removing any need for prospective relief.

The refusal to grant retroactive relief is necessitated by finality concerns; change is worse than the unconstitutional conduct. In that respect, it is a political question, and the decisions and actions of an unconstitutionally constituted government will be protected and implemented. The continued existence of that government is not necessitated by finality concerns, and therefore is not a political question. There may be other reasons why prospective relief cannot be granted, such as the remedy problem Frankfurter foresaw in the malapportionment situation. See infra text accompanying notes 64-72. But this should merely result in a refusal to grant a remedy, not in a refusal to decide the constitutionality of the government, although if it is absolutely clear from the beginning that no remedy would be forthcoming despite a finding of unconstitutionality, case and controversy problems may arise. See infra note 111 and accompanying text.

In fact, the challenged activities did not violate the Constitution because the republican form clause did not yield standards from which the court could conclude that the particular practice violated a presumption of constitutionality; more simply, the clause did not prohibit the challenged activity. There is, however, a value underlying the clause and some activity is clearly violative of that value: A monarchy would surely violate the republican form guarantee. Just as in Coleman, the Court's declaration of lack of criteria signifies nothing more or less than that the challenged activity is not violative of a constitutional prohibition.

Actually, the traditionally slender, barely ascertainable guarantee value, "masquerading" as an equal protection claim in Baker v. Carr, was considerably fattened in that case. Justice Brennan's statement in Baker that the exact claim which constituted an equal protection violation would be dismissed as a political question if brought under the guarantee clause is unconvincing. The only conceivable way to determine that malapportionment is unreasonable discrimination, or that discrimination in voting is subject to a more stringent standard than other discrimination, is to conclude that the resulting distribution of political power is offensive to a constitutional norm. Since the equal protection clause does not itself supply that norm, or any other, a constitutional standard simply doesn't exist or exists independently of that clause. If no standard can be discovered, no constitutional prohibition is violated. If the standard does exist outside the equal protection clause, the most likely place for it to independently exist is the guarantee clause. A conclusion that malapportionment violates equal protection is probably based on the conclusion that it violates the guarantee clause, and in that event, of course, the equal protection conclusion is wholly redundant. While it is arguable that malapportionment offends a guarantee value, it is not arguable that a standard absent in that clause can be

57. For a different view of the guarantee clause, although one that also imposes substantive restraints enforceable by the courts, see Note: The Rule of Law and the States: A New Interpretation of the Guarantee Clause, 93 Yale L.J. 561, 561 (1984) ("the guarantee clause should secure the 'rule of law' in the states by requiring, as a matter of federal constitutional law, that the states either observe their own constitution and laws or change them by legally valid procedures.") Id. at 561 (footnote omitted).
58. 369 U.S. at 297 (Frankfurter, J., dissenting).
59. Id. at 227.
60. "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.
discovered in equal protection. If no standard governing malapportionment existed in the guarantee clause, malapportionment would still not be a political question: It would simply be constitutional on the merits under both clauses.

A comparison of the two dissenting opinions in *Baker* reveals additional factors argued to be relevant to a political question disposition. Justices Frankfurter and Harlan both concluded (as we do) that malapportionment is not an equal protection violation.62 Having so concluded, Harlan would have simply dismissed the claim on the merits. Since the equal protection claim does not contain standards making malapportionment unconstitutional, he reasoned, malapportionment is constitutional: “The suggestion of my Brother Frankfurter that courts lack standards by which to decide such cases as this, is relevant not only to the question of ‘justiciability,’ but also, and perhaps more fundamentally, to the determination whether any cognizable constitutional claim has been asserted in this case.”63

Frankfurter’s dissent, although nearly identical to Harlan’s in its view of the merits, characterizes the weakness in the claim as creating not a merit deficiency, but a political question.64 There are two possible reasons for this difference in manner of disposition, one spelled out in the opinion, the second only suggested. Both rationales are species of the genus that another factor creating a political question is the goal of protecting the prestige and power of the Court.

The first principle asserts that if the Court cannot constitutionally invalidate noxious governmental action because the action is constitutional, it should abstain from any decision, rather than in some measure legitimate the action through a validating decision.65 The political question doctrine is thus asserted to be one of the several “passive virtues.”66 Since the Court is not a bully pulpit, the doctrine, so used, should be invoked by summary disposition without opinion. Where some explanation is necessary the resultant opinion should be long on poetry and short on precision. Lack of standards language — translation — it’s constitutional but we don’t like it and therefore won’t validate it — seems appropriate to that end. That

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63. *Id.* at 337 (Harlan, J., dissenting).
64. *Id.* at 277-78 (Frankfurter, J., dissenting).
66. See generally R. BICKEL, supra note 65, at 183-98.
may be a fair description of Frankfurter's opinion, or at least of that portion concerning the "merits" of malapportionment.

A second rationale is made explicit in the Frankfurter opinion. He stresses not only that there is a lack of standards governing the constitutionality of malapportionment — i.e., that malapportionment is constitutional — but also that there is a lack of standards governing the appropriate remedy even if the practice were unconstitutional.67 Important to Frankfurter's refusal to intervene is his anticipation that because of a political impasse regarding a new legislatively determined apportionment, the Court would have to construct one itself. Since a near infinite number of apportionment variations would satisfy constitutional requirements (at least as suggested by the three Justices who wrote concurring opinions),68 and since a court would have to choose among them, the court selecting a remedy would necessarily be drawn into the thicket of partisan politics.69 To avoid that result, Frankfurter would not intervene even if the practice were unconstitutional. His reason for this abstinence is to protect the court as an institution.

[Intervention] may well impair the Court's position as the ultimate organ of "the supreme Law of the Land" in that vast range of legal problems, often strongly entangled in popular feeling on which this Court must pronounce. The Court's authority — possessed of neither the purse nor the sword — ultimately rests on sustained public confidence in its moral sanction. Such feeling must be nourished by the Court's complete detachment, in fact and in appearance, from political entanglements and by abstention from injecting itself into the clash of political forces in political settlements.70

Indeed, given the state of the merits as they seemingly existed circa Baker, and given the great difficulty legislatures had in reapportioning themselves, Frankfurter's fears were realistic. Although Baker was a substantial departure from past precedent,71 the sea

68. Id. at 243-44 (Douglas, J., concurring), 254, 261 (Clark, J., concurring), 265-66 (Stewart, J., concurring).
70. Baker, 369 U.S. at 267 (Frankfurter, J., dissenting).
71. See Colgrove v. Green, 328 U.S. 549 (suit challenging congressional districts as violative of equal protection dismissed, since such determinations are properly left to the political process), reh'g denied, 329 U.S. 825, motion for rehearing en banc denied, 329 U.S. 828 (1946).
change awaited *Reynolds v. Sims*. All but the dissenting opinions in *Baker* spoke in terms of malapportionment being constitutional so long as not irrational, so long as short of the topsy turvical. Justice Stewart couldn’t even understand what the fuss was all about. He saw nothing in the majority decision “to prevent a State, acting not irrationally, from choosing any electoral legislative structure it thinks best suited to the interests, temper, and customs of its people.” Frankfurter realized that given the problem of remedy, there was no half way. Either rotten boroughs were to be allowed to continue, albeit without judicial legitimation, or a precise substantive standard much more normative than irrationality would have to be created. He was right. *Reynolds* created a one person — one vote standard within two years of *Baker*.

The thrust of the Frankfurter opinion is that in regard to some substantive issues the Court will make its greatest contribution by doing as little as possible. That may be, but, as we shall show, the political question doctrine should not be made a vehicle for this purpose. Its theoretical function is very different from passivity, and inclusion of that value causes utter confusion in considering the nature of the disposition to follow a political question determination.

C. The Nature of the Disposition

The significance and uniqueness of the political question doctrine, indeed its reason for being, is the nature of the disposition following a finding that a controversy is a political question. The standard language is that a political question creates a non-justiciable controversy, to be resolved through the political process, not by the courts. Non-justiciability, however, exists separately from the political question doctrine. Standing, ripeness and mootness, for example,

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72. 377 U.S. 533 (1964). In *Reynolds*, the Court adopted “one man — one vote” as the districting standard.
73. *Baker*, 369 U.S. at 244-45 (Douglas, J., concurring), 254 (Clark, J., concurring), 265 (Stewart, J., concurring).
74. *Id.* at 254 (Clark, J., concurring).
75. *Id.* at 265 (Stewart, J., concurring) (citation omitted).
76. Several commentators have supported the proposition that the Court should abstain from deciding certain issues in order to protect the prestige and jurisdiction of the Court. See R. Bickel, *supra* note 65, at 183-98 (1962); J. Choper, *Judicial Review and the National Political Process* (1980); Finkelstein, *Judicial Self-Limitation*, 37 Harv. L. Rev. 338, 344 (1924). Professor Choper, however, specifically disassociates his proposal from the political question doctrine. J. Choper, *supra* this note, at 361.
are situations where the status of a party disables her from invoking judicial action over an issue. In the political question context, by contrast, the issue itself, independent of the status of the parties, has been termed non-justiciable. It would appear then that while a case dismissed because of party status might subsequently be adjudicated in other circumstances, a political question, as a non-justiciable issue, would, like the ancient mariner, forever roam the seas, never to be resolved. It is our position that a political question resolution is not a subset of non-justiciability, but rather a particular type of merit determination.

We agree that in a true political question the court neither determines the issue nor interferes with the political decision. It differs from an ordinary merit decision where the court refrains from interference only when and because it determines the political action to be valid. In the true political question, the court assumes rather than determines validity for reasons external to the validity of the political action taken, such as an overwhelming need for finality. Since the processes of validation are different, the precedential consequences should also be different. Since validity is assumed and not determined, the decision should not be a precedent on the issue of validity and the court should protect the political action only so long as the overwhelming need for finality exists. In all other respects, however, both processes should result in a merit decision that protects the political action from interference by the reviewing court or by any other institution, and which should be implemented by the court in a subsequent enforcement proceeding.

So described, a political question resolution is a merit decision, not a subset of non-justiciability as it is almost always characterized. Does it make any difference? There is no difference in terms of interference by a reviewing court in a lawsuit brought to attack the political action. In that context a court will refrain from interference whether disposition be by determination of validity, assumption of validity, or determination of issue non-justiciability. A court's necessary and proper role, however, is not limited to passive non-interference with a valid political decision. It also has the vital, active function of protecting the political decision from interference by all others and of taking jurisdiction over enforcement actions brought to implement the political decision. Those functions exist and operate to the extent a political question resolution is considered the equivalent of a merit decision; they do not if it is characterized as an instance of non-justiciability.
A true political question, at least as the term is used here, is presented when it is necessary for a court to defer to the political branch determination of the constitutionality of its own action because interference with that action would cause intolerable consequences. In such situations, the court abdicates its usual judicial review function, accepting the political determination that the challenged action is constitutional. The doctrine has both a substantive and a procedural aspect. Substantively, invocation of the political question doctrine is a determination that finality is more important under the circumstances than a judicial assessment of constitutionality. It follows as a procedural matter that the challenged action is thereby immunized from disruption by the reviewing court. Moreover, the finality value which triggers the doctrine dictates that the coordinate branch decision, in addition to being immune from the instant court’s interference, be immune from any other interference, and that the courts should assume jurisdiction over implementing enforcement proceedings. A political question resolution, then, is almost the opposite of non-justiciability. Far from being neutral and non-active, a court, having decided that an issue is a political question, should accept the coordinate branch decision and be receptive to actions brought to force the rest of the world to do the same. In terms of disposition, it is exactly equivalent to a merit determination of constitutionality. It differs only in that validity is assumed rather than judicially determined.

We believe that the significance and uniqueness of the political question doctrine is the nature of the resulting disposition: A merit decision in which validity is assumed, not determined. That disposi-

78. One such source of interference is a state court. In Goldwater v. Carter, Justice Rehnquist specifically and gratuitously says that a political question dismissal, like a mootness dismissal, may not be binding on state courts, so long as the state courts “do not trench upon exclusively federal questions of federal policy.” 444 U.S. 996, 1005 n.2 (1979) (Rehnquist, J.). For further discussion on this point, see infra note 149.

79. The Act of State doctrine is analogous in terms of disposition. As stated by the Supreme Court in Ricaud v. American Metal Co., 246 U.S. 304 (1918), the Act of State doctrine:

does not deprive the courts of jurisdiction once acquired over a case. It requires only that, when it is made to appear that the foreign government has acted in a given way on the subject matter of the litigation, the details of such action or the merit of the result cannot be questioned but must be accepted by our courts as a rule for their decision. To accept a ruling authority and to decide accordingly is not a surrender or abandonment of jurisdiction but is an exercise of it.

Id. at 309 (emphasis added). The political question doctrine, like the Act of State doctrine, is a rule of decision, not a rule of abstention. See also Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964).
tion should be limited to situations where finality is more important than right, and is therefore inappropriate where lack of standards and concern for the role of the Court have traditionally been considered relevant to invocation of the doctrine. These other factors, to the extent that they are legitimate factors, relate to determination of validity, not assumption of validity, and therefore require no separate doctrine. They, too, however, yield merit decisions, not determinations of issue non-justiciability. In fact, we doubt whether there is, in any context, such a thing as issue non-justiciability.

80. Court role concerns, if accepted as valid considerations in determining the disposition of a controversy, also do not result in issue non-justiciability. The Court, of course, has never explicitly included the avoidance of legitimating noxious or unconstitutional activity as a political question factor. That it is a factor is exclusively the surmise of some commentators, most notably Professor Bickel. See R. Bickel, supra note 65.

If this concern is a factor in judicial determination, it could have two applications. First, where the activity is constitutional, but noxious, dismissal of an action to enjoin that activity on political question grounds is a merit determination. Use of the political question label in this situation would simply be a device to avoid legitimation. The activity would not be interfered with, would, if necessary, be implemented, and would be protected against interference by others.

We do not know that the doctrine has ever been used when the activity was unconstitutional, but for reasons of self-protection could not be so ruled. If so used it would also be a decision on the merits, as would become obvious in any necessary ensuing enforcement proceeding. Although a decision on the merits, it is certainly not of the garden variety. For here, like the situation where finality is implicated, the Court would be upholding the activity for reasons external to its validity and assuming, rather than determining, validity. It would, to that extent, be a political question disposition as the term is here defined.

81. Justice Jackson's dissenting position in Korematsu v. United States, 323 U.S. 214 (1944), is probably an example of true issue non-justiciability. The petitioner in that case was appealing a conviction in a federal district court for remaining in a military area contrary to Civilian Exclusion Order No. 34 issued by the Army. Justice Jackson, dissenting, refused to affirm the conviction. He believed that military expedients cannot always conform to Constitutional restraints, but also believed that the Constitution should not be skewed to accommodate what is militarily necessary. He then stated how a judge should proceed:

My duties as a justice as I see them do not require me to make a military judgment as to whether General DeWitt's evacuation and detention program was a reasonable military necessity. I do not suggest that the courts should have attempted to interfere with the Army in carrying out its task. But I do not think they may be asked to execute a military expedient that has no place in law under the Constitution. I would reverse the judgment and discharge the prisoner.

Id. at 248 (Jackson, J., dissenting).

It appears that Justice Jackson would also refuse to hear the habeas corpus petition of a person held by the army in similar circumstances. If so, this is an example of true issue non-justiciability. It also points out one of its weaknesses. Under this view, the military decision is completely immune from judicial scrutiny. Cf. Banco Nacional de Cuba v. Sabbittino, 376 U.S. 398, 470-72 (1964) (White, J., dissenting).

In a recent book, Professor Choper proposes that most constitutional allocation of power questions be treated as non-justiciable issues. J. Choper, supra note 76. Under his proposal, the court would not determine the constitutional separation issue between Congress and the
Further consideration of the disposition problem provides independent proof, or at least buttresses the conclusion, that lack of manageable standards in the context of allegedly wrongful exercise\(^{82}\) is actually simply a merit determination of constitutionality, not a species of non-justiciability. Coleman v. Miller\(^{83}\) is said to have been decided on political question grounds, as an instance of issue non-justiciability.\(^{84}\) Assume, however, that Congress proposes a constitutional amendment prohibiting abortions in some circumstances where they are presently constitutionally protected, and provides ground rules for state ratification of the amendment which arguably violate a presumed consensus value implicit in the amendment clause. An action, predicated on violation of such a consensus requirement, is brought to vacate the "successful" amendment; on the authority of Coleman, that action is dismissed as a non-justiciable political question. Compare the situation where the United States, as authorized by implementing legislation, prosecutes a doctor for performing a prohibited abortion. Defendant argues that the legislation is unconstitutional because the amendment on which it is based is unconstitutional. What does the Supreme Court do on appeal of the conviction? We assert that it would affirm the conviction based upon the merit determination made in Coleman, if Coleman is still good law on the merits. If Coleman really stood for the proposition that the consensus issue is non-justiciable because the Court cannot decide what consensus means, then the decision below should be vacated. A court cannot deprive one of his liberty without ensuring an opportunity to have his constitutional claim determined.\(^{85}\) A court,

\(^{82}\) For a discussion of a possible distinction between lack of standards in the wrongful exercise and allocation contexts see infra pp. 253-54.

\(^{83}\) 307 U.S. 433 (1939).

\(^{84}\) Id. at 454.

\(^{85}\) Yakus v. United States, 321 U.S. 414 (1944); P. Bator, P. Mishkin, D. Shapiro & H. Wechsler, Hart and Wechsler's The Federal Courts and the Federal System 341 (2d ed. 1973). As discussed, we disagree with Justice Jackson's conclusion that there is (or could be) such a thing as a non-justiciable issue. See supra note 81. Jackson, however, recognized that if an issue is non-justiciable, it is always so. Accordingly, although he would not
at most, could hold, whether or not it said so, that the amendment process is arguably constitutional, and is therefore presumed constitutional. That is simply a common garden variety merit determination, having no resemblance to either non-justiciability or to the political question doctrine.

Lack of standards in the allocation context presents a more difficult problem. For instance, in *Goldwater v. Carter*, plaintiffs U.S. Senators asserted that President Carter did not have constitutional authority to unilaterally withdraw the United States from its treaty with Taiwan. The plurality opinion ruled that the Constitution does not contain a standard allocating the withdrawal power that is sufficiently clear to permit a merit determination. Hence, it dismissed the case as a non-justiciable political question. As we shall subsequently discuss, it is much harder to resolve a foreign policy allocation claim than a wrongful exercise claim, by presumption. To the extent that such a claim cannot be decided because there are no criteria for decision, a true non-justiciability issue may be said to exist. But even if such an animal does exist, it is confusing and inaccurate to call it a political question, for it would have to exist in all its transfigurations, including any necessary enforcement proceedings to implement the decision to withdraw. If no standard of decision exists, the Court would be unable to assert jurisdiction to enforce and implement the withdrawal decision—a necessary function in a true political question situation.

That same plurality opinion, however, indicates that issue non-justiciability may evaporate in the crunch. Justice Rehnquist suggests that the issue might be decided in a suit involving an injured private party rather than a disputatious Senator. Since the clarity of the standard obviously does not vary with party status, any such

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86. *444 U.S. 996 (1979).*
87. *Id. at 1002-03 (Rehnquist, J.).*
88. *See infra pp. 253-54.*
89. We, however, offer criteria for decision of such a claim. *See infra* text accompanying notes 151-58.
90. In *Goldwater*, Justice Rehnquist, relying on *Coleman*, concludes there is a political question because of lack of standards. He also labels the political question a form of non-justiciability which, like a mootness dismissal, is not necessarily binding on state courts. *Goldwater*, *444 U.S. at 1002-06 (Rehnquist, J.). See infra note 149.
91. *Goldwater*, *444 U.S. at 1004-05 (Rehnquist, J.).*
difference in result indicates that the Court is merely avoiding a difficult question for as long as it is able. If and when real injury threatens, it will have to decide: First, because the Court cannot allow a constitutional injury to continue merely because it finds the issue intellectually difficult; and second, because the Court cannot relinquish its duty to protect and implement a valid political decision. In the end, the issue becomes justiciable. Its temporary avoidance seems more the product of standing doctrine than issue non-justiciability or anything that could coherently be called the political question doctrine. Indeed, issue non-justiciability language ordinarily masks either a defect in party status or, more often, a determination of merit constitutionality. The fallacy that non-justiciable issues exist persists only because so many allegedly unconstitutional actions do not involve any enforcement proceeding.

If a true political question is a merit decision indistinguishable

92. See supra note 80.

93. One commentator concludes that there is no such thing as a political question. Henkin, supra note 24, at 600-01. We believe Professor Henkin erred because he focused on the anticipatory suit. He believes, as we do, that a determination of lack of manageable standards in a wrongful exercise case is actually a judicial determination of merit constitutionality, no different from any other merit determination. Id. at 606, 610, 612-13. He also believes, however, that the residue — the situations involving an overwhelming need for finality — are easily manageable within standard independent doctrine, namely, remedy law. An overwhelming need to attach finality to the decision of another branch, even where that decision is unconstitutional, results in a situation where there is a right without a remedy. There are other situations where that dichotomy exists, he reasons, and since they are resolved by usual remedy law, this instance should not require a separate doctrine. Id. at 606, 617-24.

There is, however, a basic distinction between the two situations. In the no remedy case, the court first determines that a right exists, leading to the paradox of a right without a remedy. In the true political question, the court assumes that no right exists, that the action is constitutional. And this very different methodology is purposeful and necessary. A court's inability to provide an immediate remedy ordinarily would not and should not prevent it from making a merit determination. It will decide the merits because circumstances do not compel it to protect or implement the political decision; a decision of unconstitutionality is not a problem. What Professor Henkin fails to address is the situation where finality is essential. Here, the court does not make a merit determination — it assumes constitutionality — because it is prepared, if necessary, to actively implement and protect the coordinate branch decision. For instance, if the constitutionality of a war is a political question, the court should and would protect that decision by imposing punishment on prosecuted draft resisters. See Tigar, Judicial Power, the "Political Question Doctrine," and Foreign Relations, 17 UCLA L. Rev. 1135, 1175-78 (1970). Since it is simply "too much" to actively implement a decision just determined to be unconstitutional, the Court, in a political question, assumes constitutionality.

Although we disagree with Professor Henkin's assertion that there is no need for the doctrine since its paradigm example can be easily disposed of through remedy law, he is correct insofar as the Court sometimes confuses the right without a remedy situation with political questions. Justice Frankfurter's dissenting opinion in Baker is an example. He said that even if malapportionment were unconstitutional it should be regarded as a political question because

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from the lack of standards case in terms of disposition, why do we not then just call the decision one of simple merit constitutionality? Although all political questions are merit decisions, the merits are decided in very different ways. Decisions validating action on the ground of inadequate standards are essentially indistinguishable from other constitutional merit determinations. Not so with respect to true political questions, where there is an overwhelming need for finality. There, the merits are not examined at all: The need for finality requires the court to assume constitutionality without an independent examination. A very rara avis that differs from the notion that even the most imperative command bends to compelling necessity. The necessity that invokes the doctrine is not the world beyond the actor's control, but is created by the very action that is argued to be unconstitutional.

It would be most difficult to incorporate this finality value into an independent judicial examination of the merits. The outcome might be a determination that the coordinate branch action is constitutional because it is unconstitutional and not rectifiable, and that therefore the Court will not interfere with the decision but will rather protect and implement it. It would be better to avoid any independent examination, except, of course, an examination of the magnitude of the finality constraint. If a true political question is recognized for what it is, then it is not the issue itself that invokes the doctrine, but the need for finality, and that need may not exist if a suit is brought either before the action is taken or after the finality

of the immense difficulties that the judiciary would have in fashioning a remedy. Baker v. Carr, 369 U.S. 186, 266-330 (1962) (Frankfurter, J., dissenting). See supra text accompanying notes 67-69. Assuming that Frankfurter was right in his estimate of those difficulties, that would, at most, be a reason to deny a remedy, not a reason for holding the controversy to be a political question. If malapportionment itself were a political question, nothing should be done to remedy it, and it should be protected and implemented. But there is no reason why malapportionment should be a political question. It should be either constitutional or unconstitutional on the merits. If self protection considerations militate against a prospective judicial remedy, then no remedy need be given. Here, we do have simply a right without a remedy, at least without the remedy of judicial reapportionment. That situation, however, does not require that the Court protect the malapportionment against other institutions — say the State executive or judiciary. It does not even require that the Court decline to rule the apportionment unconstitutional. A decision that the challenged activity is unconstitutional coupled with a refusal to remedy the violation makes it crystal clear that the Court is unwilling or unable to remedy unconstitutional conduct. Although this could hurt the prestige of the Court, it has the advantage of a clear decision on the merits which places an obligation, albeit not judicially enforceable, on the political branches. The same problem regarding retroactive relief is present here, as in Luther v. Borden, 48 U.S. (7 How.) 1 (1849), or any guarantee clause challenge. See supra note 54.
concern has lessened. This is different from an ordinary garden variety merit determination and should be recognized as such. The political question designation is the means of conveying that, unlike an ordinary decision on the merits, the political decision is being accepted without independent judicial inquiry because the consequences of change are intolerable.

II. THE DOCTRINE'S APPLICATION TO FOREIGN AFFAIRS

There is essentially no need for a political question doctrine in domestic affairs. In fact, functionally, the doctrine does not there exist. Its domestic application has been limited to lack of standards situations which, as we have shown, are really judicial determinations of merit constitutionality. The evolved history of the doctrine in its principal domestic application — the republican guarantee clause — demonstrates that the "doctrine" is empty rhetoric. When a challenged action was deemed to be arguably democratic, it was held to be a political question on account of lack of standards, and when deemed undemocratic, it was invalidated. It is more accurate and less confusing to simply conclude that arguably republican forms are constitutional and clearly non-republican forms are unconstitutional. Although the domestic application has not been formally repudiated, it was last used by the Court in 1946. The doctrine, however, has had continued and growing vitality in foreign affairs.

The costs created by the doctrine's application to issues concerning allocation of the foreign affairs power are enormous. Because the ground rules remain unsettled, power tends to flow to whichever may then be the politically more powerful institution, without refer-

94. For example, assume the President of the United States is convicted by the Senate of an impeachable offense under circumstances that in a usual criminal proceeding would be a denial of due process. He challenges the conviction in court. The Justices believe that they cannot decide for the President, either because the consequences of confusion with regard to who is President at any given time are intolerable, see C. Black, Impeachment: A Handbook 54-55, 61-62 (1974), or because change itself is intolerable. They might label such an action a political question, but perhaps might not do so if the action were brought in anticipation of the Senate trial.

95. We say "essentially" instead of "absolutely" because impeachment might be a political question. See supra note 22.

96. See supra text accompanying notes 39-92.

97. See supra text accompanying notes 46-57.


99. Colegrove v. Green, 328 U.S. 549 (1946). The Supreme Court has referred to the doctrine as being relevant in subsequent cases, but has not dismissed squarely on that basis. See Gilligan v. Morgan, 413 U.S. 1, 9-12 (1973); O'Brien v. Brown, 409 U.S. 1, 2-5 (1972).

100. See supra notes 3-5 and accompanying text.
ence to whether it is best equipped to exercise the power. This unset-
tiled condition prevents either institution from acting decisively, since
each has the means to weaken the other's position and the lack of
ground rules legitimates the use of such means. The result is foreign
policy by stalemate. Moreover, decisive action, even if otherwise pos-
sible, carries political risk. This is as it should be, but where the
ground rules are unsettled the risks become excessive. The unsuccess-
f ul policy becomes more than a serious or even disastrous mis-
take: It becomes a usurpation of power. Faced with these risks,
there is a tendency to do as little as possible. Finally, the national
debate shifts from the merits of proposed action to its legitimacy.
That deflects from careful consideration of the merits and encour-
gages demagogy.

A. Allocation and Finality

The allocation ground rules remain unsettled because the Su-
preme Court considers them political questions, and in the foreign
affairs context, unlike the domestic sphere, a determination that an
issue is political sometimes means that it is non-justiciable. Why is
the judicial response to a foreign affairs controversy so different from
one involving domestic concerns? Why is a political question dis-
position in a foreign affairs controversy sometimes the protection and
implementation of a coordinate branch decision without an indepen-
dent merit determination by the Court, and sometimes the
equivalent of issue non-justiciability? How can such opposite dis-
positions stem from the same doctrine?

The Court refers to the same factors as contributing to the crea-
tion of a political question in domestic and foreign affairs and
most of them seem equally irrelevant to both. The Court has never
held that any controversy, domestic or foreign, has been committed
to one of the political branches for final determination by virtue of
clear constitutional text. Nor does lack of standards, at least as used
and defined in the domestic context, have any different or greater
application in foreign affairs controversies. Consider a controversy

248-49.
102. See supra notes 20-23 and accompanying text.
103. Jones v. United States, 137 U.S. 202, 212 (1890); Williams v. Suffolk Ins. Co., 38
involving the claim that the federal government, operating with the concurrence of both political branches, acted unconstitutionally in the foreign affairs realm. Parsed, such a claim could have two elements: Either the United States acted without authority, or it executed its authority wrongfully, in violation of a constitutional prohibition. Lack of authority claims are non-extant because it is assumed that the United States has a complete foreign affairs power. Wrongful exercise claims can and do exist, and it has been held that the constitutional prohibitions defining wrongful exercise apply equally to the foreign and domestic powers. This may overstate the case, since there probably should be more “play” in a prohibition as applied in a foreign affairs context. But regardless of whether the standard be uniform or different, the Court can and does determine the scope of the prohibition and decides the merits of the controversy. In upholding the action, the Court sometimes uses political question language, but is in actuality rendering a merit decision either that the action is not wrongful under a unitary standard or is not wrongful because a different standard is being adopted. It is

106. See supra note 1 and accompanying text.
108. For example, the Supreme Court, in Wilson v. Girard, rejected the claim that trial of a soldier stationed abroad by the courts of the country where the crime took place violated due process. 354 U.S. 524, 529-30 (1957). See also Henkin, supra note 24, at 611-13; Nathanson, The Supreme Court as a Unit of the National Government: Herein of Separation of Powers and Political Questions, 6 J. Pub. L. 331, 359-62 (1957).
109. The two most noted cases in this regard are Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103 (1948) and Harisiades v. Shaughnessy, 342 U.S. 580 (1952). Waterman involved a challenge by a contender for a foreign air route to the presidential grant of the route to a competitor airline. Waterman attempted to appeal the decision under a statute that subjected to judicial review all orders issued by the Board pursuant to the statute, except any order in respect of a foreign air carrier. 333 U.S. at 105-06. Although Waterman was not a foreign air carrier, the Supreme Court construed the statute to deny appeal whenever the Board order required presidential approval because it involved overseas and foreign air transportation. Id. at 106-11. Harisiades sustained the deportation of a lawfully admitted permanent resident alien because of previous communist party affiliation even though, at the time of the affiliation, it was legal. 342 U.S. at 581-96.

In each case, the Court upheld the political decision using language that characterized the decision as “political,” one which the Court should not review. Despite such language, Professor Henkin concludes, as we do, that these cases are not examples of political questions, for the Court, in fact, neither refused to decide the issue nor accepted, without examination, the political decision. Henkin, supra note 24, at 611-13. For a contrary view of these cases see Scharpf, supra note 24, at 578-82.

These cases present difficulty because the objects of regulation are persons to whom constitutional protections apply, yet there are direct foreign policy implications in the decisions. See Nathanson, supra note 108, at 359-61. In our truly external relationships, where we are acting upon a foreign state, it is likely that there are no substantive constitutional restrictions. We can make an alliance with the devil or go to war with an angel. There are no substantive
neither accepting a coordinate branch decision without examination, nor refusing to decide the issue. It is therefore not really invoking the political question doctrine in either configuration — assuming for the moment that the doctrine does have two configurations in foreign affairs.

The third purportedly relevant factor — finality — appears to provide a rational foundation for a true political question resolution, and to be especially, perhaps uniquely, applicable to foreign affairs. “Finality” measures the concern that a decision, once made, not be changed; it does not incorporate the different issue of the public importance of the original decision. “Compelling necessity” is a gloss excepting all constitutional rights from protection. There is no need for the political question doctrine to handle the claim that what otherwise would be a constitutional infringement is saved by the overwhelming need for the action taken, since merit constitutionality subsumes all such situations, whether of foreign or domestic origin. There may, however, be situations where there is a compelling reason for not altering course, whether or not there was a compelling reason for choosing that course or even whether or not the chosen course was constitutional. Conviction by the Senate of an impeached President may be such a situation of domestic origin, the only one we can think of. It is likely that there are more numerous situations in foreign affairs. Disorder produced by a declaration of unconstitutionality is always manageable in the domestic context because we expect and can readily require Americans and American institutions to obey judicial processes. Foreign governments, however, are not amenable to American judicial powers. If the Court declared a war or a treaty commitment unconstitutional, the consequences might be overwhelming. Indeed, if the impeachment situation is a political question, it is probably, most importantly, because of its disruptive effects on foreign relations.

Of course, it does not follow that all constitutional controversies involving foreign relations are political questions. Many, perhaps

restraints because foreigners outside the United States have no rights under the U.S. Constitution, L. Henkin, supra note 1, at 267, and because finality is of great value. See infra p. 242. In these cases, the object of the exercise of power is either a U.S. citizen or a person within the territorial United States, and hence there may well be substantive constitutional restraints. Yet the direct foreign policy implications might call for greater freedom of action on the part of the U.S. officials whose exercise of power is being challenged.

most, are not, because there is seldom an overwhelming need for finality even in foreign affairs. To the extent that such a need can be demonstrated, however, and to the extent that the finality need is not independently accommodated by an interpretation of the scope of the utilized power, the political question doctrine performs a useful role. If it is determined as a threshold matter — and it should be a threshold matter — that there is a compelling need to stay on course, whether or not there was a compelling need to adopt that course, the Court should not interfere with the political decision; if necessary, it should protect and implement that decision.

The Court should not, however, make a merit determination, for to do so in those circumstances would create an unsatisfactory dilemma. There would be tremendous pressure, internal as well as external, to validate the action taken, thus unnecessarily skewing correct doctrine in a situation where the overwhelming finality need did not exist. Alternatively, as one commentator seems to suggest, the Court might declare the action unconstitutional, but withhold a remedy. But this approach has several defects. First, if it is decided as a threshold matter that no remedy will be given, now or later, the matter may not be a case or controversy within article III requirements. Second, there is little point in further politicizing the situation where, by definition, the course is unalterable. Third, if staying the course is imperative, it may be imperative for the Court to protect and implement the decision as well as to refrain from interference. It is indefensible for a court to declare a decision unconstitutional and simultaneously aid in its enforcement.

Although disputes involving the constitutionality of a joint exercise of the United States foreign relations power by the two political branches could, on account of the finality concern, be political questions, the doctrine has not been invoked for that reason in respect of such controversies. It has instead been used in disputes involving the

111. It is likely, for instance, that the finality need would result in a construction that there are no constitutional limits on the war making power as exercised jointly by the President and Congress. If any such limits were implied, however, it is likely that the controversy would be deemed a political question.

112. See supra notes 93-94 and accompanying text.

113. See supra note 93.

114. Cf. Linda R.S. v. Richard D., 410 U.S. 614 (1973) (where plaintiff fails to allege personal stake in outcome of controversy, court may dismiss for lack of standing). In this case, the dissent suggested the absence of a live, on-going controversy. Id. at 622 (Blackmun, J., dissenting).

115. But see infra pp. 247-48 (contending that finality concerns should never invoke the doctrine in an allocation dispute).
wholly different issue of the allocation of that power between the coordinate federal branches.\textsuperscript{116} The simmering, non-litigated constitutional controversies concerning foreign relations are also all in that category.\textsuperscript{117}

Allocation questions concerning foreign affairs arguably implicate both substantive components of the doctrine. Unilateral presidential actions committing United States forces, prestige and honor may so irrevocably define a course that extrication by court order is impossible. The cure would be worse than the disease. Moreover, an absence of standards seems to have an operative significance here, lacking in the domestic context and in the context of jointly made foreign policy initiatives. It is our contention, however, that, properly considered, the political question doctrine should have no applicability to allocation questions.

Wrongful exercise claims — i.e., actions claimed to be in violation of a constitutional prohibition — present no different methodological difficulties in the foreign or domestic context. Absence of standards, therefore, is equally inapposite to both.\textsuperscript{118} All wrongful exercise claims, in the absence of an overwhelming need for finality, should receive a determination on the merits. Allocation claims in the domestic area are no different. According to the constitutional text, confirmed by all the opinions in the Steel Seizure Case,\textsuperscript{119} the President has scant domestic power and none in contravention of congressional policy. In many areas in the foreign context, however, the allocation question is far from clear. Text, history, precedent and pragmatic concerns do not resolve real uncertainty as to the intended, or otherwise proper, distribution of the power. In the absence of a substantive, judicially created doctrine resolving that uncertainty, it is inviting to call forth the amorphous and ill defined political question doctrine.

Much of the confusion concerning the doctrine results from a failure to separately consider its special significance in disputes involving allocation of the foreign affairs power, and to untangle the two strands there involved. If the doctrine evolves from the finality need, then it should result in a determination of constitutionality without consideration of the underlying merits. The political decision should be protected, and, if necessary, implemented by the Court. If,

\begin{itemize}
\item \textsuperscript{116} See supra text accompanying notes 3-5.
\item \textsuperscript{117} See supra text accompanying notes 6-12.
\item \textsuperscript{118} See supra text accompanying notes 39-57.
\item \textsuperscript{119} Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579 (1952).
\end{itemize}
however, the doctrine evolves from substantive uncertainty, then it should indeed result in that most rare species, issue non-justiciability, on account of non-correctable ignorance. It would indeed be ironic that the same doctrine in one configuration — implementation of the finality value — subordinates constitutionality to order, and in its second configuration — issue non-justiciability — produces disorder. We conclude this paper with a suggested substantive standard governing allocation of the foreign affairs power, thus mooting the contention that allocation questions are non-justiciable because of a lack of standards. That leaves for present consideration the finality concern as it relates to allocation questions.

There is absolutely no question that unilateral presidential action in foreign affairs, whether or not pursuant to legitimate constitutional authority, may create an overwhelming need for finality. That may be part of the Vietnam War political question case resolutions. Since the President has control over the physical apparatus of government, and Congress does not, he or she can create facts, Congress only words. Consequently, it might follow that congressional “action,” being less likely to create an overwhelming need for finality, is less likely to be a political question than is presidential action involving the identical allocation question. The President, for example, may effect a merit determination in an action brought to declare the War Powers Resolution unconstitutional as an intrusion on the presidential power over foreign affairs, but Congress is precluded by the doctrine from obtaining a merit determination of its claim that a presidential commitment of troops is in excess of his or her constitutional power.

In fact, however, both claims should be resolved on the merits, because finality concerns should never invoke the doctrine in an allocation dispute. Unauthorized presidential action may implicate finality concerns as much as joint branch action but in an allocation dispute, the rightful holder is by constitutional definition and by practical experience the proper institution to measure the significance of the finality concern. The finality concern is not an indisputable absolute, and its relative significance depends upon the ability to exercise policy alternatives. The rightful holder is such because it — not the Court — should make the policy determination, and because it has an assortment of other powers relevant to the problem

120. See infra pp. 252-56.
beyond the remedial arsenal of the Court. The cure is less likely to be worse than the disease when the doctor has an assortment of palliative options short of amputation. In a given case, an overwhelming need for finality may present Congress with no practical alternative to endorsement. Even there, however, the proper institution, with the power to effectuate lesser alternatives and with far greater pertinent experience than the Court, has exercised its legitimate power. Moreover, there would be far fewer agonizing congressional decisions because the merit determination itself will, operating as a precedent, reduce the frequency of future unauthorized action.

B. Allocation and Lack of Standards

In 1978, President Carter announced that the United States would withdraw from its treaty with Taiwan as part of a major foreign policy initiative normalizing relations between the United States and the People’s Republic of China. Senator Barry Goldwater brought suit challenging President Carter’s unilateral withdrawal, alleging that the President acted unconstitutionally in taking such action without the participation of Congress, either in the form of two thirds Senate advice and consent or majority congressional approval. Justice Rehnquist wrote the plurality opinion in Goldwater v. Carter, concluding that the action should be dismissed on political question grounds. In Rehnquist’s view, the controversy was a political question because the Constitution does not explicitly allocate a treaty withdrawal power, and, therefore, does not yield

122. Even in the situation where sub judice uncertainty is intolerable, Congress can respond by ratifying the presidential action prior to Court resolution of the separation issue.

123. It is instructive and hopeful to note that in the last allocation controversy where the political question doctrine might have been invoked on finality grounds, it was not. Dames & Moore v. Regan, 453 U.S. 654 (1981). The President resolved the Iranian hostage dispute by executive agreement arguably in excess of his power, but for the United States to have reneged might have had very serious consequences. The Court decided the merits, id. at 686-88, perhaps aware that to invalidate the action on account of lack of authority would have allowed the proper institution, Congress, to itself decide whether the consequences would be dire and to make that decision in the context of policy alternatives not available to the Court.


125. The United States Constitution confers presidential power to make treaties provided two thirds of the Senate concurs. U.S. Const. art. II, § 2, cl. 2.

126. Withdrawal from the treaty was not in contravention of the treaty since it was provided for by the treaty. Goldwater v. Carter, 617 F.2d 697, 699 (D.C. Cir.), vacated, 444 U.S. 996 (1979). Therefore, only the allocation question was at issue. 617 F.2d at 703-09.


128. Id. at 1002 (Rehnquist, J.). Justice Powell made up the majority of five, voting to dismiss on ripeness grounds. Id. at 997 (Powell, J., concurring).
sufficient standards for court resolution;\textsuperscript{129} he further reasoned that dismissal for lack of standards is particularly appropriate where the contending parties can adequately protect their interests in the political process.\textsuperscript{130}

We have concluded that "lack of standards" in the wrongful exercise context is a merit determination of constitutionality.\textsuperscript{131} In the allocation context, lack of standards can also yield a merit determination. The result in \textit{Goldwater}, then, could have been based on a determination that an uncertain allocation of power is presumed to be a concurrent allocation, exerciseable by either branch. Since Congress did not contest the withdrawal, it would not have been necessary to determine the question of preeminence.\textsuperscript{132} Alternatively, it could have been concluded that \textit{Goldwater} presented a true political question for the reason that the opening to mainland China, constitutional or not, set a course whose alteration would have profoundly disruptive effects: Finality concerns dictate that the decision be left undisturbed, its constitutionality assumed.\textsuperscript{133} Again, this is a merit decision.\textsuperscript{134} Justice Rehnquist's opinion, however, is not on the merits. His failure to mention any finality value is inconsistent with the finding of a true political question. His suggestion that the case might be resolved differently if the plaintiff were a private individual\textsuperscript{135} is inconsistent with either type of merit decision, as is his observation that state courts might not be bound by the instant decision.\textsuperscript{136} Instead, Rehnquist is saying that in the absence of standards the Court cannot determine or assume the merits; it can only do

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{129} \textit{Id.} at 1003 (Rehnquist, J.).
\item \textsuperscript{130} \textit{Id.} at 1004.
\item \textsuperscript{131} See supra text accompanying notes 39-57.
\item \textsuperscript{132} Justice Powell's position may be essentially the one here stated except that he labels the matter a ripeness defect rather than a Fed. R. Civ. P. 12(b)(6) dismissal on the merits. \textit{Goldwater}, 444 U.S. at 997-98 (Powell, J., concurring). His "ripeness" concept however, must be based on the fact that the President's unilateral action is constitutional — at least until such time as Congress expresses a policy to the contrary. The question of preeminence arises only when the branches disagree. Alternatively, Powell might have concluded that the issue is not "ripe" for a congressperson whose injury depends on presidential actions contrary to congressional directive, but would be "ripe" if the plaintiff was an individual who had sustained economic injury as a result of the President's action. If so, then Powell's opinion contains no view as to the constitutionality of the President's action.
\item \textsuperscript{133} We would disagree, since we believe that allocation disputes never involve an overwhelming need for finality. See supra text accompanying notes 120-23.
\item \textsuperscript{134} See supra pp. 231-35.
\item \textsuperscript{135} \textit{Goldwater}, 444 U.S. at 1004 (Rehnquist, J.).
\item \textsuperscript{136} \textit{Id.} at 1005.
\end{enumerate}
\end{footnotesize}
nothing. Lack of standards yields issue non-justiciability.\textsuperscript{137}

The plurality’s recognition that the Court might decide the merits on suit by or against a private individual injured by the withdrawal suggests a completely different and independent basis for decision. It is passing strange that a question becomes more or less answerable depending upon the identity of the parties.\textsuperscript{138} That the justiciability of the controversy is said to possibly so vary reaffirms our conviction that there is no such thing as a non-justiciable issue. There may well be difficult issues that a court will avoid so long as it is able. Its ability to do so may depend upon plaintiff’s standing, and there may be an interplay between the difficulty of an issue and the applicable standing requirement.\textsuperscript{139} But whatever the standing requirement and however it is determined, those considerations relate to party status, not issue status, and are therefore irrelevant to the political question doctrine and to issue non-justiciability. \textit{Goldwater}, then, might be simply a footnote to standing doctrine, albeit an unfortunate one since it invites continuing debate on the legitimacy of presidential action. The problem with so characterizing the Rehnquist opinion is that it does not so characterize itself; indeed, it studiously avoids that characterization. Rehnquist obviously believes that something more than standing is involved: The political question doctrine is implicated — the issue is non-justiciable.\textsuperscript{140}

It may not make much practical difference whether the decision in \textit{Goldwater} is based on a merit determination, a true political question, on plaintiff’s lack of standing, or on issue non-justiciability.

\textsuperscript{137} The opinion heavily relies on \textit{Coleman v. Miller}, 307 U.S. 433 (1939). As already discussed, we regard \textit{Coleman} as a merit decision. \textit{See supra} text accompanying notes 39-45, 84-85.

\textsuperscript{138} Rehnquist makes this distinction in attempting to reconcile his opinion with \textit{Youngstown Sheet & Tool}, the Steel Seizure case, where the Court did decide an allocation claim. He distinguishes \textit{Youngstown} on the basis of the difference in plaintiffs — i.e. a private party in \textit{Youngstown} versus a Congressperson in \textit{Goldwater} — and then implies that if the plaintiff had been a private party in \textit{Goldwater}, the result might have been different. Although he suggests that a different result might be appropriate based on the difference in political weapons available to these plaintiffs, 444 U.S. at 1004 & n.1, it is not clear that this is true. As observed by Professor Choper, where the issue involves a power struggle between Congress or the Senate and the President, both political branches have access to effective political weapons. J. Choper, \textit{supra} note 76, at 281-82. These weapons remain intact no matter who the plaintiff is in a particular lawsuit. This observation is particularly cogent when one realizes that the probable reason why a Congressperson resorts to judicial action is because she cannot persuade Congress to act with regard to the matter challenged.

\textsuperscript{139} Bickel, \textit{supra} note 23, at 75-76. \textit{See Scharpf, supra} note 24, at 528-33 (Court’s use of procedural rules to screen cases raising constitutional issues).

\textsuperscript{140} \textit{Goldwater}, 444 U.S. at 1002 (Rehnquist, J.).
In any event, the withdrawal stands, the opening to mainland China effected. The Court, again, can get by with issue non-justiciability rhetoric only because no ensuing enforcement proceeding is necessary, and it is unlikely that the withdrawal decision will need judicial protection from interference by others. The potential problem, explicitly addressed in the Powell opinion, did not arise in Goldwater. What happens if the President and Congress adopt inconsistent courses, whether in respect of treaty withdrawal or any other foreign policy initiative where constitutional allocation is uncertain? There, the differences between a merit decision and a determination of issue non-justiciability are likely to be more than academic. Pending an uncertain political resolution, no one, including both Chinas, would know the status of the treaty, or, consequently, of United States-Chinese relations. The Logan Act prohibits private persons from conducting foreign relations on behalf of the United States. It is much worse to have foreign affairs inconsistently conducted by multiple institutions, each asserting ostensible and nonreviewable authority. Inefficiency, indecisiveness, divisiveness and mutual charges of illegitimacy are sure to follow. How ironic that a doctrine whose sole justification is the preservation of order, even at the possible cost of constitutionality, might apply to a situation requiring resolution, and, if applicable, apply in a form prohibiting resolution and thus promoting disorder. As Justice Powell observes:

If the President and the Congress had reached irreconcilable positions, final disposition of the question presented by this case would eliminate, rather than create, multiple constitutional interpretations. The specter of the Federal Government brought to a halt because of the mutual intransigence of the President and the Congress would require this Court to provide a resolution pursuant to our duty "to say what the law is."

Justice Powell considers an inter-branch dispute to be justiciable — indeed, for the reasons he gives, super-justiciable — and criticizes the Rehnquist opinion for indicating otherwise. It is probable that Powell's understanding of the Rehnquist opinion is correct. If

141. Id. at 999-1001 (Powell, J., concurring).
144. Id. at 998-1001 (Powell, J., concurring).
145. It is probable, but not certain. Rehnquist's position could be that although it cannot
the text does not clearly allocate the withdrawal power where the President has acted alone, it probably does not allocate the power any more clearly where the branches have acted inconsistently. The Rehnquist opinion suggests that the Court may "force" a construction where a powerless individual is adversely affected. From that perspective, however, there is no reason to do so where the contestants each have political power and where their respective shares of power do not vary depending upon whether they agree, disagree or merely fail to act.

A merit decision — preserving order, constitutionalism and legitimacy — is probably most important in an allocation dispute. Issue non-justiciability should not exist in any context, and it is unfortunate that under the Court's plurality opinion it seems to exist in the area where it creates the most mischief. Resolution should take the form of a garden variety merit determination, for an allocation dispute cannot be a true political question. First, because the finality value will not ordinarily be implicated in any dispute. Although resolution is important, staying on course may not be. Second, even where finality is important, a merit determination will allow the legitimate powerholder to determine its importance and act accordingly. Finally, it would be impossible, in any event, to apply the doctrine to an allocation dispute. The heart of the doctrine is its assumption of constitutionality. It is possible to assume constitutionality where unified, governmental wrongful exercise is in question; it is not possible where the sole issue is which one of two inconsistent actions was valid. To assume the constitutionality of two inconsistent actions is to create an anomaly that has no place in constitutional adjudication.

C. Toward the Development of Allocation Standards in Foreign Relations

We agree with Justice Powell that an allocation claim, especially where the branches have acted inconsistently, urgently re-

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146. See supra pp. 246-48.
quires judicial resolution.\textsuperscript{147} A need for resolution, however, does not supply a means for resolution. Justice Rehnquist's opinion states that the Constitution does not provide an answer to the question of whether the President may unilaterally withdraw the United States from a treaty.\textsuperscript{148} We quarrel with his use of the phrase "political question" to describe that phenomenon, and we disagree with the conclusion that the Constitution's failure to explicitly or clearly resolve the issue results in the Court's inability to resolve the controversy. We do, however, completely agree that if the Constitution does not provide the answer to a constitutional question, the Court, definitionally, cannot find the answer. How could it be otherwise?

Underlying Justice Rehnquist's position is an assumption that the Constitution allocates the withdrawal power but the Court is unable to ascertain the intended allocation; since the Court cannot ascertain what was intended, it cannot and hence will not resolve the controversy. The opinion asserts that it is merely applying existing lack of standards doctrine: If manageable standards do not exist, the issue is non-justiciable. Since we believe that a determination of lack of standards in wrongful exercise cases is a merit determination, Rehnquist is either creating issue non-justiciability for the first time, or applying a doctrine that exists only in allocation cases.\textsuperscript{149}

\begin{itemize}
\item \textsuperscript{147} \textit{Goldwater}, 444 U.S. at 1001-02 (Powell, J., concurring).
\item \textsuperscript{148} \textit{Id.} at 1003 (Rehnquist, J.).
\item \textsuperscript{149} Not only does Rehnquist say that lack of standards creates issue non-justiciability, he also says that it is essentially indistinguishable from party non-justiciability, hence not binding on state courts. \textit{Goldwater}, 444 U.S. 1005 (Rehnquist, J.). This seems to suggest that although the Supreme Court will not interfere with President Carter's unilateral withdrawal, the Supreme Court of Iowa may freely do so. But Rehnquist's statement that state courts could decide political questions was qualified: "so long as they do not trench upon exclusively federal questions of foreign policy." \textit{Id.} at 1005 n.2, (citing \textit{Zschernig v. Miller}, 389 U.S. 429, 441 (1968)). In \textit{Zschernig}, the Court noted that the state's interest must yield where there is a "great potential for disruption or embarrassment" which the Court believed exists where a state court undertakes an inquiry into "the actual administration of foreign law . . . [and] . . . the credibility of foreign diplomatic statements." 389 U.S. at 435. The Taiwan treaty issue may be within this qualification. One does wonder, however, why Justice Rehnquist raises this issue in the text when there is no need to do so, if he means to negate it in his footnote.
\item A true political question would be protected by the Court from all interference. Even if the issue were non-justiciable, this species of non-justiciability should be treated differently than the party variety such as mootness or lack of standing. Party non-justiciability, for example, does not assume that constitutional intent is non-ascertainable, but simply relates to the nature of the injury necessary to activate the federal judicial process — arguably different than that appropriate to a state's judicial process. Here, however, if the controversy is non-justiciable it is so because the constitutional standard is not ascertainable by the Supreme Court, and, therefore, by any other court. If a state court should pretend to answer the unanswerable, that decision should be vacated by the Supreme Court on lack of humility grounds.
\end{itemize}
Is there a distinction between lack of standards in the wrongful exercise and allocation contexts which resolves into merit constitutionality in the former and non-justiciability in the latter? If a court is unsure of the parameters of a constitutional prohibition or of whether the defined parameters have been exceeded, it should validate the action pursuant to a presumption of constitutionality. Thus, lack of standards yields merit constitutionality in the wrongful exercise situation. Where the controversy is about allocation, however, resolution by presumption is not possible. The question is not whether the governmental power exists, since in foreign affairs that is assumed, or whether it has been rightly exercised; that, in the absence of a clear standard of prohibition, is presumed. Rather, the question is which of two coordinate branches has the power to act. In foreign affairs, we know a priori that governmental power exists. If we did not know it a priori we would not know it at all because only a few components of that power are specified. In many instances — treaty withdrawal is but one example — since the governmental power itself is not specified, it obviously is not allocated. Each branch can lay claim to the power as implied or derivative from another textually specified power. And that's the rub. The governmental power exists. Each branch has an arguable claim to it. The competing claims cannot be resolved by presumption, however, because the branches are coordinate. Hence, issue non-justiciability arises from non-answerability.

Let us examine why it may be difficult, or impossible, to resolve an allocation question. The framers, perhaps, intended to resolve the issue but stated it inartfully, or they never thought of the problem — a true lacuna. Or, they thought of the problem but could not agree on the resolution, leaving the stalemate to future decision by someone else. Or, they thought of the problem but agreed that resolution could not be constitutionalized or at least not constitutionalized right then. Resolution should vary over time depending upon the shape of the world and the role of the United States in that evolving world. Do these possibilities, or any of them, resolve in favor of judicial abstention, or do they suggest a basis for a merit determination?

Assume that the intent was to leave the issue unresolved, to allow standards to evolve over time through the political process — the War Powers Resolution, Lend Lease, the Neutrality Act, etc.

150. See supra text accompanying notes 39-57.
To the extent that a future political resolution was intended, that political resolution, whatever it may be, is constitutional and legitimate. Justice Rehnquist in *Goldwater* foresees political resolution, but seems to view it as the practical consequence of an inability to judicially ascertain a precise constitutionally intended allocation standard, rather than as the constitutionally intended standard. Would he characterize action taken pursuant to the War Powers Resolution or contrary to its terms as a political question, inviting claims of illegitimacy, or would he use that act as the constitutionally derived standard?

Even assuming that a precisely delineated constitutional allocation standard was intended but cannot be ascertained, that failure should result in adoption of the "second best" solution, a validation of the political resolution as the only workable alternative. We suspect that the Court would adopt the political resolution of an allocation question as the constitutional standard where it does not conflict with a more precise allocation made in the Constitution and where the political resolution is accomplished through a legislative act. In that situation, action consistent with the legislation would be upheld and inconsistent action invalidated, both decisions on the merits.

*Goldwater* raises problems because it involves a situation where the politically resolved allocation was not in legislative form. Is action taken by other political means, however, a less valid resolution? In respect of presidential action it is less valid if it is assumed that the power stems exclusively from article I of the Constitution. In that event, at least a majority of Congress would be necessary for valid resolution, as is of course the case with respect to domestic affairs. Stalemate, however, is usually more dangerous in foreign than in domestic matters. That is a reason for finding that the power does not emanate exclusively from article I. More significantly, if it did so emanate, there would be a clear and precise constitutional allocation, no need to use a political resolution standard and certainly no occasion to find issue non-justiciability. The intended allo-

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154. See *Goldwater*, 444 U.S. at 1003 (Rehnquist, J.).
cation, and hence the merit result, would also be clear if the power were found to derive exclusively from article II, an exclusive presidential prerogative. The uncertainty, and hence the utility of a political resolution standard is therefore limited to situations where a careful examination of the usual sources of constitutionalism — text, history, practice, and need — yields no answer or, far more likely, supports both article I and article II origins: Each branch can lay claim to the power. Under a political resolution standard, the Court should then presume that the framers intended that more precise delineation of the allocation question was to be politically determined.

Where the political resolution standard is applicable and where there has been no politically agreed upon resolution, then both branches, or either, may act under their respective articles. The difference is that Congress may only act under article I with presidential approval, or by a two-thirds overriding vote, while the President may act unilaterally under article II. Given the momentum created by action, presidential action is likely to prevail, by congressional approval or acquiescence. This gives the President an enormous advantage, but an advantage only in areas which, by hypothesis, do not clearly call for a different standard.156 In areas that do, a more precise, constitutionally based standard would be ascertainable.157 Un-

156. For an opinion that generally takes a view similar to the one here expressed, see Massachusetts v. Laird, 451 F.2d 26 (1st Cir. 1971). Cf. United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936).

Professor Choper has taken the position that courts should never resolve allocation of power claims between Congress and the President. Choper, supra note 76, at 263, 378-79. By using its limited credit to decide these matters, otherwise adequately resolved by the political process, the courts would be hampered in their principal role of protecting individual liberties. Id. at 169. Despite the "issue non-justiciability" label, under Choper's proposal, a court would not only avoid interference with a political resolution, but would implement it, where necessary. See supra note 76. As a practical matter, then, his proposal in some respects is similar to the one here proposed. It differs, however, in that while we would limit political resolution to situations where there are insufficient constitutional criteria for decision, Professor Choper would extend it to situations where the constitutional standard is clear. See id. at 336, 349-52. Our proposal relates to constitutional interpretation, his, seemingly, to constitutional amendment via the "non-justiciability" route.

157. For instance, there is a common and perhaps accurate assumption that only Congress may engage the country in a war, at least in the absence of emergency. War making may be exclusively an article I power. If the President unilaterally engages the U.S. in a war and is thereby acting unconstitutionally, and the Court so holds, Congress, not the Court, should deal with the finality consequences. Not every military action, however, even short of emergency, is a war. Those actions are within articles I and II. They may, perhaps should, be worked out through legislation such as The War Powers Act, 50 U.S.C. §§ 1541-1548 (1982). See also Carter, The Constitutionality of the War Powers Resolution, 70 VA. L. REV. 101 (1984). On the other hand, Congress might not be able to completely surrender its war declaring power to the President. In that situation there might be a precise constitutional standard that the Court
less the power was found by the Court to reside exclusively in article II, Congress, in the end, has the allocated power to reverse the policy, either by so determining and overriding a veto, or by refusing to allocate the necessary funds, a power which should clearly exist where Congress has independent, concurrent power over the subject matter. Indeed, the appropriation function was probably given exclusively to Congress because that body was intended to be dominant in extremis, and because it was intended that other power be exercised concurrently, with the attendant advantages that concurrence creates for the President.

Justice Rehnquist’s opinion in Goldwater makes treaty withdrawal, de facto, a concurrent power. It recognizes the naked power of the two branches to resolve the allocation issue, by orderly agreement or otherwise. Unfortunately, it suggests that the presidential action, although probably unassailable, may be completely illegitimate, thereby inviting destructive political hoopla. The opinion should have made the merit determination that in the absence of inconsistent and overriding congressional action, the withdrawal was constitutional.

**CONCLUSION**

The varied and imprecise use of the political question doctrine has created unnecessary confusion and destroyed its utility. Its use in wrongful exercise situations on account of claimed absence of standards masks the true significance of such a dismissal, which is, in

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158. See Massachusetts v. Laird, 451 F.2d 26, 34 (1st Cir. 1971). The court observed that:

The objective of the drafters of the Constitution was to give each branch “constitutional arms for its own defense.” The Federalist No. 23 at 476 (Mod. Lib. ed.) (Hamilton). But the advantage was given to Congress, Hamilton noting the “superior weight and influence of the legislative body in a free government, and the hazards to the Executive in the trial of strength with that body.” *Id.* at 478.

*Id.* at 34. See also U.S. v Capps, 204 F.2d 655 (1953), *aff’d on other grounds*, 348 U.S. 296 (1955); *The ‘Yale Paper’—Indo China: The Constitutional Crisis*, Part II, 116 CONG. REC. S7591-S7593 (May 21, 1970).

159. Two recent Supreme Court opinions dealing with division of powers between the President and Congress, interestingly both written by Justice Rehnquist, are not inconsistent with the approach suggested here. Although in neither case is the issue here discussed centrally involved, both opinions to some extent, support this view. See Immigration & Naturalization Serv. v. Chadha, 462 U.S. 919 (1983); Dames & Moore v. Regan, 453 U.S. 654 (1981).
fact, a merit determination of constitutionality. More significantly, the imprecision with which the doctrine is defined allows it to be invoked in any circumstance where it is difficult to come to a merit determination, no matter what the nature of that difficulty. Where the doctrine is used to avoid a merit determination as to who is the proper exerciser of a foreign relations power, it is especially troubling, since in these matters resolution is particularly important. Further, if the political question dismissal in this context is a de facto merit determination, as we suspect it is, then the doctrine's use results in a merit determination without any consideration of the merits, greatly increasing the risk of a wrong decision. There is similarly no independent merit determination in the one circumstance that we believe is a true political question — the acceptance and protection of a political decision because finality is essential. Unlike the allocation situation, however, in a true political question situation there is no alternative but to accept the political decision, and the precedential value of the merit determination is limited to the need for finality under that specific set of circumstances.