



The Political Question Doctrine: Historical Background (Part 2)

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This Legal Sidebar is the second in a [six-part series](#) that discusses the Supreme Court’s political question doctrine, which instructs that federal courts should forbear from resolving questions when doing so would require the judiciary to make policy decisions, exercise discretion beyond its competency, or encroach on powers the Constitution vests in the legislative or executive branches. By limiting the range of cases federal courts can consider, the political question doctrine is intended to maintain the separation of powers and recognize the roles of the legislative and executive branches in interpreting the Constitution. Understanding the political question doctrine may assist Members of Congress in recognizing when actions of Congress or the executive branch would not be subject to judicial review. For additional background on this topic and citations to relevant sources, please see the [Constitution of the United States, Analysis and Interpretation](#).

The political question doctrine has its origins in the foundational case for judicial review, *Marbury v. Madison*. *Marbury* involved a suit seeking to force Secretary of State James Madison to deliver a signed commission to a newly appointed official, William Marbury. The commission had been signed by the previous Administration but not delivered. Following the change in presidential Administrations, Madison refused to deliver it. Among the issues presented in that case was whether the Court even had the authority to adjudicate the legality of Madison’s refusal to deliver the commission. That question, according to Chief Justice Marshall’s opinion for the Court, turned on “the nature” of the government action in question. As the Court explained, “Questions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court.” Thus, if the act of an official is one in which the “executive possesses a constitutional or legal discretion, nothing can be more perfectly clear that their acts are only politically examinable.” However, if a “specific duty is assigned by law, and individual rights depend on the performance of that duty,” then injured individuals have a right to resort to the courts. According to the Chief Justice, “[t]he power of nominating to the senate, and the power of appointing the person nominated” were political questions, and fundamentally unreviewable. By contrast, “if, for example, Mr. Marbury had taken the oaths of a magistrate, and proceeded to act as one; in consequence of which a suit had been instituted against him, in which his defense had depended on his being a magistrate, the validity of his appointment must have been determined by judicial authority.” Ultimately, the Court concluded that the question of whether to deliver Marbury’s commission was not a political one, as Marbury had a legal right in the appointment.

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Although the Court in *Marbury* opined that it could not decide “[q]uestions[] in their nature political,” that case did not articulate the political question doctrine as the concept is understood today—a rule that deprives the federal courts of jurisdiction to hear certain cases, including cases involving claims of constitutional rights. Rather, *Marbury* indicated only that some decisions are inherently discretionary and are therefore immune from judicial scrutiny because there is no enforceable legal right at stake.

In the years following *Marbury*, the Court invoked the political question doctrine when deferring to the factual or policy determinations of the other branches in certain categories of cases. For example, the Court held in the 1827 case *Martin v. Mott* that the legality of the President’s decision to call out the militia in response to a supposed national emergency was beyond judicial scrutiny. Similarly, in *Williams v. Suffolk Insurance Co.*, an 1839 case raising the question of who ruled the Falkland Islands, the Court concluded that the executive had the final word on questions of foreign sovereignty. In another case, the Court concluded that this deference in the realm of foreign affairs applied to the President’s authority to enter into treaties. In several cases from the 19th and early 20th centuries, the Court also expressed a willingness to defer to Congress with respect to certain legal questions. For example, the Court concluded that the judiciary was required to defer absolutely to congressional recognition of Indian tribes, as well as congressional determinations of when wars begin and when they conclude.

In 1849, in the case *Luther v. Borden*, the Court expanded the political question doctrine and took another step toward the modern judicial approach to political questions. *Luther* arose out of a rebellion against the government of Rhode Island due to the state constitution, which significantly limited the right to vote. Rhode Island citizens who had become dissatisfied with the existing regime held a constitutional convention, called elections, and declared the winners the valid government of Rhode Island. When the existing “charter government” opposed these efforts and declared the conduct illegal, the newly elected governor of the rebel government, Thomas Dorr, gathered an armed force to assert the legitimacy of his government and its constitution. In response, the charter government called the militia and declared martial law. In the course of events, charter government agents broke into plaintiff Luther’s house in order to arrest him for his support of Dorr. Luther then sued for trespass. The question of the legitimacy of the home break-in necessarily gave rise to the question of which government—the charter government or the rebel government—was the legitimate government of the state at the time of the break-in.

Luther alleged that the charter government that authorized the break-in was unconstitutional, in part because the voting restrictions in the Rhode Island constitution violated the U.S. Constitution’s Guarantee Clause, which states that “[t]he United States shall guarantee to every State in this Union a Republican Form of Government.” The Supreme Court refused to reach the question, instead concluding that the question of which government was lawful, and whether a government was a “republican” one, was a political question for Congress to decide and entirely outside the purview of the judiciary. In an opinion by Chief Justice Roger Taney, the Court held that courts were not institutionally competent to judge republicanism or governmental legitimacy because judicial standards were lacking. Further, an attempt to judge whether a government was legitimate could undermine other branches and ultimately cast all the acts of the questioned government into doubt. The Court concluded that while a court should “always be ready to meet any question confided to it by the Constitution, it is equally its duty not to pass beyond its appropriate sphere of action.” Since deciding *Luther*, the Court has routinely held that cases involving the Guarantee Clause present nonjusticiable political questions.

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