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in the United States

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nos Estados Unidos

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## **POLITICAL QUESTIONS AND JUDICIAL POWER IN THE UNITED STATES**

## **QUESTÕES POLÍTICAS E O PODER JUDICIAL NOS ESTADOS UNIDOS**

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**Abstract:** When one considers the extraordinary power of the American courts over American society and public policy – judicial power that until recently was virtually unique to America, but now is increasingly an international phenomenon – it might seem surprising that there is an American judicial doctrine that political questions must not be adjudicated by the courts. Yet there is such a doctrine. It dates to the early years of the American republic, and it has been invoked intermittently both in the 19<sup>th</sup> and in the 20<sup>th</sup> century when the courts decline to decide certain cases.

There are a handful of topics, and at least one Constitutional provision, that are said to raise political questions which the courts will not adjudicate. Whilst the courts sometimes invoke the political question doctrine to avoid adjudication, or to adjudicate in favour of whatever the elected government has done, the doctrine imposes little real restraint on the courts' power, even on the limited range of questions to which the doctrine is said to apply. The "political questions" of the doctrine, anyhow, are not necessarily the questions with the most importance to the social and political character of American life. American courts have taken on an increasingly political role, deciding social controversies that would otherwise be up to democratically accountable legislatures. The article explains the "political question doctrine" as the American courts actually apply it, showing how the doctrine coexists with growing judicial activism.

**Resumo:** Quando se considera o poder extraordinário dos tribunais americanos sobre a sociedade americana e a política pública – poder judicial que até recentemente era virtualmente único na América, mas que agora se tem vindo a tornar cada vez mais um fenómeno internacional – pode parecer surpreendente a existência de uma doutrina judicial americana segundo a qual existem questões políticas que não podem ser controladas pelos tribunais. Mas tal doutrina existe. Data dos primeiros anos da república americana, e foi invocada intermitentemente tanto no século XIX como no século XX, tendo os tribunais se recusado a decidir certos casos.

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Há um punhado de tópicos, e pelo menos uma disposição constitucional, que supostamente levanta questões políticas sobre as quais os tribunais não se pronunciarão. Enquanto os tribunais algumas vezes invocam a doutrina da questão política para evitar a adjudicação, ou para decidir em favor de qualquer decisão tomada pelo governo, a doutrina impõe pouca restrição real ao poder dos tribunais, mesmo no domínio limitado das questões às quais a doutrina aplicável. As “questões políticas” dessa doutrina, de qualquer forma, não são necessariamente as questões com maior importância para o caráter social e político da vida americana. Os tribunais americanos têm assumido um papel cada vez mais político, decidindo controvérsias sociais que, de outra forma, caberiam às legislaturas democraticamente responsáveis. O artigo explica a “doutrina da questão política” tal como os tribunais americanos realmente a aplicam, mostrando como a doutrina coexiste com o crescente ativismo judicial.

**Summary:** I. Introduction; II. The “Political Question Doctrine”; A. Early Days; B. Guarantee Clause; C. Impeachment; D. Foreign Policy and War; E. Electoral Constituencies and Gerrymandering; III. Beyond the Political Question Doctrine: The Courts as Political Activists; IV. Conclusion: Political Adjudication and Judicial Independence

**Sumário:** I. Introdução; II. A “Doutrina da Questão Política”; A. Os primeiros dias; B. Cláusula de Garantia; C. Impeachment; D. Política Externa e Guerra; E. Círculos Eleitorais e Gerrymandering; III. Para além da Doutrina da Questão Política: Os Tribunais como Activistas Políticos; IV. Conclusão: Adjudicação Política e Independência Judicial

**Keywords:** Political Questions; Judicial Activism; Impeachment; Gerrymandering; Foreign Relations

**Palavras-chave:** Questões Políticas; Ativismo Judicial; Impeachment; Gerrymandering; Relações Externas

## **I. Introduction**

When one considers the extraordinary power exercised or assumed by the United States Supreme Court, and even by lesser American courts, over American society and public policy – a species of judicial power that, until quite recent years, was virtually unique to America, but now is increasingly an international phenomenon – it might seem surprising that there is a doctrine, or at least an idea, in American law that political questions must not be adjudicated by the courts: in American legal jargon, that such questions are “non-justiciable”. Yet there is said to be such a doctrine, and perhaps that it has constitutional force. The idea of a limit on the adjudication of political questions has both a narrow and a broader sense. In a narrow sense, there is the formal doctrine, known as the political question doctrine: but it is not much of a constraint, if any at all, on judicial rule over key dimensions of American life. In a broader sense, the question remains acute – and very divisive in America – how much power judges

should have to direct the way Americans must live.

## II. The Political Question Doctrine

### A. Early Days

The formal doctrine, such as it is, claims early and illustrious ancestry. *Marbury v Madison*, decided in 1803 in a famous opinion by Chief Justice John Marshall, is generally considered the source of American judicial review: the idea that Acts of Congress (and eventually state laws, and executive and administrative acts as well) must be struck down or at least denied enforcement if they violate the Constitution.<sup>2</sup> (The Constitution itself does not specify that the courts should have this power.) Yet the judgment in *Marbury* noted that the “peculiar character” of some cases would “exempt [such cases] from legal investigation, or exclude the injured party” from legal redress. For example, “the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character,

and to his own conscience.... [T]here exists, and can exist, no power to control that discretion. The subjects are political.”<sup>3</sup> All this, to be sure, was what common-lawyers call obiter-dictum, because Justice Marshall did not find the *Marbury* case itself to have such “peculiar” character, and the court proceeded, instead, to interpret – or to misinterpret – a provision of statutory law as unconstitutional, and to rule it void or unenforceable.

Are there provisions of the Constitution itself which are not amenable to interpretation by the courts, and which will therefore not be adjudicated? A decision by the Supreme Court in 1849, *Luther v Borden*, is probably the earliest source for the idea that there are.<sup>4</sup> For a few months in 1842 there were two competing state governments, or would-be governments, in the state of Rhode Island. Luther, a partisan of one of them, claimed that he was mistreated by Borden, an armed agent of the other; Borden’s defence was that he was carrying out the orders of the legitimate government.<sup>5</sup> Which of the two governments was actually the legitimate one? And for the federal Supreme Court to decide that question, what provision of the federal Constitution could the court rely upon? The Constitution provides that “the United States [i.e. the federal government] shall guarantee to every State in this Union a Republican Form of Government.”<sup>6</sup> Justice Taney, writing for the Supreme Court, held that “[u]nder this article of the Constitution it rests with Congress to decide what government is the established

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2. *Marbury v Madison*, 5 US (1 Cranch) 137 (1803).

3. *Id.* at 165-6.

4. *Luther v Borden*, 48 US (7 How.) 1 (1849).

5. Luther’s full name was Martin Luther; Borden’s was Luther Borden: a small indication of how Protestant was the United States in the early-to-mid-19th century.

6.. US Const., art. IV, sec. 4.

one in a State.... the right to decide is placed there, and not in the courts.”<sup>7</sup> Yet Justice Taney’s opinion did in fact decide the case, namely that Borden’s defence was valid. As to the Guarantee Clause, Justice Taney added – in what surely seems an interpretation of the clause – that “[u]nquestionably a military government, established as the permanent government of the State, would not be a republican government, and it would be the duty of Congress to overthrow it.”<sup>8</sup> (Taney did not go on to say whether or not it would also be the duty of the court to enforce Congress’ duty.)

The dictum in *Marbury*, and especially Justice Taney’s discussion in *Luther v Borden*, provide a kind of groundwork – albeit a characteristically shaky one – for the formal political question doctrine today.

In the twentieth century, when deciding the 1962 case *Baker v. Carr*, the Supreme Court suggested a variety of reasons why a case might not be adjudicated – why it might be “non-justiciable” – as a political question:

“Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for 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.”

Several of these possible criteria might imply, not so much that the courts must abstain from deciding, as that the courts will decide, and what they will decide is that anything the “coordinate department” (executive or legislative, federal or state) chooses to do is within its rights to do. For example, if the court finds “a textually demonstrable constitutional commitment of the issue” to the executive, or to Congress, the court – arguably – is not declining to hand down a constitutional ruling, but rather it is ruling that under the constitution, whatever the executive or Congress does about such-and-such a matter is within its constitutional powers.

There are perhaps two subjects, or types of cases, about which it is moderately safe (but only moderately safe) to predict that the courts today will treat the case as a “political question” and decline to adjudicate (or to second-guess) the constitutional issue which a litigant might raise.

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7. *Luther v Borden*, *supra*, 48 US at 42.

8. *Id.* at 45.

### *B. Guarantee Clause*

The first is any claim under the Guarantee Clause: such is the precedential resonance of *Luther v Borden*. Thus, in a case decided in 1912, when the Pacific States Telephone Company claimed that an Oregon state tax violated the Guarantee Clause because it was adopted by popular initiative rather than by vote of the state legislature – i.e. the company’s claim was that legislation initiated directly by the people is not representative and hence not republican government – the Supreme Court held that enforcement of the Guarantee Clause “because of its political character, is exclusively committed to Congress” and dismissed Pacific States’ constitutional claim “for lack of jurisdiction”.

Yet in several cases after *Luther v Borden* but before *Pacific States Telephone*, the Supreme Court had in fact decided the merits of claims under the Guarantee Clause: for example, in 1874, that denial of women’s suffrage by the State of Missouri did not violate the guarantee of republican government. In *Luther* itself, after all, Justice Taney had remarked on the merits of the Guarantee Clause, as forbidding permanent military government. While it is a commonplace among American lawyers that the Guarantee Clause is non-justiciable, then, it is not difficult to imagine cases in which the courts might well adjudicate it, if a state were to take a provocative enough non-republican turn.<sup>9</sup>

### *C. Impeachment*

A second kind of case deemed non-justiciable is any challenge to impeachment proceedings against federal officers. The Constitution says the House of Representatives “shall have the sole Power of Impeachment”, and the Senate “shall have the sole Power to try all Impeachments”, with conviction and removal from office only by two-thirds vote of the Senators. Federal executive officers, including the President, and federal judges are subject to impeachment and removal from office; but impeachment votes are rare and convictions even rarer. (In the history of the United States, two presidents have been impeached and none convicted and removed; fifteen federal judges – out of many thousands – have been impeached and eight convicted and removed.) In 1993, a federal district judge named Walter Nixon<sup>10</sup> was impeached for accepting bribes, and convicted and removed by two-thirds vote of the Senate after a Senate committee held hearings and took evidence on the charges, and after three hours’ oral argument to the full Senate. Nixon then sought judicial review, on the ground that the evidentiary hearing by the Senate committee meant that the full Senate failed to

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9. A few decades ago, when the Province of Quebec threatened to secede from Canada, it was imaginable that eastern Maritime Provinces of Canada, now isolated from central and western Canada, might have sought admission to the United States. But suppose they had wished to keep their monarchical ties, or merely to preserve their parliamentary form of government? One can only speculate whether the US courts would have decided on the merits how the guarantee of republican government applied in such a case.

10. No relation to President Richard M. Nixon.

“try” his impeachment. The Supreme Court held the question non-justiciable – a political question – and dismissed Nixon’s suit. Chief Justice Rehnquist’s opinion noted that federal judges, including Supreme Court Justices, are subject to impeachment, and that it would “eviscerate” this check – practically the only check – on the judiciary if the judiciary itself had final review of impeachments.<sup>11</sup>

Yet there is some uncertainty even about whether challenges to impeachments are inevitably non-justiciable political questions. Three Justices would have decided the merits in the Nixon case (albeit in favour of the Senate’s proceedings and against Nixon). Even Chief Justice Rehnquist’s opinion notes that the word “try”, “both in 1787 and later, has considerably broader meanings than those to which [Nixon] would limit it” – seemingly a point on the merits. Suppose the Senate were to announce that it would automatically vote to convict and remove anyone impeached by the House? Suppose a two-thirds majority of Senate announced that they would vote to remove anyone of a disfavoured race or religion or sex? Moreover, Chief Justice Rehnquist’s opinion alluded to the idea – from *Baker v. Carr* – that there is a “textually demonstrable constitutional commitment of the issue” to the Senate, in the grant of “sole Power”. As always on this criterion, the distance between not adjudicating, and actually adjudicating that the Senate has full power, is not great and might seem almost purely verbal.

#### *D. Foreign Policy and War*

There are a few other subjects to which the formal political question doctrine is commonly said to apply, notably foreign or war policy and the mapping of electoral constituencies: but judicial abstention – that is, the prospect that the courts will decline to intervene – on some of these issues is even less certain than it is for Guarantee Clause and impeachment cases.

In recent decades, the two leading cases on foreign affairs and on war as non-justiciable political questions were (1) a case involving the presidential abrogation of a treaty and (2) a case in which a member of Congress challenged the constitutionality of a use of military force in the absence of a congressional declaration of war.

The Constitution provides for the President to make treaties “by and with the advice and consent of the Senate”, two-thirds of the Senators concurring, but the Constitution says nothing about how a treaty can be brought to an end (or “denounced” in foreign relations jargon). In 1979 President Carter abrogated a US treaty with the Republic of China (Taiwan) in order to open diplomatic

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11. Perhaps a third subject which the courts will not adjudicate (or at least not readily) is the nuance of procedure for amending the Constitution: for example, if Congress endorses an Amendment, and submits it to the states for ratification without stating how long the ratification period remains open, the courts seem disposed to call it a political question, and to refuse to decide how long is long enough. The issue threatened to arise with the feminist Equal Rights Amendment, endorsed by Congress in the 1970s. Since then, Congress has evidently learned to stipulate a time period for ratification.

relations with the People's Republic of China. A group of Senators, led by Barry Goldwater, sued on the ground that the Senate had not approved the abrogation of the Taiwan treaty, and hence that the President had acted unconstitutionally. The Supreme Court dismissed the suit, with four Justices – but not five, who would have been needed for a majority – saying that this was a political question involving executive and congressional power over foreign relations, and non-justiciable by the courts.

As to the use of military force, the Constitution provides for declaration of war by vote of Congress, but there has not been a formal declaration of war since the American entry into World War II, whereas American forces have been engaged on various occasions since that time. In 1973 a member of Congress sued to challenge the constitutionality of American operations in Indochina (specifically the bombing campaign in Cambodia), and one Justice of the Supreme Court approved a lower court order halting the bombing. The eight other Justices quickly reversed their colleague, instead upholding – without discussion of the merits – an intermediate appeals court ruling that the case presented a non-justiciable political question. There were, in fact, numerous lawsuits during the 1960s and 1970s challenging the constitutionality of the war in Indochina, and all such challenges were ultimately dismissed as non-justiciable (although in some cases on technical grounds other than the political question doctrine.)

While it is true that US courts have never adjudicated a military conflict to be unconstitutional as such – and perhaps they never will – the courts have adjudicated various cases arising out of such military operations, and decided issues closely connected to the military conduct of such conflicts. In 1951, during the Korean War, when labour relations broke down in the steel industry – an industry that produced essential war materiel – President Truman issued an order for the government to take possession of the steel mills and to keep them running. (What Truman, who had been elected with trade union support, wanted to do was to settle the labour disputes on better terms than the private owners were offering, and in that way to maintain production.) The steel companies sued, claiming that this exceeded the President's constitutional authority. The Supreme Court agreed. Various Justices offered various constitutional reasons, but all argued on the constitutional merits – not only the majority who ruled against the President but also the three dissenters who would have upheld the steel seizure – and none mentioned the political question doctrine or suggested the possibility that the question was non-justiciable or should be left to the political branches to settle.

Likewise, during the conflict in Afghanistan in the mid-2000s, the Supreme Court decided a series of claims in behalf of enemy combatants captured in Afghanistan and held at Guantanamo Bay, Cuba. The Court ruled against the President and the military authorities that these combatants – some of them American citizens, others not – were entitled to hearings under the Due Process clause of the Constitution and to seek judicial writs of habeas corpus. The majority opinions did not mention the political question doctrine. There were sharp dissents on the merits of whether the Constitution accords any such rights, and brief allusion

to the idea that these military questions were constitutionally committed to the political branches, but even the dissents did not explicitly invoke the political question doctrine. The majority of the Justices stood on their right, or their power, to have the last word, and to overrule the President, even on these matters obviously involving foreign and military policy.

### *E. Electoral Constituencies and Gerrymandering*

A final topic said to raise non-justiciable political questions is the mapping of electoral constituencies. Members of the U.S. House of Representatives and of the state legislatures are elected in geographic legislative districts: the boundaries of all these are drawn by the state legislatures. In the first half of the twentieth century, rural constituencies typically had smaller populations, and fewer voters, than urban districts, and the state legislatures did not re-draw the boundaries to equalise the number of voters per representative. When this inequality was challenged in a 1946 Supreme Court case – as a violation of the constitutional “guarantee of Republican Form of Government” – the Supreme Court dismissed the case as a non-justiciable political question. But Supreme Court decisions in 1962 and 1964 reversed the earlier decision and held that the Constitution requires state legislative and federal Congressional districts to be equal in population (or, as later decisions made clear, as equal as possible).<sup>12</sup> The Court thus rejected the claim by many state governments that a state should be able to draw its election boundaries to match its internal political subdivisions, or simply to give country people more political weight – even when the voters in the state, including a majority of urban voters, had voted to give this advantage to rural areas and their people.

If it is not a political question – or is no longer such – whether legislative districts need be equal in population, is it a political question where to draw the boundaries of the equal-in-population districts? It makes a great difference politically, in America, where the boundaries are drawn. Briefly, suppose a state is entitled to ten elected representatives, and suppose Party A usually (but not always) gets 60 percent of the votes in the state, and Party B usually gets 40 percent. If Party A controls the legislature, as it usually does, and if its managers can predict where each party’s voters live – and they easily can nowadays, with sophisticated digital software – Party A can draw the boundaries in such a way as to pack most of Party B’s voters in fewer than four districts: in three or two or (if the lines are drawn cleverly or unscrupulously enough) even in one district, leaving all the rest for Party A. This is known as gerrymandering, named after an early-19th century politician skilled in the art, named Elbridge Gerry, whose strategically-drawn district was seen by a caricaturist to look like an elongated salamander

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12. *Baker v Carr* (1962); *Reynolds v Sims* (1964). *Baker* and *Reynolds* dealt with state legislatures, and invoked the Equal Protection Clause of the Fourteenth Amendment to require equal populations in legislative districts. *Wesberry v Sanders* (1964) held that Congressional districts must have equal populations as well, but by virtue of the Constitutional requirement that representatives are to be chosen “by the people”, Article I, section 2, clause 1.

(hence “gerrymander”). It might be thought that the boundaries simply ought to be drawn “fairly”: but no one has an uncontroversial theory of what would be fair, and wherever the lines are drawn it will favour one party or the other, such that the results will often give more seats to one party, or to the other, than the parties’ statewide share of the votes.

Until recently, the federal courts usually dismissed lawsuits challenging partisan gerrymandering, and in Supreme Court cases decided in 1986 and in 2004 pluralities of three and four Justices, but not a majority of five, would have held gerrymandering – and where the geographic boundaries ought instead to be drawn – to be a non-justiciable political question.<sup>13</sup> (What happened in those cases is that the Justices holding in principle that gerrymandering is non-justiciable were joined by other Justices who merely concurred that in the particular case, the boundaries were not so improper as to violate the constitution.) More recently however, several lower and intermediate federal courts have struck down legislative districting maps as unconstitutionally gerrymandered, relying on the fact that a majority of the Supreme Court has never declared this a non-justiciable political question. In 2018 the Supreme Court remanded a gerrymandering case to the lower federal courts, without deciding the merits of whether, or how, such cases might be justiciable, but with several Justices implying a willingness to subject mapping of legislative districts to judicial review.<sup>14</sup> There is a partisan tinge to all this, since Republicans have won most of the state legislatures in recent years, hence it is they who have been drawing the maps, and the lawsuits mostly come from Democrats. The question inevitably arises in the public mind whether it is coincidental, or otherwise, that judges and Justices appointed by Democrats, or generally thought sympathetic to them, seem more apt to intervene against recent gerrymanders, and less likely to treat the issue as a political question immune from judicial power.

### **III. Beyond the Political Question Doctrine: The Courts as Political Activists**

The formal political question doctrine, in short, is intermittently invoked by the Supreme Court or by a less-than-majority group of the Justices, typically in cases with a certain public and dramatic interest, but the doctrine imposes little insuperable restraint, if any at all, on the courts’ power to adjudicate, even on the limited range of questions to which the doctrine is said to apply. It has recently been argued very persuasively by Tara Leigh Grove that the doctrine is actually a recent creation, and that it reinforces judicial supremacy rather than limiting it. In the nineteenth century, as Grove demonstrates, “political questions” were facts conclusively found by the executive or Congressional authorities rather than constitutional questions which the courts debarred themselves from adjudicating; and the more recent twentieth-century doctrine arms the courts

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13. *Davis v Bandemer* (1986); *Vieth v Jubelirer* (2004).

14. *Gill v Whitford* (2018) (remanding a case arising from a gerrymander by the Republican majority in the the Wisconsin state legislature which drew electoral maps to give Republicans markedly more legislative seats in subsequent elections than their statewide share of the vote.

to determine which constitutional questions are to be determined by which authority – including, whenever the courts so determine, the courts. This, says Grove, really empowers the courts more than it restrains them.<sup>15</sup>

The “political questions” of the political questions doctrine, in any event, are not necessarily the questions with the most importance to the social and political character of American life. Notably, the mid-twentieth century Supreme Court cases striking down racial discrimination were political in the sense that they challenged and within a decade or so helped to transform a deeply ingrained way of life in much, if not in virtually all, of the United States. These decisions, beginning with the “restrictive covenants” case of *Shelley v. Kraemer* in 1948 and culminating in the school de-segregation case of *Brown v Board of Education* in 1954 and its sequels, were generally decided by a unanimous Supreme Court and entertained no suggestion that the cases involved political questions beyond the power of the courts to adjudicate.

Virtually everyone agrees today – although there was controversy, even among legal scholars, at the time – that the Supreme Court did the right thing in striking down racially discriminatory laws as unconstitutional. Racial segregation and discrimination were unjust: they were the worst blot on American democracy since the era of slavery, from which they derived. They were pervasive in much of America and practically monolithic in the South; they were embedded in state laws, and in social attitudes as well. They were effectively impervious to challenge through ordinary democratic politics: for one thing, black Americans had been systematically excluded from voting in southern states since the turn of the twentieth century if not before. How could this deep-rooted injustice be challenged? Apart from the courts, no other institution – no elected branch of government – could do it. And after all, the post-Civil War constitutional amendments, in their language and spirit and by their clear intent, were against racially discriminatory government.

But in the years since the mid-century civil rights decisions – evidently inspired by them and by the prestige and influence that they won for the judiciary – the American courts began to adjudicate many other controversial questions of public policy. Some of these, such as how state police officers should conduct investigations, and under what conditions, if at all, the death penalty could be imposed, involved – at least in some sense – the administration of justice, although these had not been federal constitutional questions until the Supreme Court newly declared them to be, and pre-empted the elected legislatures from deciding them. Other Supreme Court decisions took on broad social questions having little or nothing to do with the administration of justice as such: limiting and largely overturning state regulation of abortion, overturning state restrictions on homosexual conduct, requiring the states to give legal standing to homosexual marriage (if they provide for heterosexual marriage, as all the states do).

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15. TARA LEIGH GROVE, *The Lost History of the Political Question Doctrine*, *New York University Law Review*, 90, 2015, p. 1908.

These questions, and many others like them which are now litigated in the American courts, are surely political in a broad sense, or they were until the courts divested the people's elected representatives from having the decisive say about them. Yet these questions do not necessarily, or at all, present so clear a right and wrong as racial discrimination did. It is less clear in these cases that representative democracy cannot cope: that if the courts did not intervene, then nothing would change for the better. And the legal basis for the courts' rulings, in the language, intent, and spirit of the Constitution, is less persuasive – to put it as gently as possible – than it was in the cases striking down racial segregation and discrimination.

In at least some important areas of public policy, then, the American Supreme Court became a kind of super-legislature in the decades since the mid-twentieth century, deciding social controversies that would otherwise be up to democratically accountable legislatures. For a time, such judicial power and influence was virtually unique to the United States: it would have been quite alien to civil law systems, and to the cautious common law courts of the United Kingdom as well, for judges to take on the role of lawmakers on matters of major public controversy. But in recent years, courts in many countries around the world have become more “activist”, inspired perhaps by the recent American model, and often drawing on supra-national ideas or powers derived, for example, from the European Union or from international human rights agreements.

#### **IV. Conclusion: Judicial Activism and Judicial Independence**

Broad policy-making by the courts is always liable to be at odds with democratic and representative self-government. The tension is minimal, or generally manageable, when judicial decisions are persuasively based on the Constitution's commands, at least in a country like the United States, where people's belief in the Constitution is strong. The tension is more serious the more “creative” or uncertain the actual basis, in constitutional text and history, for the courts' decrees. Americans who doubt the wisdom or the moral imperative of the courts' decisions about abortion or sexuality have reason, in addition, to doubt that it is the Constitution, rather than the untethered will of the judges, that underlay the decisions.

Controversial public policy by judicial decree also raises questions of judicial independence. As Philip Hamburger points out, judicial independence has both an “external” and an “internal” dimension:

[Judicial independence] required constitutional protection from external threats to tenure and salary. More fundamentally, however, independent judgment was the office or duty of a judge, and thus... the deeper question about independence has always been internal – the duty of judges to exercise independent judgment untainted even by their own will or passion.<sup>16</sup>

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16. PHILIP HAMBURGER, *Is Administrative Law Unlawful?*, Chicago, 2014, p. 144; PHILIP

For most of American history, judicial appointments to the American federal courts were relatively uncontroversial. In recent years, as judges are increasingly thought to exercise will rather than judgment, these appointments have become extraordinarily partisan, divisive, and bitter. Adjudication of political questions, unrestrained by the formal political question doctrine, plainly raises the stakes for these appointments. The danger is that the stakes will be raised to the breaking point. Judicial independence, and the authority of the courts, depend after all on the courts' impartiality and on their maintaining a proper judicial rôle. The early-to-mid-twentieth century judge Learned Hand, often said to be the greatest American judge never appointed to the Supreme Court, put the problem in a famous phrase: "For myself it would be most irksome to be ruled by a bevy of Platonic Guardians, even if I knew how to choose them, which I assuredly do not." Many Americans feel the same way – and recent votes in European countries as well as in the United States suggest that there is widespread wariness of what is seen, rightly or wrongly, as Platonic Guardianship, whether by judges or by other unelected grandees. Judges and courts confronting political questions, and not only doctrinally-defined "political questions", would do well to take note.

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HAMBURGER, *Law and Judicial Duty*, USA, 2008, pp. 159-60 (tracing the history of this idea to Thomas Aquinas and to Reformation-era political thought).