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Review of "The Supreme Court and 'Political Questions': A Study in Judicial Evasion," By Philippa Strum

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BOOK REVIEW

THE SUPREME COURT AND "POLITICAL QUESTIONS": A STUDY IN JUDICIAL EVASION. By Philippa Strum.[1] The University of Alabama Press, Birmingham, Alabama. Pp. 188. $7.50.

Professor Strum has contributed another volume to the ever-expanding library of literature on the operation of the power of judicial review in the United States Supreme Court. *THE SUPREME COURT AND "POLITICAL QUESTIONS": A STUDY IN JUDICIAL EVASION*,[2] consists, as one might expect, of an effort to analyze those cases in which the Court has (and those relevant instances in which it has not) declined to exercise jurisdiction that might otherwise belong within its particular sphere of competence, on the ground that the issue is more appropriately left for final decision by the "political branches" of government. In his analysis, Professor Strum leads us through an extensive review of the cases, having subdivided them for the sake of manageability into four classes based upon the subject matter in litigation before the Court. The first, not surprisingly, is composed of the small number of cases in which the issue presented to the Court revolved about article IV, section 4 of the Constitution of the United States, which guarantees a "Republican Form of Government" to every state in the Union.[3] These cases come immediately to mind, of course, because the Court conceived the doctrine of "political questions" in this context; or perhaps we should say simply that the doctrine was identified when the first conflict involving this provision of the Constitution came before the Court.[4] Although these cases captured center stage for many decades and still retain significant historical interest, the spot-

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2. P. STRUM, THE SUPREME COURT AND POLITICAL QUESTIONS: A STUDY IN JUDICIAL EVASION (1974) [hereinafter cited as STRUM].

3. "The United States shall guarantee to every State in the Union a Republican form of Government . . . ." U.S. CONST. art. IV, § 4.

4. The case of first impression was Martin v. Mott, 25 U.S. (12 Wheat.) 19 (1827), in which Justice Story first articulated the doctrine of political questions. The most famous of these cases, Luther v. Borden, 48 U.S. (7 How.) 1 (1849), was decided in the embattled context of the Dorr Rebellion in Rhode Island.

light has shifted to another subject—apportionment.[5] This, the second and by far the most extensive group of cases, together with the related discussion of a third group of cases involving other electoral process issues, form the focal point of the book and the theory which it proposes. Finally, there is a discussion of those "political question" cases touching upon the executive power.

Professor Strum's starting point is the admonition of John P. Roche:

> A juridical definition of the term [political question] is impossible, for at root the logic that supports it is circular: political questions are matters not soluble by the judicial process; matters not soluble by the judicial process are political questions.[6]

The mistake, according to Strum, has been the "attempt to define the category as a function of political institutions—that is, as political dogma or a constitutional doctrine such as separation of powers—rather than of the political process—that is, the struggle to obtain and retain power."[7] Lest the reader gasp in horror at the images of the Justices of the United States Supreme Court grappling for political power, Professor Strum assuages our incipient revulsion by a footnote in which he assures us that, "power is [not] sought as an end in itself. . . . In the case of the political question, the Justices concern themselves with the power problem in order to retain their freedom to implement their versions of the 'good life.' "[8]

Professor Strum is quick to recognize, however, that "politicization" of the federal judiciary would be unacceptable to the public mind. "Popular belief in an independent judiciary enables the courts to place a final stamp of legitimacy upon all governmental acts, including those which might otherwise come under direct attack in the form of disobedience."[9] The importance of public confidence in the courts and in the integrity of their judges is not, in Professor Strum's opinion, to be minimized:

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5. There has been significant opinion that the shift of emphasis from the republican guarantee clause to apportionment required under the equal protection clause has been, itself, an evasion technique by which the Court has been able to ignore its earlier precedents, while not overruling itself. *See, e.g.*, Baker v. Carr, 369 U.S. 186, 266 (1962) (Frankfurter, J., dissenting).

6. Roche, *Judicial Self Restraint*, 49 AM. POL. SCI. REV. 762, 768 (1955).

7. STRUM 1.

8. *Id.* at 146 n.6. Some strict constructionists might not be very comforted by this explanation.

9. *Id.* at 3.

> This unenlightened esteem is indispensable to the courts, for it constitutes their only independent resource. The Court can hand down opinion after opinion—scholarly, thoughtful, realistic—but unless it parallels public feeling, or unless the "political" branches and particularly the executive are willing to undertake its enforcement, a Court decree becomes a meaningless piece of paper.[10]

The constitutional system would be undermined because "[d]isrespect for the Court means that it fails in its job of legitimation."[11] In this, of course, he agrees with constitutional scholars of nearly every persuasion.[12] While acknowledging the importance, under our constitutional system, of public respect for the Court, Professor Strum nevertheless labels the conception of an independent judiciary committed to the principled adjudication of actual controversies within its assigned jurisdiction as one of the popular myths upon which society is necessarily based.[13] The Court may realize the significance of developing public belief in judicial neutrality, and articulate those principles which will best assure the image of a detached, reflective judiciary. To the extent the Court develops and acts according to those principles, does it not in fact respect the principle of neutrality or the "Rule of Law"? Perhaps the problem is a metaphysical one, but the allegation that the "actual motivation" of the Court is neither the one projected to the legal profession through the articulation of "principled decisions," nor the one popularly held by laymen, seems to require more elaborate explanation of its premises and criteria for distinguishing the reality from the myth. The important effort by scholars to demythologize the operation of public institutions has contributed much to our understanding and appreciation of those institutions. Even the most well intentioned of these investigations, however, can be misled by its own enthusiasm.[14]

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10. *Id.*

11. *Id.* at 4.

12. Justice Brandeis, for example, dissenting in Horning v. District of Columbia, 254 U.S. 135, 139 (1920), stated, "[The judge] may advise; he may persuade; but he may not command or coerce. He does coerce when without convincing the judgment he overcomes the will by the weight of authority." Although the issue in that case was the usurpation of jury prerogative by the court, a parallel can certainly be drawn to the issue of usurpation of legislative (or executive) power.

13. STRUM 3. In his summary and conclusions Professor Strum asserts that "the civilization able to function without a mythology had not yet evolved; this is a necessary part of ours." *Id.* at 143.

14. *Cf.* R. FOGEL & S. ENFERMAN, TIME ON THE CROSS (1974). A flood of controversy has been engendered.

The Supreme Court has been many things to many people. Great institutions of enduring value exist in a complex world with competing and often conflicting ideologies, and to survive must steer a careful course, as the Court has done. The subtleties necessitated by such navigation ought not to be subjected to the reductionist impulse without appropriate recognition that distortion inevitably accompanies the attempt to schematize reality. Implicit, however, in Professor Strum's general discussion of judicial review is the recognition of this problem. He appears both convinced of the artificiality of the Court's rhetoric and impressed with its success in fostering public respect for the Court and the system at whose pinnacle it stands.[15] The late Professor Bickel cautioned that

> [n]o one should underestimate the dominion of ideas in a nation committed to the rule of principle as well as to majoritarian democracy. Acknowledging the limits of the rule of principle and its fragility when it passes them must not plunge one into such an underestimate.[16]

This warning bears repetition.

The specific thesis of this book is the factors which define the operation of the political question doctrine as a "non-principle" of constitutional law decisionmaking. According to Professor Strum, the political question doctrine is the product of a determination, consciously or unconsciously made by the Court, of the difficulty of enforcing any decision which the Court is likely to make based on existing constitutional principles. The author believes that this occurs when the Court is presented with avant-garde litigation prior to the time at which the changing societal values have coalesced sufficiently to support a new constitutional doctrine. The Court then, is faced with the Hobson's choice of either making a decision that is certain to go unenforced (based upon emerging social norms) or making one that is "likely to be enforced but at the same time depending on a negation of an existing or emerging American 'truth' " (this alternative based upon principles existing in the twilight of acceptability).[17] In either case, the argument continues, "the Court would suffer a loss of prestige and power."[18] "Some crotchety people," says Professor Strum,

15. "This *unenlightened* esteem is indispensable to the courts . . . ." STRUM 3 (emphasis added).

16. A. BICKEL, THE LEAST DANGEROUS BRANCH 188 (1962).

17. STRUM 4.

18. *Id.*

"may call this ducking the situation, but many other observers will point to it as yet another indication of the Court's uncorrupted wisdom. In reality, this is no more than another example of that human instinct for self-preservation which, at the institutional level, becomes a partiality towards power."[19]

The author rejects the late Professor Bickel's suggestion that the political question doctrine is frequently used as an educative device. This, according to Strum, is simply not supportable.[20] Similarly, it should be noted, Professor Bickel rejected Professor Strum's thesis (albeit long before the publication of this book). In his exploration of the "Passive Virtues," Bickel, discussing *Colegrove v. Green*,[21] stated:

> The decisive factor in *Colegrove* could not well have been the difficulty or uncertainty that might attend enforcement of a judicial decree. It comes easily enough to mind that the foreseeable difficulty in the *School Desegregation Cases* was graver, and that the difficulties in many earlier and later Fifteenth Amendment cases were not appreciably less serious.[22]

In all fairness to Professor Strum, however, there is probably significantly less divergence between the two than the quoted passage would seem to indicate. Professor Bickel summarized his sense of the political question doctrine when he wrote that its foundation is

> in both intellect and instinct . . . the Court's sense of lack of capacity, compounded in unequal parts of (a) the strangeness of the issue and its intractability to principled resolution; (b) the sheer momentousness of it, which tends to unbalance judicial judgment; (c) the anxiety, not so much that the judicial judgment will be ignored, as that perhaps it should but will not be; (d) finally ("in a mature democracy"), the inner vulnerability, the self-doubt of an institution which is electorally irresponsible and has no earth to draw strength from.[23]

Professor Bickel's point (c) seems to coincide directly with Professor Strum's contention that the Court, facing two equally undesirable alternatives, uses the political question doctrine to choose neither. Strum points out that one alternative is a decision based upon a discredited (or rapidly waning) ideology. Professor Bickel suggested that the

19. *Id.* at 5-6.
20. *Id.* at 6-8.
21. 328 U.S. 549 (1946).
22. A. BICKEL, *supra* note 16, at 191.
23. *Id.* at 184.

Court was, in these cases, concerned that perhaps any decision based on existing principles would be enforced, but that such enforcement was undesirable.

Clearly, an appreciation of the Court's fear that a decision will diminish its prestige shapes the entire development of Professor Bickel's thesis of the "Passive Virtues," including his explanation of the particular nature of the political question doctrine. According to Professor Strum's argument, the ultimate basis for the decision not to adjudicate is the long term lack of vitality generated by lost prestige. Missing from Strum, but present in Bickel and others, who wanted to reevaluate the work of the Court by analyzing its actual operation and not its "normative rhetoric," is a greater recognition of the subtleties of the process of constitutional law decisionmaking; also lacking is a frank acknowledgment that the explanation will not be found in a single impulse, however fundamentally a part of the prevailing conception of human nature that impulse may be. For instance, Mr. Justice Frankfurter, consistently an exponent of judicial restraint, dissented in *Baker v. Carr*[24] and urged the Court to decline "jurisdiction" on the ground that the question before the Court was not appropriate for judicial resolution. He stated:

> Disregard of inherent limits in the effective exercise of the Court's "judicial power" not only presages the futility of judicial intervention in the essentially political conflict of forces by which the relation between population and representation has time out of mind been and now is determined. It 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. . . .
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> We were soothingly told at the bar of this Court that we need not worry about the kind of remedy a court could effectively fashion . . . because legislatures would heed the Court's admonition. . . . [This] implies a sorry confession of judicial impotence in place of a frank acknowledgment that there is not under our Constitution a judicial remedy for every political mischief, for every undesirable exercise of legislative power. . . . In any event there is nothing judicially more

24. 369 U.S. 186 (1962).

> unseemly nor more self-defeating than for this Court to make in terrorem pronouncements, to indulge in merely empty rhetoric, sounding a word of promise to the ear, sure to be disappointing to the hope.[25]

To suggest that such an exposition of judicial logic can be reduced to the bare bones of "power guardianship" when stripped of its ideological flesh requires a too patently psychoanalytical perspective. A more eclectic approach would lend substantial weight to what seems to be an accurate, but uncomfortably narrow perspective.

Putting to one side a disagreement with the singularity of Professor Strum's thesis, there is much merit in the contention that the problem of ultimate enforcement of any judicial decree weighs heavily on the minds of Justices who must decide whether to adjudicate a particular controversy urged upon them. Admittedly, the Court itself has generated much of the recent literature that seeks to "go behind the rhetoric" of its decisions. In many cases it has been either less than candid in articulating the constitutional premises of its decisions, or it has been sufficiently incoherent or incomplete to generate legitimate curiosity. *Baker v. Carr*[26] is a case in point. The Court did not find that a political question barred adjudication on the merits of a controversy involving the Tennessee legislature's failure to reapportion its districts in spite of dramatic shifts in population during the sixty years since its last apportionment. Early in his opinion for the Court, Justice Brennan asserted that "[t]he nonjusticiability of a political question is primarily a function of the separation of powers."[27] Later he cavalierly observed that "[t]he question here is the consistency of state action with the Federal Constitution. We have no question decided, or to be decided, by a political branch of government coequal with this Court."[28] The failure even to allude to the repeated seating of elected representatives from Tennessee by the Congress of the United States, a coequal branch of government, invites disbelief. The Congress possessed both the power to "judge the qualifications of its own members"[29] and the obligation, according to an earlier decision of the Supreme Court, to "guarantee a Republican Form of Government"[30] to every state in the Union.

25. Baker v. Carr, 369 U.S. 186, 267, 269-70 (1962) (Frankfurter, J., dissenting). ing).

26. 369 U.S. 186 (1962).

27. *Id.* at 210.

28. *Id.* at 226.

29. U.S. CONST. art. I, § 5, cl. 1.

30. U.S. CONST. art. IV, § 4; Luther v. Borden, 48 U.S. (7 How.) 1 (1849).

Such a deliberate and unexplained failure to deal squarely with one of the most difficult aspects of earlier precedents necessarily breeds skepticism. Justice Frankfurter, dissenting, stated clearly that the Court was not merely overlooking some minor facet of its previous decisions, but that it had been admonished to consider the difficult problems implicit in distinguishing *Baker* from previous cases held to be political under the Republican Guarantee Clause.[31]

Justice Clark came closest to acknowledging the political nature of the problem and his reasons for believing *Baker* to be outside existing precedent. In language strongly reminiscent of Justice Stone's famous footnote 4 in *United States v. Carolene Products Co.*,[32] Justice Clark stated:

> Although I find the Tennessee apportionment statute offends the Equal Protection Clause, I would not consider intervention by this Court into so delicate a field if there were any other relief available to the people of Tennessee. But the majority of the people of Tennessee have no "practical opportunities for exerting their political weight at the polls"

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31. Having been apparently unsuccessful at convincing his brethren in conference, Justice Frankfurter began his dissent by stating what appeared to be obvious. "The Court today reverses a uniform course of decision established by a dozen cases, including one by which the very claim now sustained was unanimously rejected only five years ago." Baker v. Carr, 369 U.S. 186, 266 (1962). Later he concluded that the appellants' contention that the equal protection clause guarantees equal weight to every vote and a basis of representation tied exclusively to population simply cannot be independently sustained.

> To find such a political conception legally enforceable in the broad and unspecific guarantee of equal protection is to rewrite the Constitution. . . . Indeed since "equal protection of the laws" can only mean an equality of persons standing in the same relation to whatever governmental action is challenged, the determination whether treatment is equal presupposes a determination concerning the nature of the relationship. This, with respect to apportionment, means an inquiry into the theoretic base of representation in an acceptably republican state. . . . To divorce "equal protection" from "Republican Form" is to talk about half a question.

Id. at 300-01.

32. 304 U.S. 144 (1938). Justice Stone stated:

> There may be a narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments . . . .
>
> It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation.

Id. at 152, n.4.

> to correct the existing "invidious discrimination." Tennessee has no initiative and referendum. I have searched diligently for other "practical opportunities" present under law. I find none other than through the federal courts.[33]

Professor Strum concludes, "The Court's realization that a societal majority and its Presidential representative would be sufficient insurance against enforcement difficulties caused the reapportionment issue to be dusted off and removed from the political question shelf."[34] He fails to explain, however, why the Court became so confident in its ability to fashion apportionment formulas and to enforce them against entrenched political machines. In fact, we now know that enforcement was slow, difficult, and not without significant opposition to judicial interference in this most partisan of political activities.

A strong bias shapes this work from beginning to end. It is the belief that the courts are legitimate organs of government for policy making. Professor Strum comments, "Like *Brown v. Board of Education*, *Baker v. Carr* was 'bad law' in that it prepared the way for a flood of litigation that could have been halted by the establishment of an absolute standard."[35] Later he observes that the Court "involved itself in the politics of the people and emerged unscathed, still clothed in the garb of constitutionalism. This is surely no more and no less than the legitimate function of the Court[!]."[36] Obviously, Professor Strum does not share a belief in a government of law, not of men, under a written constitution embodying restraints upon government and delegating specialized tasks to separate units within a single system, in an attempt to achieve a meaningful check on the abuse of power. In his concluding remarks he asserts that, "There is nothing in the idea of separation of powers which prevents the Court from making any decision it wants to, but there is something in the theory which gives the Justices an excuse for not deciding an issue they do not wish to touch."[37] We apparently are being told that despite 200 years of relatively successful constitutional government, the only "real" restraints, in the last analysis, are those of power politics—that the Court can only operate within the parameters of societal consensus. "When it declares the presence of a political question, the Court tacitly admits

33. Baker v. Carr, 369 U.S. 186, 258-59 (1962) (Clark, J., concurring).
34. STRUM 66.
35. *Id.* at 83.
36. *Id.* at 91 (punctuation added).
37. *Id.* at 143.

that it cannot find, and therefore cannot ratify, a social consensus which does not violate basic American beliefs. . . . If the Court admitted such considerations openly, however, it would destroy its image as a neutral, objective, eternal body."[38]

Admittedly, many of the Court's opinions in political question disputes either explicitly articulate concern with the powerlessness of the judiciary to enforce unpopular decisions or are informed with a sense of self-doubt in this connection. It is, however, very difficult to separate the self-interest that generates this concern from the philosophically different issue of concern for the lack of political responsibility of an appointive judicial body which serves during "good behavior" regardless of the climate of public opinion respecting its decisions. In the second issue, the root of the dilemma is the fundamental principle that in a democratic society policy decisions should remain in the hands of elected representatives. In the first case, the Court's self interest in retaining its power provides a more practical basis. Finally, the Court may have genuine concern for its institutional role in a constitutional system, and fear that its inability to enforce even a principled decision will sap the vitality of the entire constitutional scheme. Quite happily for the Court, the self-interest of the Court in maintaining its power to influence the future course of events in the country coincides significantly with the public interest in securing the continuing viability of the constitutional system. This may be one of the factors that has allowed the Court to maintain its consistently high level of prestige, in spite of much "scholarly" criticism.

Anthony Lewis noted in a recent article[39] that in spite of general disillusionment with governmental institutions among Americans, rampant skepticism about the integrity of persons in power has not, despite academic criticism, significantly altered the respect Americans feel for the institution of the Supreme Court and the men to whom the process of constitutional adjudication is entrusted. Commenting upon the reaction of a recent group of American law students who visited the Supreme Court, Lewis observed that "there was something surprising, and possibly significant, in [their] reaction. . . . [T]he students were enormously impressed . . . by the process." One student remarked, "There was a sense that [the Justices] were interested in the merits

38. *Id.* at 142, 143.

39. Lewis, *A Day in Court*, N.Y. Times, Oct. 16, 1975, at 39.

of the issues, not in power." Another opined, "[S]omething happens to people who become Supreme Court Justices. They may be ordinary, but they understand the responsibility and try to carry it." Lewis believes that the students' remarks summarize the abiding attitude of most Americans. The tenacity of the public esteem for the Court and its Justices is, according to Lewis, the result of the Court's chosen function: providing the lubrication necessary for a rapidly changing society to survive under a written constitution.

> The problem of any free society, over the long haul, is how to adapt to enormous changes in the objective circumstances of life—technology, population, social upheaval—while remaining constant to the basic principles of freedom. In the United States, that has been the special and extraordinary function of the courts. Judges have kept the American Constitution alive. . . . There have always been skeptics to warn against reliance on judicial power. . . . Other critics say that courts have not done enough for liberty. . . . But there is something in the feeling of a visitor that the Supreme Court of the United States is entitled, as an institution, to our faith.[40]

Perhaps we lawyers are more easily persuaded by ideological rhetoric than by the cold-blooded analysis of political scientists. Or perhaps, as Professor Strum has suggested, we, as well as the Court, tend to take its disguise seriously.[41] In any event, there is a certain disquietude which overcomes at least this reviewer at the suggestion that, beneath what frequently appears to be a reasonably honest intellectual struggle by the Court to steer a course somewhere between judicial impotence and judicial hegemony, there is simply a practical calculation about the constellation of political power.

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40. *Id.*

41. STRUM 5.

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