THE POLITICAL QUESTION DOCTRINE: SUGGESTED CRITERIA

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ABSTRACT

Whether there should be a political question doctrine and, if so, how it should be implemented continue to be contentious and controversial issues, both within and outside the Court. This Article urges that the Justices should reformulate the detailed definition that they have utilized (at least formally) since 1962, and adopt four criteria to be applied in future cases. The least disputed—textual commitment—is the initial factor listed in Baker v. Carr. The other three are based on functional considerations rather than constitutional language or original understanding. The first of these—structural issues: federalism and separation of powers—has been advanced and developed at length in my earlier work. It is based on a comparative advantage of the political process over the Court in sound constitutional decisionmaking respecting the relevant issues, as well as the trustworthiness respecting fundamental values of the national legislative/executive branches in doing so. The remaining two criteria involve removing questions of individual rights from the judiciary's realm, something that would (and should) occur very infrequently. The manageable standards test recognizes that there may be constitutional provisions for which the Court lacks the capacity to develop clear and coherent principles. The generalized grievance guide is similar in many ways to structural issues in that it is also grounded in matters of comparative advantage and trustworthiness of results.

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INTRODUCTION

With roots tracing to *Marbury v. Madison*,[1] the political question doctrine—that courts should abstain from resolving constitutional issues that are better left to other departments of government, mainly the national political branches[2]—has been most ambitiously, and authoritatively, defined by the Supreme Court in *Baker v. Carr*:[3]

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional

1. 5 U.S. (1 Cranch) 137 (1803).
2. *Id.* at 165–66.
3. 369 U.S. 186 (1962).

> 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.[4]

But despite these carefully developed (and *seemingly* readily applicable)[5] criteria, the doctrine has rarely served as a meaningful restraint on the Supreme Court's authority. Now, catalyzed by the Court's decision in *Bush v. Gore*,[6] in which the Justices voted 5 to 4 to resolve a presidential election dispute without so much as mentioning the doctrine, scholars have concluded that political questions are in serious decline, if not fully expired, because they are clearly at odds with the notion of judicial supremacy adopted by the Court in recent years.[7] Moreover, within the past fifteen years, the Court has raised the possibility that the Guarantee Clause may again become part of the judiciary's repertoire.[8] But other decisions over the past three decades suggest that reports of the political question's demise are premature. Two rulings, each authored by the Court's then-Chief Justice, specifically invoked the doctrine in refusing to subject to judicial review either "the composition, training, equipping, and control" of the National Guard[9] or the congressional impeachment

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4. *Id.* at 217.

5. For intense criticism of the *Baker* specifications as being "useless," "confusing and unsatisfactory," see ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 129–30 (2d ed. 2002). *See also infra* note 13 and accompanying text.

6. 531 U.S. 98 (2000) (per curiam).

7. *See, e.g.*, Rachel E. Barkow, *More Supreme than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237, 240 (2002) ("[T]he demise of the political question doctrine is of recent vintage, and it correlates with the ascendancy of a novel theory of judicial supremacy."); Mark Tushnet, *Law and Prudence in the Law of Justiciability: The Transformation and Disappearance of the Political Question Doctrine*, 80 N.C. L. REV. 1203, 1233 (2002) (contrasting the Warren Court's assertion of judicial supremacy and use of prudential decisionmaking with that of the Rehnquist Court).

8. *See* New York v. United States, 505 U.S. 144, 184–85 (1992) (noting that both a 1964 Court decision and constitutional scholars suggest that not all Guarantee Clause claims present nonjusticiable political questions).

9. Gilligan v. Morgan, 413 U.S. 1, 10 (1973) (Burger, C.J.).

process.[10] Indeed, just two Terms ago, four members of the Court urged its application to partisan political gerrymandering, one deferred consideration of the matter, and none of the remaining Justices even suggested that nonjusticiability was no longer a viable approach.[11] Thus, it continues to be true that "whether or not a political question doctrine *should* be recognized as purely a normative matter, . . . the modern Court *has* adopted such a doctrine, both in theory and practice."[12] Consequently, it appears to be an appropriate occasion to ask both what remains of the political question doctrine and what role it should play in the future.

A significant part of my thinking and writing over the years has focused on the political question issue, particularly in connection with my proposals that the Court should not decide structural constitutional questions—those concerning the authority of the national government vis-à-vis the states or the respective powers of Congress and the president.[13] Although it has been recently said that "the effort to make the political question problem into a 'doctrine'—to bound it by a rule of law—is a fool's errand,"[14] this Article expands on my prior work and attempts to paint a fuller picture of the reach of the political question principle. In setting out a series of fairly specific criteria to guide the determination of a political question, my goal has been to avoid the legitimate criticism of the *Baker* formulation as depending "almost entirely on the discretion of the majority of the Justices, untethered to any legal principles rooted in the Constitution's structure, theory, history, or early precedent."[15] The rationale advanced in this Article is closely tied to my conception of the role of judicial review in American representative democracy and centers primarily on questions of comparative institutional competence and the distinction between structural constitutional

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10. Nixon v. United States, 506 U.S. 224, 235 (1993) (Rehnquist, C.J.).

11. Vieth v. Jubelirer, 541 U.S. 267, 267–70 (2004).

12. Martin H. Redish, *Judicial Review and the "Political Question,"* 79 NW. U. L. REV. 1031, 1035 (1984).

13. *See generally* JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT (1980). It may be worth noting that, because of the ongoing controversy over the doctrine of "political questions," I never used the phrase in the book, instead describing the inquiry as involving the "justiciability" of various constitutional issues.

14. Louis Michael Seidman, *The Secret Life of the Political Question Doctrine*, 37 J. MARSHALL L. REV. 441, 442 (2004).

15. Robert J. Pushaw, Jr., *Judicial Review and the Political Question Doctrine: Reviving the Federalist "Rebuttable Presumption" Analysis*, 80 N.C. L. REV. 1165, 1196 (2002).

issues and individual rights. Part I presents a standard definition of the political question doctrine and suggests four criteria by which courts should determine whether a particular case is a nonjusticiable political question. Part II presents a comprehensive application of these criteria to a number of legal issues that are often thought to be political questions.

I. DEFINITION OF POLITICAL QUESTION

I define "political question" as follows: a substantive ruling by the Justices that a constitutional issue regarding the scope of a particular provision (or some aspects of it) should be authoritatively resolved not by the Supreme Court but rather by one (or both) of the national political branches.[16] A further refinement, however, is needed. Thus, Professor Mark Tushnet describes the political question "issue" in two separate ways: (1) "Who gets to decide what the right answer to a substantive constitutional question is?" and (2) "Does the Constitution give a political branch the final power to interpret the Constitution?"[17] The first comports with my formulation. The second differs, seemingly invoking what the Court in *Baker v. Carr* labeled a "textually demonstrable constitutional commitment,"[18] resting essentially on conventional constitutional interpretation.

While I readily accept the "textual commitment" principle,[19] my approach, drawing heavily on my earlier analysis,[20] is mainly a functional one, rather than one grounded in constitutional language or original understanding,[21] and essentially describes the current

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16. It should be absolutely clear that this conclusion by the Court does not state its belief that any decision reached by the designated official body is constitutionally correct, but only that it is within the province of that governmental organ to make.

For a brief consideration of state court decisions of "political questions," see *infra* note 81.

17. Tushnet, *supra* note 7, at 1207.

18. 369 U.S. 186, 217 (1962).

19. *See infra* notes 27–36 and accompanying text.

20. *See generally* CHOPER, *supra* note 13.

21. My analysis may be fairly characterized as "extra constitutional," Seidman, *supra* note 14, at 459, in the sense that it is grounded in policy ("functional") considerations that I have openly urged as leading to wise and proper constitutional decisionmaking. Since I have never suggested otherwise, however, it is inaccurate to describe my view as having "an unarticulated and undefended *political* position" that "subverts the core assumptions of constitutionalism by deciding the very political questions it purports to avoid." *Id.* Thus, my "*political* position" has never meant to be "best achieved by manipulating the jurisdictional responsibilities of the

system: one branch of government should be the final arbiter of disputes over each provision of the Constitution (or certain types of issues arising under it), but it should not be the same branch for all such matters.[22] And I generally subscribe to the view that the Court should have the ultimate say as to which branch decides.[23] In most respects, I see the Justices' analysis of the political question doctrine as involving the same justifications that govern the institutional role of judicial review under our form of government—most importantly, whether the political branches at both the national and local levels can be trusted to determine the meaning and scope of a particular constitutional provision.[24]

I believe that the Court should consider four criteria in determining whether to relegate questions of constitutional interpretation to the political branches. First, the Court should refrain from deciding questions where there is a textual commitment[25] to a coordinate political department—that is, when the Constitution itself is interpreted as clearly referring the resolution of a question to an

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various political branches." *Id*. For example, the "Federalism Proposal" urged in my book, *see* CHOPER, *supra* note 13, at 171, would have the Court decline to adjudicate the constitutional issue of national power versus states' rights in *United States v. Lopez*, 514 U.S. 549 (1995); *see id.* at 561 n.3 (comparing the federal and state power to criminalize conduct). But I have not hesitated to express my "political" (policy) view as agreeing with Professor Donald Regan's position that "[t]here is nothing in the background of the [Gun-Free Schools Zone Act] to suggest that states are less capable of dealing with the problem of guns in schools than the federal government; nor is there anything to suggest the states are inadequately motivated to do so." Donald H. Regan, *How to Think About the Federal Commerce Power and Incidentally Rewrite* United States v. Lopez, 94 MICH. L. REV. 554, 578 (1995). Consequently, I have recently urged that congressional action in that situation is unwarranted. Jesse H. Choper, *Taming Congress's Power Under the Commerce Clause: What Does the Near Future Portend?*, 55 ARK. L. REV. 731, 772 (2003).

22. This is similar, but not identical, to ERWIN CHEMERINSKY, INTERPRETING THE CONSTITUTION 84 (1987).

23. One cannot unqualifiedly accept this formulation without rejecting the venerable positions of Jefferson, Jackson, and Lincoln that no branch of government is authorized to act as final arbiter and that each may determine constitutionality when exercising its constitutionally assigned powers. My functionally grounded instincts coincide with our developed thinking that the Court should possess the ultimate decisionmaking authority *and* that the other departments should feel bound thereby. *See* Cooper v. Aaron, 358 U.S. 1, 18–19 (1958) (holding in the context of desegregation that, while education is primarily a state power, it is a power which must be exercised in accordance with federal constitutional requirements as announced by the Court). Still, there are situations where I lean in the opposite direction, particularly when this produces greater security for individual rights, e.g., after the Court upholds the constitutionality of a federal statute, a president who disagrees with the Court's judgment declines to enforce it, pardons those convicted under it, or vetoes similar legislation.

24. *See infra* Part I.B.

25. Baker v. Carr, 369 U.S. 186, 217 (1962).

elected branch. Second, pursuant to a functional rather than a textual approach, when judicial review is thought to be unnecessary for the effective preservation of our constitutional scheme, the Court should decline to exercise its interpretive authority. Third, the Court should not decide issues for which it cannot formulate principled, coherent tests as a result of "a lack of judicially discoverable and manageable standards."[26] Finally, I would tentatively suggest that constitutional injuries that are general and widely shared are also candidates for being treated as political questions. These four criteria have a common thread: they identify questions either that the judiciary is ill-equipped to decide or where committing the issue to some political branch promises a reliable, perhaps even a superior, resolution.

A. Textual Commitment

The first criterion, textual commitment to a coordinate branch, involves the allocation of power among the national branches. It is perhaps the most straightforward.[27] It is difficult to disagree with the proposition that if the text of the Constitution or the original understanding of its meaning, as reflected in its "structure and underlying political theory,"[28] persuasively leads to the conclusion that the elected branches rather than the Court should be the final arbiter of its meaning, then the Justices should withdraw. Although, as I shall discuss further, this will very rarely be true, it merits emphasizing that the Court's finding a political question under any of my four suggested tests does *not* instruct either Congress or the president or state legislators or executive officials that they have an *unbounded discretion* to settle the matter, but rather that their task is to make as *informed and sensitive a constitutional judgment* as possible.

The consequences of removing the prophylaxis of judicial oversight by vesting full authority in the political branches are, of course, incalculable. Still, it must be remembered that political action by multi-member bodies often depends on the votes of just a few. Thus, the possibility that the product of the decisionmaking process

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26. *Id.*

27. For the view that this is the *sole* ground for departing from *Marbury*'s edict that "it is, emphatically, the province and duty of the judicial department, to say what the law is," 5 U.S. (1 Cranch) 137, 177 (1803), see Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 3 (1959).

28. Pushaw, *supra* note 15, at 1196.

of the political branches, when they consciously exercise final constitutional authority, will be undertaken with a greater adherence to principle than when they engage in ordinary lawmaking is greatly increased by the fact that only a small number of legislators (or executive officers) are usually needed to determine the outcomes. Only *their* sense of duty must be affected.[29] Consequently, there is at least some reasonable chance (as could arise by the Court's possible ruling that certain claims of individual rights in the area of military and foreign affairs are committed for resolution by the national political branches)[30] that acceptance of this constitutional responsibility by the president and legislature may result in greater protection for personal liberties than would the Court's deciding the merits while giving great deference to the political decisionmakers (as the government argued and some of the lower courts decided in the initial group of War on Terrorism cases to reach the Supreme Court).[31]

This possibility of greater political responsibility may be illustrated by the operation of the firm rule in place between 1935 and 1990 respecting the scope of Congress's power under the Commerce Clause. The Court upheld exercises of authority over state and local matters as long as "Congress had a rational basis for finding that . . . [the regulated activity] affected commerce."[32] The rationale of how judicial review—rather than treatment of the matter as a political question—may tend to enhance national hegemony rather than protect local governance in the context of the Commerce Clause is simple enough. Suppose that members of Congress who ignore constitutional concerns for states' rights prevail in the legislative process, and the Court then upholds the enacted statute in deference to Congress's apparent judgment that it is constitutional. But if that congressional judgment has never really been made, judicial review is self-defeating. Lawmakers who believe that constitutionality is the equivalent of whatever the Court upholds will be emboldened to take further national steps into what were previously thought to be state

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29. For modern examples of serious constitutional consideration by some national legislators, see Louis Fisher, *Constitutional Interpretation by Members of Congress*, 63 N.C. L. REV. 707, 718–22, 740–41 (1985).

30. *Cf.* Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103 (1948), described *infra* in note 212.

31. Hamdi v. Rumsfeld, 542 U.S. 507 (2004); Rasul v. Bush, 542 U.S. 466 (2004); Rumsfeld v. Padilla, 542 U.S. 426 (2004).

32. Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 258 (1964).

preserves. Indeed, even those Senators and Representatives who are most sensitive to the limits of national power, and who treat the constitutional question very seriously, cannot help but be affected by judicial validation on the merits of earlier federal regulations. As another illustration of this dynamic, it may well be that the Senate will act more conscientiously and with greater sensitivity while trying impeachments when the legislators know that their decision is final than if the rule were that the action could be challenged in the courts but that the Senate possessed "wide discretion"[33] and would be upheld as long as it stayed within its "broad boundaries."[34]

Even prior to his historic pronouncements in *Marbury*, John Marshall expressed his view that although some "interpretation[s] of rules of law . . . demanded the exercise of the type of discretionary judgment that characterizes political action," this "did not thereby cease to be a matter of applying legal norms" and "principle[s],"[35] and he "believed in the ability of the political branches conscientiously to interpret and obey the Constitution . . . especially in those cases beyond the power of the judiciary to resolve."[36] Thus, even if the Court had adopted a "color blind" or "strict neutrality" standard for its review of race- and sex-based state action under the Fourteenth Amendment, in contemporary America, were the Justices subsequently to rule that the criteria for the selection of high ranking Cabinet officials are exclusively within the province of the executive, a constitutionally caring president might well conclude that, regardless of the judicially determined invalidity of all other kinds of race- or sex-based state action, it is important (or "compelling" in equal protection terms) that appointed government leaders reflect the racial, ethnic, and gender makeup of the general population.

B. Federalism/Separation of Powers vs. Individual Rights

The second criterion, like the first, concerns the division of authority among the Congress, the president, and the Court, but, like the third and fourth criteria, focuses on the functional role of judicial review rather than on constitutional text and original understanding.

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33. Nixon v. United States, 506 U.S. 224, 239 (1993) (White, J., joined by Blackmun, J., concurring in the judgment).

34. *Id.* at 253 (Souter, J., concurring in the judgment).

35. Walter Dellinger & H. Jefferson Powell, *Marshall's Questions*, 2 GREEN BAG 2D 367, 373 (1999).

36. *Id.* at 377.

This second gauge distinguishes between matters of constitutional structure—questions relating to federalism and separation of powers between the political branches[37]—and those involving individual rights. The basic rationale—which is fully developed in my book and will only be sketched in this Article—rests on notions of institutional competence. By abstaining when the political branches may be trusted to produce a sound constitutional decision, the Justices reduce the discord between judicial review and majoritarian democracy and enhance their ability to render enforceable decisions when their participation is vitally needed. Moreover, since issues of constitutional power between the nation and the states and between the executive and legislative branches turn more on matters of pragmatic operation than on those of principled interpretation (unlike questions of individual rights), there is a much sounder basis for vesting such decisions with the political rather than judicial organs of government. It is important to recognize that the constitutional issue posed by the contention that the national government or one of its political branches has acted beyond its delegated authority is wholly different from the assertion that government action abridges individual rights. The essence of the latter type of claim is that no organ or government—federal or state, legislative or executive—may take the challenged action. In contrast, an alleged violation of the federalism or separation of powers principles concedes that one of the two agencies of government—the nation or the states, Congress or the president—has power to engage in the conduct; the argument is simply that the particular organ that has acted is, constitutionally, the improper one. Finally, since the legislative and executive departments are well equipped to handle constitutional structure issues because the competing interests—federal power versus states' rights, congressional versus executive authority—are forcefully represented in the national political process, the justification for judicial review, the most antimajoritarian exercise of the national government's power, is at a low ebb in those matters.[38]

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37. With respect to constitutional conflicts between the political branches and the Supreme Court, I urge that, since the federal judiciary is not well represented in the national political process, the Court should continue to use its power of judicial review to reject laws that improperly restrict or expand the Court's authority. *See* CHOPER, *supra* note 13, at 380–415.

38. Most constitutional provisions that I would subject to political question analysis under this criterion may also generate individual rights claims, which should be subject to normal judicial review independent of constitutional structure issues. For example, in *United States v. Darby*, 312 U.S. 100 (1941), it was contended that the Fair Labor Standards Act of 1936 (which

Again, I wish to emphasize the *functional* rather than *textual* basis for this view. The clauses of the Constitution that allocate power between the national government and the states (such as the Commerce, Taxing, and Spending powers), and those that divide authority between Congress and the president (such as the Appointments and Treaty provisions) no more plainly reveal, either by text or intent, which institution of government should determine the constitutionally proper balance than does Article IV's proviso that "the United States shall guarantee to every State in this Union a Republican Form of Government"[39] or Article V's procedures for amending the Constitution.[40] While the Court has ruled that both the Guarantee Clause and Article V raise political questions, they no more satisfy the textual commitment criterion than most other clauses of the Constitution whose language plainly places power in the political branches but still have been traditionally subject to judicial interpretation. And, as above, I wish also to underline that although these matters of constitutional structure are nonjusticiable under my approach, they are still outside the realm of everyday politics in the sense that they should not be resolved by *conventional political criteria* for majoritarian decisionmaking, but rather by a *deliberative constitutional judgment*. To whatever extent this occurs, however—and I neither contend nor expect that it would be often[41]—in my view, such questions are still best decided by a branch that, unlike the judiciary, is capable of being politically accountable and dealing with matters of practicality.

This second criterion, in particular, also takes account of John Marshall's understanding that the constitutional division of authority

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regulated wages and hours in factories that produced goods for interstate commerce) exceeded Congress's commerce power, *and*, even if it were within that power because the matter substantially affected interstate commerce, nonetheless such regulation of personal economic freedom was a deprivation of property without due process of law, *id.* at 125. Similarly, in *United States v. Belmont*, 301 U.S. 324 (1937) and *United States v. Pink*, 315 U.S. 203 (1942), it was charged both that President Franklin D. Roosevelt's executive agreement with the Soviet Union respecting Russian assets within the states was an invasion of states' rights *and* that it violated the Fifth Amendment by depriving individual creditors of property without due process of law and by taking private property without just compensation. *Belmont*, 301 U.S. at 327, 332; *Pink*, 315 U.S. at 221, 226.

39. U.S. CONST. art. IV, § 4.

40. U.S. CONST. art. V.

41. *But see supra* note 29 and accompanying text (emphasizing that not infrequently only a few members of the political branches need be altruistically influenced in order to achieve a praiseworthy outcome).

is founded largely on questions of institutional competence. Professors Walter Dellinger and H. Jefferson Powell write that

> Marshall thought that the Constitution expects of political officials no less than of judicial ones the ability and willingness to interpret and apply legal norms. But he did not think that in doing so the politicians could or would renounce politics. Indeed, on some issues only the political capacity to make judgments of prudence and policy can fulfill the Constitution's requirements.[42]

To illustrate his approach, Marshall believed that the constitutionally established power to extradite under a treaty is properly committed to the executive department because only that branch can have a complete view of how this judgment will affect the nation's foreign relations.[43] Similarly, he voted to uphold a statute granting the president the unreviewable authority to identify an emergency that justified activating the militia to repel an attack.[44] Moreover, the Court has continued this practice of invoking the political question doctrine when venturing into areas where it believed that the executive had special responsibilities. Thus, in *Gilligan v. Morgan*,[45] the Court declined to exercise close supervision over training and command of the Ohio National Guard, explaining that the executive and the legislature were better equipped for this task.[46]

Adjudication of individual rights claims should similarly depend on the special qualifications of each of the branches. The necessity of vindicating constitutionally secured personal liberties is the principal justification for the awesome (and antimajoritarian) power that judicial review confers upon the federal judiciary. For reasons already

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42. Dellinger & Powell, *supra* note 35, at 376.

43. Speech of the Honorable John Marshall (Mar. 7, 1800), *in* 18 U.S. (5 Wheat.) app. note I, at 28 (1820).

44. Martin v. Mott, 25 U.S. (12 Wheat.) 19, 29 (1827).

45. 413 U.S. 1 (1973).

46. *See id.* at 10 ("The complex subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, subject always to civilian control of the Legislative and Executive Branches."). In *Gilligan*, the Court relied mainly on the textual commitment criterion. *See id.* at 6 (noting Art. 1, § 8, cl. 16's explicit reservation to Congress of authority over militias). To the extent that the conclusions in all three situations just discussed are ultimately influenced by the judiciary's inability to gather and assess the relevant data, the matter falls within the "manageable standards" criterion (to be discussed shortly), *see id.* at 14 (Blackmun, J., joined by Powell, J., concurring) (asserting that courts lack adequate standards by which to judge specific military activities), although such factors may surely influence the Court's judgment on original understanding.

suggested,[47] an alleged violation of constitutional structure simply does not implicate the same concerns as for individual rights. Chief Justice Marshall adverted to this precept in *Marbury* when first raising the notion of a political question, concluding that no judicial involvement is warranted when a claim's "subjects are political," thus "respect[ing] the nation, not individual rights . . . ."[48] This distinction exists because, where personal rights of underrepresented interests are at stake, it cannot often be assumed that the majoritarian political process can produce a trustworthy result.

Consequently, the Court should be exceedingly reluctant to find an individual rights claim to be nonjusticiable, even though it may concern "politics," the political process, or the internal workings of the political branches.[49] (Of course, this in no way guarantees that the personal liberty appeal will succeed.) Nonetheless, there may be controversies implicating personal liberties that the Court concludes are governed by the political question doctrine. Thus, under the textual commitment criterion, as noted earlier, if the Constitution is read to commit authoritative interpretation of a constitutional provision to the political branches, the Court must decline to rule for the claimant. In my judgment, however, the text or original understanding would have to be exceptionally clear to persuade the Court to reach this result in order to defeat what it otherwise believes may be a violation of a constitutionally protected individual right.[50] Few (if any) constitutional provisions unambiguously require such a determination.

C. Judicially Manageable Standards

My third criterion, the absence of "judicially discoverable and manageable standards," is drawn from *Baker v. Carr*.[51] It is concerned not only with issues arising at the national level (as *Baker* reasoned), but it (and my fourth criterion as well) also includes acts of state or local governments and addresses not just questions involving division

47. *See supra* notes 37–38 and accompanying text.

48. 5 U.S. (1 Cranch) 137, 166 (1803).

49. *See generally* JOHN H. ELY, DEMOCRACY AND DISTRUST (1980).

50. For a prominent example of a court that does so, see *Hobson v. Tobriner*, 255 F. Supp. 295 (D.D.C. 1966), in which the court, drawing on a long line of Supreme Court opinions, read Art. I, § 8, cl. 17 as granting Congress "plenary power" to deny citizens of the District of Columbia "the right to vote insofar as the local government is concerned," *id.* at 299–300.

51. *See supra* note 4 and accompanying text.

of power but mainly issues of individual rights.[52] The "manageable standards" test reflects the judgment that, under some circumstances, a decidedly practical restraint on justiciability may be necessary. There may be constitutional provisions for which the Court simply lacks the capacity to develop clear and coherent principles to govern litigants' conduct. This is true even though the Justices can always produce *some* standard. Professor Tushnet argues, for example, that the "one person, one vote" precept developed by the Court in *Reynolds v. Sims*[53] exceeds the Court's proper role in fashioning creative guidelines while using what it claims are simply "ordinary [methods] of constitutional interpretation."[54] For me, however, the real question is whether a particular standard is constitutionally warranted ("judicially discoverable"), desirable, and sufficiently principled to guide the lower courts and constrain all jurists from inserting their own ideological beliefs in ad hoc, unreasoned ways. Although my thinking about this is still tentative, examples of the constitutional problems that may resist judicial efforts to resolve in accordance with the criteria just set out include whether a partisan gerrymander violates the Equal Protection Clause,[55] limiting punitive damages under the Due Process Clause, and (probably most controversially) the definition of a regulatory "taking" under the Just Compensation and Takings Clause.[56]

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52. For the view that this is consistent with the pre-*Baker* use of the political question doctrine, see Fritz W. Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 YALE L.J. 517, 538–39 (1966). *See also* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 184 (1962) (noting that one element of the political question doctrine is "the Court's sense of lack of capacity . . . [because of] the strangeness of the issue and its intractability to principled resolution").

53. 377 U.S. 533 (1964).

54. Tushnet, *supra* note 7, at 1208. *Compare* Scharpf, *supra* note 52, at 555–58.

55. *See infra* Part III.B.

56. Whether the judiciary can articulate appropriate criteria for determining whether the nation is at "war" was debated in *Campbell v. Clinton*, 203 F.3d 19, 22–23 (D.C. Cir. 2000). Compare the separate concurrences of Judge Silberman, *see id.* at 25–27 (noting that there is "[no] constitutional test for what is war" in contrast to "measures necessary to repel foreign aggression") and Judge Tatel, *see id.* at 37 (observing that this is "no more standardless than any other question regarding the constitutionality of government action"). For the view that the word "war" had a relatively specific meaning at the time the Constitution was ratified, and that this meaning has been further refined in case law and diplomacy, see Michael P. Malakoff, *The Political Question and the Vietnam Conflict*, 31 U. PITT. L. REV. 504, 507–08 (1970). He argues that, if the Court were to confront a question such as "Is the United States now at war?" in the course of interpreting the War Powers Clause, it would have several sources of manageable standards, including the text of the Constitution, the intent of the Framers, the "characteristics common to wars," and "the meaning of the term 'war' in international law and in domestic law."

A final observation respecting the manageable standards criterion: in *Nixon v. United States*,[57] the Court reasoned that the absence of such standards "may strengthen the conclusion that there is a textually demonstrable commitment to a coordinate branch."[58] Similarly, *Luther v. Borden*[59] suggested that the definitional difficulties that the Court would face in deciding whether a challenged state government was "republican" influenced its conclusion that the Guarantee Clause was intended to be ultimately interpreted by Congress.[60] Nonetheless, I am doubtful that the text or original understanding of either the Impeachment or Guarantee Clauses is sufficiently clear to negate *all* judicial review, especially because of the legitimate individual rights claims that may be made in both the impeachment and *Luther* contexts.[61] Therefore, if the Court were to determine that a constitutional issue presents a political question because of the manageable standards criterion—as was suggested by the plurality opinion in *Coleman v. Miller*[62] on the question of a reasonable time for the pendency of a constitutional amendment[63]—its conclusion should not be based mainly on the textual commitment theory but rather on the functional approach of judicial review not being feasible. Once again, however, I want to be clear that this criterion is grounded in judicial incapacity to fashion a governing standard, and not in the Court's judgment that the political branches ought to have "discretion free of principled rules."[64] To the contrary, the ideal is that Congress and the executive will develop their own principles, albeit informed by political needs and experience.

Id. *But see* Archibald Cox, *The Role of Congress in Constitutional Determinations*, 40 U. CIN. L. REV. 199, 204–05 (1971) (arguing that a judicial attempt to formulate "a workable principle for delimiting the President's power to engage in military activities overseas" would be "far from easy" because of line-drawing problems (e.g., whether a declaration of war would be needed to send military advisors or arms) and because of courts' limited ability to assess other relevant factors (such as negative effects a declaration of war might have on international relations)).

For a discussion of manageable standards in respect to proposed constitutional amendments, see *infra* notes 285–89 and accompanying text.

57. 506 U.S. 224 (1993).

58. *Id.* at 228–29; *see also supra* note 46.

59. 48 U.S. (7 How.) 1 (1849).

60. *Id.* at 47.

61. *See infra* notes 126 and 311 and accompanying text.

62. 307 U.S. 433 (1939).

63. *Id.* at 436; *see infra* notes 285–86 and accompanying text.

64. BICKEL, *supra* note 52, at 186.

D. Generalized Grievance

A fourth criterion for nonjusticiability, about which I am yet more uncertain than the third, borrows from standing doctrine the concept of a "generalized grievance"—a harm by which people are injured or affected in a similar way.[65] Generalized grievance cases may encompass individual constitutional rights insofar as all (or almost all) persons may truly be said to have suffered comparable injury in respect to their personal liberties. This may fairly lead to the conclusion that a decision by a government body that is accountable to an electoral majority trustworthily represents all affected. Although I believe that there are very few examples of this phenomenon, cases such as *United States v. Richardson*,[66] involving the contention that the Statement and Account Clause mandated that the CIA publish its budget even though a federal statute allowed it to be kept secret,[67] and *Schlesinger v. Reservists Committee to Stop the War*,[68] presenting the argument that a Senator's or Representative's membership in the Armed Forces Reserves violates the Incompatibility Clause,[69] are potential candidates.

It is clear that neither clause involves national power versus states' rights. Nor does either appear to cover genuine constitutional clashes between Congress and the president. However, it is debatable as to whether they pose individual rights issues. It may be that they

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65. Justice Scalia has discussed this factor under the heading of standing, *see* Fed. Election Comm'n v. Akins, 524 U.S. 11, 29–37 (1998) (Scalia, J., joined by O'Connor & Thomas, JJ., dissenting), but it seems to me that his rationale, particularly as articulated in an earlier essay, *see* Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK. U. L. REV. 881, 896–97 (1983), leads at least equally to the conclusion that this should be treated as a nonjusticiable political question.

66. 418 U.S. 166 (1974).

67. *Id.* at 167.

68. 418 U.S. 208 (1974).

69. *Id.* at 209–11. *Richardson* held that the plaintiff lacked Article III standing. 418 U.S. at 179–80. But in *Akins*, the Court ruled that "where a harm is concrete, though widely shared, the Court has found 'injury in fact,'" *Akins*, 524 U.S. at 24, thus enabling Congress to enact a statute granting standing and satisfying the Article III "cases" or "controversy" requirement. While I do not disagree with *Akins*' reasoning in respect to Article III, the political question problem presents an independent issue and may result in a finding of nonjusticiability even though the situation plainly involves a case or controversy. *See* CHOPER, *supra* note 13, at 404:

> [T]he federal judiciary . . . holds ultimate authority to determine that certain legislative conferments of jurisdiction either (1) invalidly augment the judicial province that is carefully described in Article III or (2) otherwise unconstitutionally undermine the critical role historically contemplated and contemporarily demanded of the Supreme Court in American government.

fall into yet a different category that I have described as "housekeeping" matters, dealing with administrative details of the federal departments (for example, the minimum age for elected national officials) or with relations among the states (for example, the Extradition Clause).[70]

But assuming (though very doubtfully on my part) that *Richardson* and *Reservists* embrace constitutionally secured personal freedoms, they are clearly distinguishable from the more usual constitutional challenges that are plainly understood to implicate individual rights such as the freedoms of speech and religion or the protections of the accused. In *Richardson* and *Reservists*, the injury was more uniformly distributed. For example, a statute that required everyone to attend religious services on Sunday may be read as treating all the same, but its enormously disparate impact is obvious. So, too, for a law that compelled all citizens to pay an annual $100 fee in order to vote. It might be argued that the *Richardson* injury, for example, is in fact of the same variety, since the denial of information about the CIA's budget also affects people to varying degrees. Some will think the withholding of information a desirable precaution, most will be indifferent, and a few, like the plaintiff, will protest. Nevertheless, it appears unlikely that the group objecting to the CIA measure is a stable or identifiable one, and as a result there is little reason to believe that the ordinary political process is not a fair and trustworthy method for resolving its concerns.[71] This conclusion stems largely from the nature of the constitutional provision at issue. Even if the Statement and Account Clause might be said to establish a kind of personal liberty, it does not appear to be one that falls within the class of "fundamental" rights that serve to protect an identifiable racial, religious, or political minority that might be subject to majoritarian abuse. Such constitutionally secured rights must be withdrawn from authoritative interpretation by the ordinary political process. Instead, the provision may be seen as establishing a right that belongs to the majority (rather than an endangered, constitutionally guarded minority), which it may at its own option choose to forego, as was done in respect to maintaining secrecy for the CIA budget.[72] If a

70. *Id*. at 2.

71. For a discussion of which minorities merit judicial protection, see *id*. at 76–77.

72. Similar reasoning has been applied with respect to the Incompatibility Clause as addressed in *Reservists*. *See* Recent Case, Reservists Committee to Stop the War v. Laird, 323 F. Supp. 833 (D.D.C. 1971), 85 HARV. L. REV. 507, 511 (1971):

future majority wishes to reclaim the right, it is a simple matter for it to repeal the legislation so as to require normal publication of the information.

When should the generalized grievance criterion apply to a situation in which a majority of voters appears to restrict its own constitutional rights, such as by agreeing to an unevenly apportioned legislature or by imposing term limits for elected officials? Does the right at issue belong to the public at large—as might be argued about the right to receive information about the CIA's budget—or is it, rather, an individual right that is not subject to majority infringement? In the 1964 *Reapportionment Cases*,[73] the Court ruled that a malapportioned legislature violates equal protection even if approved "by a vote of a majority of a State's electorate,"[74] reasoning that because the constitutional principle safeguards the right of each citizen "to cast an equally weighted vote," it extends even to the situation in which the majority creating the malapportionment includes a majority of those who would be underrepresented by it.[75] This ruling seems to be contrary to the generalized grievance test. It may be helpful to contrast the one-person, one-vote guarantee with the constitutional right at stake in a case involving laws allegedly respecting an establishment of religion. For example, the fact that a majority of non-Methodists authorized a state appropriation to construct a Methodist church should not bar a court from granting an injunction against the use of state funds for this purpose. Disregarding majority preferences here would be necessary to vindicate the rights of a specially protected minority: non-Methodists

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> [A]s the [lower] court pointed out, the constitutional provision in question was not designed to meet a possible abuse that would typically manifest itself in recognizable harm to a single individual or a distinct group of individuals. As a guard against executive interference with the legislature, the provision was meant to protect the liberties of all citizens. The primary injury which arises from a violation is to the polity as a whole and to each citizen as a member of it.

(footnotes omitted).

73. Lucas v. Forty-Fourth Gen. Assembly, 377 U.S. 713, 736 (1964).

74. *Id.* at 736.

75. *Id.* It is conceivable that a knowing majority might agree to such a scheme even though it would appear to be voting against its own interest. At the time the *Reapportionment Cases* were decided, I noted that white urban voters might support a malapportioned legislature in the belief that rural voters would take a firmer stand against integration. Jesse H. Choper, *On the Warren Court and Judicial Review*, 17 CATH. U. L. REV. 20, 31 (1967). Though less likely, it is even possible to imagine a similar scenario occurring today. For example, voters in a state whose cities were experiencing a wave of pro-tax newcomers might be persuaded to rest a greater share of voting power in the reliably anti-tax countryside.

who did not want to support the Methodist Church. Similar reasoning might be applied to the contention that the Court should refuse to consider a constitutional challenge to unequal treatment of women because they comprise a political majority. The response would be that persons of that gender (perhaps many) do not view such government measures as injuring them, but those who do (even if they are a minority of all women) should have their equal protection rights sustained.

Term limits and popularly enacted malapportionments, however, present a different problem. In *U.S. Term Limits, Inc. v. Thornton*,[76] the Court invalidated term limits as applied to members of Congress, finding that the requirements for congressional service imposed by the Qualifications Clause were meant to be exclusive.[77] The Court also emphasized the principle that "sovereignty confers on the people the right to choose freely their representatives to the National Government."[78] Although neither the majority nor the dissent treated the issue of term limits as a political question,[79] it deserves consideration under the generalized grievance criterion. In the absence of proof to the contrary, neither the imposition of term limits nor an informed referendum establishing unequally sized legislative districts would appear to have either the motive or effect of preventing an identifiable minority group from attaining power.[80] Moreover, in contrast to malapportionments that are the exclusive creation of a legislature, and which current members have a stake in perpetuating, there is no structural barrier to the electorate's

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76. 514 U.S. 779 (1995).

77. *Id.* at 837–38.

78. *Id.* at 794.

79. Justice Thomas in dissent did suggest, however, that any individual rights issues posed by the denial of ballot access to particular candidates were best analyzed under the First or Fourteenth Amendments rather than the Qualifications Clause. *Id.* at 925 (Thomas, J., dissenting).

80. In fact, term-limits proponents have suggested that they will increase the representation of women and minorities. The reasoning is that legislators elected at a time when more barriers existed to women and minority candidacies will no longer enjoy the benefits of long-term incumbency, and their opponents will have the opportunity to compete on equal ground. In practice, however, the results of recent elections for state legislatures have not borne out this view. Professor Rhine L. McLin, *The Hidden Effects of Term Limits: Losing the Voices of Experience and Diversity*, 32 U. TOL. L. REV. 539, 544–45 (2001), reports that, while term limits have caused some experienced women and minority legislators forced out of state assembly seats to run for—and win—contests in state senates, they have done little to bring newcomers into the political process, and their overall number in states with term limits has not much increased.

repealing previously enacted term limits and unwanted districting if they no longer command the majority's support. Therefore, although term limits and *all* malapportionments unquestionably restrict the individual's right to vote, it is not clear to me that this is the sort of personal liberty that courts must intervene to protect. Rather, the ordinary political process appears to provide a viable alternative.[81]

Still, even on the fair assumption that there is no reason to think that the political branches cannot be trusted to fairly resolve at least several of the constitutional claims discussed above, there are major hurdles to be overcome before they may be labeled as nonjusticiable. The fact that a widely shared grievance is strongly opposed neither guarantees nor perhaps even makes it likely that the political branches will correct it. While the traditional electoral process or other forms of direct political activity are available in theory, it may well be that various impediments will make them unlikely to respond very often. Probably, though, when the issue is significant enough, the political process will (and has) answered.[82] Moreover, the legislative or executive branches' failure to act in situations where the burden is very broadly felt does not necessarily make the outcome unfair. For both of these reasons, the criterion, if administrable, may still be viable.

II. PRUDENTIAL APPROACH

Before applying the four proposed criteria to a series of problems often discussed as political questions, a most prominent

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81. A nice question, suggested to me by a very thoughtful comment of Professor Dan Farber, is whether a state court's resolution of a political question (as defined in this Article) is final. I think not. Most simply, if a state appellate court were to hold that a federal statute is beyond congressional power (and thus, for example, does not preempt a state regulation), the Supreme Court has jurisdiction to review and reverse on the ground that, under the second criterion, the national political branches (who have already spoken in enacting the federal law) have final authority on the matter. (Although the situation is much less likely, the same result follows if a state court were to pass on a constitutional confrontation between Congress and the president.) On the other hand, suppose a state court were to decide an individual rights claim under a federal constitutional provision that the Justices felt was nonjusticiable pursuant to the manageable standards or generalized grievance criteria. If the individual right were one that Congress had express or implied delegated power to enforce, as under Section 5 of the Fourteenth Amendment or the Necessary and Proper Clause—and it would seem that virtually all individual rights fit into this category—then the issue would be somewhat more complex, and beyond the scope of full consideration in this Article. For discussion shedding some light, see *infra* notes 112 and 120 and accompanying text.

82. For development of this argument, see CHOPER, *supra* note 13, at 312–13.

proposal merits further consideration: the expedient technique of avoiding especially contentious disputes that the Justices may feel disinclined to decide according to adequately principled rules because of a fear of weakening their already vulnerable branch of government. This path of prudence (or "realpolitik")[83] was most famously developed by Professor Alexander Bickel (for political questions[84] as well as other tools of judicial abstinence), discussed by Justice Felix Frankfurter in his opinions in *Colegrove v. Green*[85] and *Baker v. Carr*, suggested (albeit inexplicitly) by the Court's famous formulation in *Baker*, more recently invoked by Justice David Souter in *Nixon*[86] and Justice Stephen Breyer in *Bush v. Gore*,[87] and identified historically by scholars as an element of the political question doctrine.[88] It is plainly questionable when applied to the Court's refusal to decide matters that are brought before it under its congressionally imposed mandatory jurisdiction.[89] The Court has never determined—when faced with a controversy that is sufficiently concrete, developed, and adverse to fulfill the explicit requirements of Article III—whether the political question doctrine is rooted in the Constitution or is simply a judicial construct that exists at the sufferance of the political branches.[90] Of course, under the textual

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83. Redish, *supra* note 12, at 1032.

84. BICKEL, *supra* note 52, at 125–26, 183–84.

85. 328 U.S. 549, 552–56 (1946).

86. 506 U.S. 224, 252–53 (1993) (Souter, J., concurring in the judgment).

87. 531 U.S. 98, 157 (2000) (Breyer, J., dissenting).

88. Professor Maurice Finkelstein posits that the political question

> applies to all those matters of which the court, at a given time, will be of the opinion that it is impolitic or inexpedient to take jurisdiction. Sometimes this idea of inexpediency will result from the fear of the vastness of the consequences that a decision on the merits might entail. Sometimes it will result from the feeling that the court is incompetent to deal with the particular type of question involved. Sometimes it will be induced by the feeling that the matter is "too high" for the courts. But always there will be a weighing of considerations in the scale of political wisdom.

Maurice Finkelstein, *Judicial Self-Limitation*, 37 HARV. L. REV. 338, 344–45 (1924).

In contrast to this notion of totally unrestrained "ad hoc" avoidance, see David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543, 545 (1985), suggesting that entire categories of cases should be nonjusticiable.

89. *See* Gerald Gunther, *The Subtle Vices of the "Passive Virtues"—A Comment on Principles and Expediency in Judicial Review*, 64 COLUM. L. REV. 1, 12 (1964) (noting that Bickel's analysis largely ignores Congressional regulation of Supreme Court jurisdiction).

90. In *Baker*, the Court stated that its conclusion "that this cause presents no nonjusticiable 'political question' settles the only possible doubt that it is a case or controversy." 369 U.S. 186, 198 (1962). This would seem to mean that if the claim *did* present a political question, there *might* be *some* doubt that it fell within Art. III, § 2. But the Court then held, in the very next sentence, that "the matter set forth in the complaint does arise under the Constitution," *id.* at

commitment criterion, all the Court need do is to hold as a matter of constitutional interpretation that resolution is committed to the political branches and that, as a consequence, no ordinary act of Congress may supersede the command of the fundamental charter. But this does not work for my other three criteria, which are functional and not determined by text or original understanding. I have argued elsewhere, however, that if the Court concludes that the resolution of certain constitutional questions would be inconsistent with proper performance of its essential role in our system of government, then it should invalidate efforts by the political branches to require it to do so.[91] Bickel's prudential approach may well be more appropriately used, however, pursuant to the Court's discretionary system of certiorari, now covering almost all of its docket. This is totally different from a holding of political question, which does not merely put off a final decision to another day, but prevents all federal courts from adjudicating the merits of a constitutional issue.

Although I concur in Justice Robert H. Jackson's famous bon mot, offered to inform the Court's task of interpreting our fundamental charter, that the Justices should not "convert the constitutional Bill of Rights into a suicide pact,"[92] and I am not unsympathetic to the pragmatic notions about discretion sometimes being the better part of valor and living to fight another day, still, I would be much troubled in concluding that the Court's concern for individual rights should be affected by its judgment of whether a particular result will bring criticism, hostility, or disobedience. Such speculation must be based on social-scientific predictions that judges are not well equipped to make. More importantly, for the Court to make this an element of how it finally interprets the Constitution conflicts with the politically neutral and principled role supporting its antimajoritarian existence in a democratic government. By following this prudential path in any but the most extraordinary and compelling circumstances, the Court would be shirking its vital function as that government agency of last resort for guarding the constitutional rights of those without political influence.

199, thus strongly suggesting that whether or not the malapportionment case raised a nonjusticiable political question, it is still "within the federal judicial power defined in Art. III, § 2," *id.* at 200.

91. CHOPER, *supra* note 13, at 404–15.

92. Terminiello v. Chicago, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting).

III. APPLICATION TO SPECIFIC TOPICS

The remainder of this Article considers how constitutional issues historically considered to be political questions might be analyzed under the suggested criteria. Professor Erwin Chemerinsky suggests seven broad categories: the guarantee of a republican form of government, the electoral process, foreign policy, congressional procedure, ratification of constitutional amendments, separation of powers questions (I would include federalism under this heading), and impeachment.[93] While some constitutional provisions fall into more than one category (impeachment claims, for example, may invoke congressional procedures), this system of classification should be helpful in applying the proposed approach and giving it fuller content.

A. Guarantee Clause

There is no provision of the Constitution more closely associated with the political question doctrine than Art. IV, § 4's mandate that "[t]he United States shall guarantee to every State in this Union a Republican Form of Government."[94] The Court has frequently found claims based on the Guarantee Clause to be nonjusticiable. In my view, however, the Guarantee Clause should be a proper subject for judicial review when it is invoked as a guarantor of individual rights.

A comprehensive examination of the Guarantee Clause forcefully contends that it was added to the Constitution mainly as a kind of efficiency device—more to ensure the proper functioning of government than to protect the individual.[95] Professor Arthur Bonfield's position was that the Framers, in devising the provision, were influenced by the prevailing political theories of the time and believed that the union would be stronger and more stable and harmonious if its component states resembled both one another and the federal government in structure.[96] But neither constitutional text nor original understanding would appear to foreclose some role for the judiciary in enforcing the thrust of the Clause. In this vein,

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93. CHEMERINSKY, *supra* note 5, at 130.

94. U.S. CONST. art. IV, § 4.

95. *See* Arthur E. Bonfield, *The Guarantee Clause of Article IV, Section 4: A Study in Constitutional Desuetude*, 46 MINN. L. REV. 513 (1961).

96. *Id.* at 522, 551 n.164 (1961) (citing 2 CHARLES CURTIS, HISTORY, ORIGIN, AND ADOPTION OF THE CONSTITUTION 470 (1858)).

Bonfield points out that eighteenth-century courts would likely have had little difficulty interpreting its meaning by invoking principles of "natural justice"—including the right of suffrage—believed to be common to all republican governments.[97] In his view, the Framers would have seen the phrase as possessing fairly definite content, and for that reason amenable to judicial interpretation.

Nor would adherence to my criteria depart substantially from what has actually been done with respect to Guarantee Clause claims. Although the Court has often treated *Luther v. Borden* as definitively foreclosing all judicial consideration of the provision, Professor Robert Pushaw has recently pointed out that the Justices frequently considered Guarantee Clause claims in the years between *Luther* in 1849 and *Pacific States Telephone & Telegraph Co. v. Oregon*[98] in 1912.[99] Several such rulings were cited by Justice O'Connor in her opinion for the Court in *New York v. United States*,[100] which rejected a "sweeping" view of *Luther* and indicated that "perhaps not all claims under the Guarantee Clause present nonjusticiable political questions."[101]

In fact, while *Pacific States* may have helped solidify the impression of the Guarantee Clause's immunity from judicial review,[102] the Court followed an approach compatible with the one I suggest. The plaintiff corporation argued that a tax levied by popular referendum was invalid because it had been adopted by direct democracy rather than a government "republican" in form.[103] The Court specifically noted that the plaintiff did not "assert that it was denied an opportunity to be heard as to the amount for which it was taxed" or that "anything inhering in the tax . . . violated any of *its constitutional rights*,"[104] which the Court plainly indicated would have

97. *Id.* at 525–28.

98. 223 U.S. 118 (1912).

99. Pushaw, *supra* note 15, at 1200.

100. 505 U.S. 144 (1992); *see id.* at 184–85 (citing four cases where the Court "addressed the merits" of Guarantee Clause claims).

101. *Id.* at 185. Although I support this point, since the act of Congress in *New York* involved no personal liberties issue but rather concerned only national regulatory power versus states' rights, I unqualifiedly disagree with the decision. *See generally* Jesse H. Choper, *Federalism and Judicial Review: An Update*, 21 HASTINGS CONST. L.Q. 577 (1994).

102. For a discussion of subsequent cases relying on *Pacific States* for this proposition, see Bonfield, *supra* note 96, at 554 n.180, 556–57.

103. *Pacific States*, 223 U.S. at 137.

104. *Id.* at 150 (emphasis added).

presented a justiciable question.[105] Instead, Pacific States' claim was "addressed to the framework and political character of the government,"[106] an issue outside "the reach of judicial power."[107]

Since rather than claiming infringement of its own rights, the *Pacific States* plaintiff indirectly asserted the exclusive rights of the state legislature to be Oregon's lawmaking body (as opposed to the people acting by way of initiative), I believe that *Pacific States* was correctly decided. Even if one posits that Oregon's practice of popular referendum violated the Court's notion of a "republican form of government," it was not challenged as having abridged any personal liberty and thus should not have been subject to judicial review. And even assuming that the Justices believe that the Guarantee Clause does not authorize Congress to alter a practice like Oregon's, were Congress to do so and a challenge claimed only an abridgment of states' rights, there should be no judicial role[108] since individual rights are not involved.[109]

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105. *Id.*

106. *Id.*

107. *Id.* at 151; *see also id.* at 141–42 (discussing whether "the provisions of [Article IV of the Constitution] obliterate the division between judicial authority and legislative power upon which the Constitution rests").

108. For example, in *Ohio* ex rel. *Davis v. Hildebrant*, 241 U.S. 565 (1916), the Court interpreted an act of Congress—that authorized states to create congressional districts "'in the manner provided by the [state] laws,'" *id.* at 568—as allowing Ohio to establish districts by referendum, *id.* at 568–69. The Court rejected an argument that this referendum process violated Art. I, § 4's proviso that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof," U.S. CONST. art. I, § 4, cl. 1; *Davis*, 241 U.S. at 567–70. The Court found that this contention "must rest upon the assumption that to include the referendum in the scope of the legislative power is to introduce a virus which destroys that power, which in effect annihilates representative government." *Id.* at 569. In turn, the essence of this rationale was that the referendum process was at odds with the Guarantee Clause, a matter the Justices would not consider because "the question of whether that guarantee of the Constitution has been disregarded presents no justiciable controversy but involves the exercise by Congress of the authority vested in it by the Constitution." *Id.* Since Congress was empowered to enforce the Guarantee Clause, even if Congress had "mistakenly dealt with a subject which was within its exclusive control," it was "beyond the limits of judicial power" to intervene. *Id.* at 570. Assuming that Ohio's districting process did not raise independent issues of individual rights, the Court's ruling was correct.

109. For adjudication of claims that otherwise proper exercises of the Guarantee Clause contravene personal liberties, see, e.g., *White v. Hart*, 80 U.S. 646, 648, 652 (1871) (holding that the Contracts Clause was violated by a Georgia constitutional provision, required by Congress as a condition of Georgia's readmission to the Union, that Congress deemed necessary for Georgia to have a republican government); *see also* Reynolds v. Sims, 377 U.S. 533, 582 (1964) ("[When admitting states,] Congress simply lacks the constitutional power to insulate States from attack with respect to alleged deprivations of individual constitutional rights.").

Under this approach, the Guarantee Clause would afford the national political branches a significant opportunity, scarcely ever undertaken in the past, to determine the meaning of the term "republican form of government" in a way that would be greatly expanded relative to current understanding. Congress might, for example, mandate that all states establish intermediate appellate courts or operate with bicameral legislatures under the theory that such institutions are necessary elements of a republican government. Similarly, Congress might require that every state permit lawmaking by initiative or referendum (or, alternatively, forbid states from doing so). Indeed, at least in respect to some matters, Congress might elect to use the Guarantee Clause as an alternative to § 5 of the Fourteenth Amendment, which the Court has recently interpreted quite restrictively, ruling in *City of Boerne v. Flores*[110] that Congress cannot exercise these enforcement powers unless the Court is persuaded that the legislation goes no further than remedying or preventing a judicially determined constitutional violation.[111]

For example, one important area to which the Court has declined to extend equal protection principles is whether state and local officers may be selected by appointment rather than election. In *Fortson v. Morris*,[112] the Court held that the one person, one vote principle applies only after a state chooses to hold an election in the first instance.[113] Therefore, Georgia's system—that the governor was to be chosen by the state legislature if no gubernatorial candidate obtained a majority (rather than a plurality) in the popular election—did not violate the right to vote secured by the Equal Protection Clause.[114] Similarly, the Court has ruled that state and local laws can, in many circumstances, structure municipal government to allow appointment rather than election of various officials, such as school board members.[115] Because such practices seemingly affect all

110. 521 U.S. 507 (1997).

111. *Id.* at 527, 536.

112. 385 U.S. 231 (1966).

113. *Id.* at 232–33.

114. *Id.*

115. *See* Sailors v. Bd. of Educ., 387 U.S. 105, 108 (1967) (upholding a system under which the county school board was chosen because there is "no constitutional reason why state or local officers of the nonlegislative character involved here may not be chosen by the governor, by the legislature, or by some other appointive means rather than by an election"); *cf.* Avery v. Midland County, 390 U.S. 474, 476, 480–81 (1968) (holding that equal protection principles *do* apply following the decision to hold an election of local officials).

members of the public equally, they are difficult to cast as equal protection violations even though they may be seen as undemocratic. While this would appear to place these regulations beyond Congress's power in implementing the Civil War Amendments, it need not follow that they could not be brought within federal legislation enacted pursuant to the Guarantee Clause.[116] Similarly, other state and local schemes that the Court has declined to invalidate may also be suitable for redress by Congress under the Guarantee Clause. For example, the Court has held that both of the following claims are nonjusticiable: allegations that improper delegations within a state's governmental system contravened "suffrage" rights,[117] and attacks on the "republican" character of state court decisionmaking procedures.[118] Moreover, since the approach I have outlined makes questions concerning the extent of Congress's powers under the Guarantee Clause nonjusticiable in the absence of an individual rights claim, Congress might confidently alter the judicial rulings in any or all of these cases.

It may be useful to explore an additional refinement. When a litigant invokes the Guarantee Clause to question state practices, the Court might adopt an approach similar to that of the Dormant Commerce Clause. Elsewhere, I have argued that my proposal about the nonjusticiability of the constitutionality of exercises of national power versus states' rights does not apply to the Dormant Commerce Clause because, in adjudicating such matters, the Court is not, strictly (but importantly) speaking, invoking its momentous power of judicial review. Since Congress indisputably has the authority to modify or overturn all such decisions,[119] the Justices are not issuing the final pronouncement on a state or local rule's constitutionality. Nevertheless, the Court's involvement helps to ensure that constitutional values are enforced. In fact, the judiciary may usually be better suited to perform this role in the first instance (acting

116. For an especially ambitious and optimistic consideration of this view, see Ethan J. Leib, *Redeeming the Welshed Guarantee: A Scheme for Achieving Justiciability*, 24 WHITTIER L. REV. 143, 178–216 (2002).

117. O'Neill v. Leamer, 239 U.S. 244, 248–49 (1915).

118. In *Ohio* ex rel. *Bryant v. Akron Metropolitan Park District*, 281 U.S. 74 (1930), Ohio required that, in order for its highest court to declare a law unconstitutional, no more than a single justice could dissent, *id.* at 75. Although five justices had voted to declare a law invalid, because there were two dissenters, the law remained in effect. The Court rejected a Guarantee Clause challenge on the ground that it presented a political question. *Id.* at 79–80.

119. Prudential Ins. Co. v. Benjamin, 328 U.S. 408, 425 (1946).

through a district judge) because this primarily concerns gathering and weighing evidence of a particular law's practical effects. Moreover, the Court is filling a gap left by the reality that Congress lacks the resources to determine on an ad hoc basis the compatibility of isolated local ordinances with the broad demands of the federal system.[120]

A Guarantee Clause approach might be modeled on similar principles, though the Court would not be nearly as well informed by the many earlier signals that Congress has sent regarding its view of the policies underlying the national commerce power. Still, if the Justices believe that a state or local policy conflicts with important values of republican government embodied in the Guarantee Clause that would otherwise go unaddressed, similar to the principle of undue burden on interstate commerce in Dormant Commerce Clause cases, they would have the power to set it aside. Congress, however, would retain full authority to overturn such judicial decisions through ordinary legislation.

Baker v. Carr, which I believe may be viewed as presenting a Guarantee Clause claim in disguise, illustrates how the Court has treated such issues as justiciable when framed in terms of individual rights. Professor Jerold Israel made a forceful argument along these lines at the time. He noted that the equal protection notion of "'rational classification'" invoked in *Baker* is "hardly self-defining,"[121] with no independent meaning in this situation, and instead must be shaped by "the basic value system within which it operates."[122] Without some additional guide, Israel contends, there would be no principled basis for finding legislative districts apportioned on the basis of, say, political subdivisions to be less "rational" than those drawn according to the one person, one vote principle. Instead, a legitimate judicial interpretation of the Constitution must rest on the fact that such an apportionment scheme conflicts with other constitutional values concerning the structure of state governments. The "leading Constitutional evidence" is the Guarantee Clause.[123] Under this type of analysis, the Court, pursuing its task of protecting individual rights, might even rule that the Guarantee Clause calls for

120. For elaboration of this argument, see CHOPER, *supra* note 13, at 206–09.

121. Jerold Israel, *On Charting a Course Through the Mathematical Quagmire: The Future of* Baker v. Carr, 61 MICH. L. REV. 107, 131 (1962).

122. *Id.* at 132.

123. *Id.* at 135.

judicial review of at least some practices providing for appointment instead of election of state and local officers.[124]

Luther v. Borden might plausibly fit under a theory akin to that of the reapportionment cases. It involved a claim that the state's "established" government was not "republican" and could therefore be guilty of a trespass.[125] To remove the analysis from the Guarantee Clause category, an argument could be made that the majority had been completely denied its fundamental right to vote because the government in power was not *legitimately* elected. In like fashion, an executive order making the incumbent governor-for-life would deny voting rights to the population at large.[126] Of course, the justiciability of a Guarantee Clause case entailing individual rights should not *depend* on whether it can be restated as a claim under the Equal

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124. *See supra* note 115 and accompanying text; *see also* Kohler v. Tugwell, 292 F. Supp. 978 (E.D. La. 1968). *Kohler* involved a challenge to a state constitutional amendment on the ground that the ballots by which the amendment was adopted were so confusingly worded that their use was a deprivation of the right to vote in violation of the Due Process and Guarantee Clauses. *Id.* at 979. While Judge Wisdom, concurring, agreed that the due process claim should be rejected on the merits, he differed with the court's conclusion that the Guarantee Clause argument presented a political question, raising several points that I have also suggested in earlier parts of this Article. *Id.* at 984 (Wisdom, J., concurring). Judge Wisdom noted that although "the expanding importance of the Fourteenth Amendment . . . reduced the need for courts to resort to the Guaranty [sic] Clause to protect the rights of individuals against a state's abuse of governmental processes[,] . . . the guarantee still has a proper place in a federal system of checks and balances." *Id.* at 984. Neither text nor original intent, he noted, precluded a judicial role, and the Court's previous opinions should be read not to foreclose all judicial involvement in Guarantee Clause enforcement, but simply to hold that, in the specific cases decided, judicial review was inappropriate because of the "nature of the controversies" involved. *Id.* at 984 (quoting Baker v. Carr, 369 U.S. 186, 297 (1962) (Frankfurter, J., concurring)). Judge Wisdom believed that some questions under the Guarantee Clause might not be susceptible to the development of manageable standards, but that it should be the "nature of the question, . . . and not the mere invocation of the clause, [that] determines whether a contention is justiciable and the clause judicially enforceable." *Id.* at 985. In this same vein, it might be that even if the Court were to find that appointment (rather than election) of some public officials raised legitimate questions of individual rights, challenges to such appointments would still ultimately be nonjusticiable because of the manageable standards or generalized grievance criteria.

125. Luther v. Borden, 48 U.S. (7 How.) 1, 42–47 (1849).

126. This was suggested in *Luther*, *see* 48 U.S. at 45 ("Unquestionably a military government, established as the permanent government of the State, would not be a republican government."), as well as in *Minor v. Happersett*, 88 U.S. 162, 165 (1874), which raised the question of whether a republican government could deny the vote to women. For fuller development of the scope of this asserted right, see *infra* notes 268–69 and accompanying text. *See also infra* notes 184–86, 253 and accompanying text.

Protection Clause.[127] At the same time, other Guarantee Clause claims, as in *Pacific States*, should be held to be nonjusticiable.[128]

B. Electoral Process

1. *Gerrymanders*. Partisan political gerrymandering unquestionably implicates the individual right to vote on an equal basis, and—as was the case in *Baker v. Carr* and its progeny dealing with malapportionment—entrenched officials have an obvious, powerful disincentive to address the issue.[129] Most obviously, the Court could adopt a standard similar to that it has chosen for racial gerrymandering,[130] but only one Justice has ever chosen to do so.[131] Although I find much to favor this approach,[132] the prevailing sentiment (both judicial and scholarly) strongly questions whether a substantive interpretation of the Equal Protection Clause that invalidated all apportionments that made political factors dominant and subordinated the usual districting criteria would be constitutionally warranted or desirable. Yet other informed solutions as to whether gerrymandering has occurred and how to remedy it would seem to require judges to make complex and imponderable factual determinations involving such matters as the extent of party loyalty among voters, the role of personal appeal or political skill in the success of particular candidates, and the degree of influence the minority party retained through its ability to lobby or utilize political patronage. These factors and many others that are central to proposed judicial standards cannot be confidently measured and are not readily within the realm of judicial expertise.

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127. *See supra* notes 110–18 and accompanying text.

128. *Contra* Coyle v. Smith, 221 U.S. 559, 579–80 (1911) (holding that Congress's power to admit new states does not include requiring a state to continue the then-location of its capital).

129. *See* Richard H. Pildes, *The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 28, 83 (2004) ("In principle, judicial review finds one of its quintessential justifications in checking such self-entrenchment.").

130. *See* Hunt v. Cromartie, 526 U.S. 541, 546 (1999) ("[A]ll laws that classify citizens on the basis of race, including racially gerrymandered districting schemes, are constitutionally suspect and must be strictly scrutinized.").

131. *See infra* note 141 and accompanying text.

132. *See generally* John Hart Ely, *Gerrymanders: The Good, the Bad, and the Ugly*, 50 STAN. L. REV. 607 (1998) (discussing possible standards for adjudicating partisan gerrymandering cases).

Despite two serious efforts, the Court has failed to produce a test for partisan gerrymandering that successfully accommodates these difficulties. While the plurality opinion in *Davis v. Bandemer* rejected the view that such rigging of the electoral landscape presented a political question, its substantive standard for judicial review—that plaintiffs show *both* discriminatory intent and effect[133] to the extent that "a voter's or a group of voters' influence on the political process" is consistently degraded[134]—has proved nearly impossible for litigants to satisfy. Most recently, in *Vieth v. Jubelirer*,[135] a four-Justice plurality sought to turn *Bandemer's* practical result into an explicit holding by declaring all political gerrymandering questions to be nonjusticiable. Justice Scalia, joined by Chief Justice Rehnquist and Justices O'Connor and Thomas, observed that there are inherent problems in identifying impermissible gerrymandering because the Constitution itself "contemplates districting by political entities"[136] and because related goals like incumbent protection have been said to be clearly permissible.[137] Moreover, the plurality emphasized, gerrymandering is also difficult for the judiciary to detect since traditional districting principles, like adherence to political subdivision boundaries, often incidentally advantage one party even where no overt partisan motive can be proven.[138] Given this backdrop of judicial acquiescence in *some* politically motivated districting, the opinion reasoned, any standard that might be developed would inevitably depend on when such impulses had gone "too far."[139] The plurality contended that these and other reasons reveal that drawing such lines would inevitably be both unmanageable and unprincipled.

The four dissenting Justices in *Vieth*[140] nonetheless propounded several tests. Justice Stevens, applying racial gerrymandering principles to the political context, argued that the governing criteria should "ask whether the legislature allowed partisan considerations to

133. 478 U.S. 109, 127 (1986) (plurality opinion).

134. *Id.* at 132.

135. 541 U.S. 267 (2004).

136. *Id.* at 286 (plurality opinion).

137. *Id.* at 300.

138. *Id.* at 298.

139. *Id.* at 291.

140. Justice Kennedy concurred in the dismissal of the complaint but declined to find a political question because he was unwilling to "foreclose all possibility" that "some limited and precise rationale" might yet be formulated "to correct" unconstitutional political gerrymandering. *Id.* at 307 (Kennedy, J., concurring in the judgment).

dominate and control the lines drawn, forsaking all neutral principles."[141] Justice Breyer would look more narrowly to situations where the group in power fixes district boundaries to achieve "unjustified entrenchment" in violation of "basic democratic norms"[142]—in other words, "a situation in which a party that enjoys only minority support among the populace has nonetheless contrived to take, and hold, legislative power."[143] Justice Souter, joined by Justice Ginsburg, proposed a complex five-element test for making out a prima facie case,[144] and then sketched how it might be applied, noting that "[i]nstead of coming up with a verbal formula for [how much is] too much, . . . the Court's job must be to identify clues, as objective as we can make them, indicating that partisan competition has reached an extremity of unfairness."[145]

Though I am sympathetic to the conflict between political gerrymanders and fundamental principles of democracy and effective representative government that Justices Souter and Breyer valiantly seek to resolve, I nevertheless agree with the plurality's difficulties with these proposals. Among their criticisms are that Justice Souter's test, while appearing to be "eminently scientific," turns on inquiries that are ultimately a matter of degree[146] and is hard to reconcile with previous opinions suggesting, for example, that protection of incumbency may be proper.[147] Justice Breyer, according to Justice Scalia, relies on factual judgments that may be impossible to determine and that, in any case, the judiciary is poorly equipped to

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141. *Id.* at 339 (Stevens, J., dissenting).

142. *Id.* at 361 (Breyer, J., dissenting).

143. *Id.* at 360. Justice Breyer explains that "*unjustified* entrenchment" means that "the minority's hold on power is purely the result of partisan manipulation" and not based on those factors that may be *temporarily* justified, such as "sheer happenstance, the existence of more than two major parties, the unique constitutional requirements of certain representational bodies such as the Senate, or reliance on traditional (geographic, communities of interest, etc.) districting criteria." *Id.* at 360–61. He notes that the "more permanently entrenched the minority's hold on power becomes, the less evidence courts will need that the minority engaged in gerrymandering to achieve the desired result." *Id.* at 365.

144. The plaintiff would have to show membership in a "cohesive political group" that "would normally be a major party," a district created with "little or no heed to traditional districting principles," correlations between the district's "deviations" from these criteria and the distribution of the political group, a hypothetical district that eliminated objectionable features and deviated less from traditional principles, and intent to disadvantage this political group. *Id.* at 347–51 (Souter, J., dissenting).

145. *Id.* at 344.

146. *Id.* at 296 (plurality opinion).

147. *Id.* at 298.

make.[148] For example, how are courts to measure the base level of support for a political party in the relevant population so as to determine whether a minority has unfairly entrenched itself, particularly given many Americans' tendency to identify with a political party weakly if at all?[149] While Justice Stevens responds to these objections concerning an unmanageable judicial role, his approach would result in a far greater degree of intervention in the political process than the Court and the country seem willing to accept.

Ultimately, this may be one of those contexts in which the judicial branch cannot develop effective safeguards for individual rights, but where the political process may afford some meaningful protection, however flawed. A political party in power, for example, may restrain itself from the worst excesses of gerrymandering because it fears either future retaliation within its own jurisdiction should the electorate reverse its advantage, or the possibility that its avarice will be presently emulated in other states where its opponents are in control. In addition, optimally successful gerrymandering is extraordinarily difficult because it confronts the party in control with an inherent tension between fashioning "safe" districts and spreading its voters more broadly (but more thinly).[150] In the former instance, there is a limit to what the party can achieve; in the latter, a small change in population or political attitudes may quickly turn a friendly district into one less hospitable to its creators.[151]

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148. *Id.* at 299–300.

149. A candidate who enjoys personal popularity or the advantages of incumbency, for example, may often succeed for reasons wholly unrelated to gerrymandering. Samuel Issacharoff, *Judging Politics: The Elusive Quest for Judicial Review of Political Fairness*, 71 TEX. L. REV. 1643, 1679–80 (1993).

150. Justice Breyer cites several authorities that question this in his *Vieth* dissent. *Vieth*, 541 U.S. at 364 (Breyer, J., dissenting) ("The combination of increasingly precise map-drawing technology and increasingly frequent map drawing means that a party may be able to bring about a gerrymander that is not only precise, but virtually impossible to dislodge."); *see also id.* at 345 (Souter, J., dissenting) (noting the "increasing efficiency of partisan redistricting"); Pildes, *supra* note 129, at 61 ("[V]oters now vote in more predictably partisan patterns than at any time in the last fifty years, and . . . technology allows legislators to exploit these patterns more efficiently than ever.").

151. It has been argued that these self-correcting forces often do not exist for racial gerrymandering. Because Democrats are strong and stable favorites among most African Americans and Latinos, safe majority-minority districts created with race as a factor may satisfy both parties. Republicans prefer to have the most reliably Democratic voters concentrated in a few districts, while Democrats wish to provide members of a core constituency with the representation they desire. Racial gerrymandering, then, may be systemically less susceptible to

Still, real potential injury to individual voting rights remains. Neither the political process nor the majority's uncertainties about the electorate may be expected to be nearly as successful as litigation in correcting the distortions partisan gerrymandering causes.[152] The intense concern the judiciary has shown with racially motivated districting puts its indifference to political gerrymanders into sharp relief, especially revealed by the Court permitting as a defense to racial gerrymandering the fact that a peculiarly drawn district was motivated by the governing party's desire to entrench itself.[153] Moreover, the extent to which the abuses of gerrymandering will be curbed through the political process applies only to the major parties. Because there is little chance that any third party would gain power and retaliate, few checks exist to dominant-party uses of districting to disadvantage splinter groups in the election process.[154] Of even larger concern, the enhanced use of bipartisan gerrymandering, implemented by consensus of both commanding national partisan organizations, greatly diminishes the chance of political reform and

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adjustment through the political process, creating a greater justification for judicial intervention. Ely, *supra* note 132, at 618–20.

152. For a recent argument that political gerrymanders have only a ten-year life span and may be made a campaign issue and corrected at an election in a succeeding decade, and that they have less locked-in permanence than the population disparities in the conventional reapportionment cases, see Luis Fuentes-Rohwer, *Doing Our Politics in Court: Gerrymandering, "Fair Representation" and an Exegesis into the Judicial Role*, 78 NOTRE DAME L. REV. 527, 575–76 (2003). He also writes that "the better the gerrymander, the better chance that this will be an issue of any salience to prospective voters." *Id.* at 575.

153. Ely, *supra* note 132, at 621. Justice Kennedy, concurring in *Vieth*, also pointed out an inconsistency between the Court's "willingness to enter the political thicket . . . with respect to one-person, one-vote claims" and its "categorical refusal to entertain claims against this other type of gerrymandering." *Vieth*, 541 U.S. at 310.

154. Even Justice O'Connor, concurring in *Bandemer* only because of her belief that gerrymandering raised a political question, observed that third parties are more likely to be victimized by "bipartisan gerrymanders" than either major party is to be lastingly damaged by the gerrymandering efforts of the other. 478 U.S. 109, 154–55 (1986). Others, however, have argued that small parties, "in a system of frequently shifting coalitions," serve instead as a "spur to political competition." Peter H. Schuck, *The Thickest Thicket: Partisan Gerrymandering and Judicial Regulation of Politics*, 87 COLUM. L. REV. 1325, 1340 (1987). According to this view, the major parties both seek to ally with third-party legislators in order to accomplish their goals. Third-party lawmakers are thus swing voters who occupy a position analogous to that of small firms having niche markets or holdouts who can exact an economic premium. Moreover, the interrelatedness of legislative issues means that lawmakers "can often translate a decisive or highly valued vote on one issue into significant influence over the outcome of other issues as well." *Id.*

"achieves representational parity at the cost of eliminating competitive elections."[155]

Overall, the task of developing a manageable standard to address political gerrymandering is by no means impossible. The Court could adopt either a principle of proportional representation,[156] or a rule that *all* consideration of politics in districting violates equal protection, or, most comprehensively, a requirement that some form of "neutral" apportionment system (such as a computer program or bipartisan commission) be used. As previously indicated, however, these positions are far distant from the nation's longstanding tradition and practice. Nonetheless, the last alternative has been gaining some operational currency, not only in this country[157] but also in "[o]ther longstanding democracies that use or recently used the same election structure as the United States, such as Great Britain, Australia, Canada, and New Zealand."[158] Still, these suggestions appear to be well beyond where the Court is willing to go; Justice Stevens' *Vieth* dissent is the closest the Court has come. Furthermore, at least the first two notions would likely engender widespread public resistance. The idea that the governing party, and the particular incumbents holding office, are entitled to certain spoils of power is quite deeply embedded in our democratic process.

The results of this situation—"a central pathology of modern American democratic institutions"[159]—trouble me considerably as a

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155. Pildes, *supra* note 129, at 64; *cf. id.* at 62–64 (discussing the emergence of bipartisan gerrymandering as a new "threat to American democracy").

156. For reference to several scholarly works to support the conclusion that "a single-member-district system helps to assure certain democratic objectives better" than proportional representation, see *Vieth*, 541 U.S. at 357 (Breyer, J., dissenting).

157. *See id.* at 362–63 (noting the increasing use of independent commissions for legislative redistricting). It has been reported yet more recently that "[l]argely uncoordinated campaigns . . . to end, or at least minimize" political gerrymandering "were under way in at least eight states, including California, Colorado, Florida, Georgia, Maryland, Massachusetts, Pennsylvania and Rhode Island." Adam Nagourney, *States See Growing Campaign for New Redistricting Laws*, N.Y. TIMES, Feb. 7, 2005, at A19.

Note, however, that in

> a fairly large state population with a fairly large congressional delegation, districts assigned so as to be perfectly random in respect to politics would translate a small shift in political sentiment, say a shift from 51% Republican to 49% Republican, into a seismic shift in the makeup of the legislative delegation, say from 100% Republican to 100% Democrat.

Vieth, 541 U.S. at 1824.

158. Pildes, *supra* note 129, at 78; *see generally id.* at 78–83.

159. *Id.* at 56.

matter of policy. The prospect of gerrymandering without any external constraints is a daunting one that ultimately bears the potential to effectively nullify the right to an equally weighted vote guaranteed by *Baker v. Carr*.[160] Nevertheless, I have so far not seen any proposed solution akin to the one person, one vote standard of *Reynolds v. Sims* that would satisfy my criterion of being constitutionally warranted ("judicially discoverable"), desirable, and sufficiently principled to guide the lower courts and constrain all jurists from inserting their own ideological beliefs in ad hoc, unreasoned ways.[161] Professor Richard Pildes does not disagree, but instead submits that "[p]roblems like gerrymandering require a shift in the way manageable judicial remedies are conceived."[162] By accounting for "politicians' interests in certainty and control, judicial creation of general but necessarily vague constraints, with a credible threat of application, might generate . . . political accommodation and compromise"[163] that would lead to "a stable equilibrium."[164] While this may ultimately be an effective avenue of relief, it remains too distant from my view of the proper role of judicial review and constitutional adjudication in our representative democracy.

2. *Textual Commitment: Article I, Section 2* In *Wesberry v. Sanders*,[165] the Court interpreted Art. I, § 2, cl. 1, providing that the House "shall be composed of Members chosen . . . by the *People* of the several States,"[166] to require parity in the apportionment of congressional districts.[167] Justice Harlan's dissent argued textual

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160. Schuck, *supra* note 154, at 1327–28.

161. *See supra* notes 55–56 and accompanying text.

Professor Samuel Issacharoff proposes to "forbid ex ante the participation of self-interested insiders in the redistricting process" by adopting "approaches . . . such as blue-ribbon commissions, panels of retired judges, and Iowa's computer-based models . . . [that are] viable alternatives to the pro-incumbent status quo." Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593, 643–44 (2002); *see also supra* notes 157–58 and accompanying text. While I find this to be very sensible as a policy matter, it is less clear by what constitutional authority the Court could legitimately impose it as a "discoverable" standard. Nevertheless, as Issacharoff has pointed out, the Court has sometimes developed such "prophylactic rules" in areas in which the danger of a constitutional violation is great but there is difficulty in "policing it after the fact." Issacharoff, *supra*, at 646.

162. Pildes, *supra* note 129, at 66.

163. *Id.* at 68, 70.

164. *Id.* at 68.

165. 376 U.S. 1 (1964).

166. U.S. CONST. art I, § 2, cl. 1 (emphasis added).

167. *Wesberry*, 376 U.S. at 7–8.

commitment. He felt that the majority had read too much into the language of Art. I, § 2 while ignoring the text of Art. I, § 4,[168] which "states without qualification that the state legislatures shall prescribe regulations for the conduct of elections for Representatives and . . . that Congress may make or alter such regulations."[169] Moreover, it was improbable that the Framers would "bury" a principle of equal representation in Art. I, § 2 yet "omit all mention of it from § 4, which deals explicitly with the conduct of elections."[170] Justice Harlan concluded that § 4 was intended to be the Constitution's exclusive provision dealing with the election of representatives, and that it "as plainly as can be . . . committed [the issue] exclusively to the political process."[171]

Justice Black's opinion for the majority in *Wesberry*, reasoning that "[t]he right to vote is too important in our free society to be stripped of judicial protection by such an interpretation of Article I,"[172] corresponds to my view. Because the dilution of one's vote for a member of Congress unquestionably involves individual rights, the Court should be reluctant to construe the Constitution in a way that would completely preclude judicial review of such a claim. As the dispute between the dissent and the *Wesberry* majority (which contended that evidence of the Framers' purpose existed to support the principle of equality in districting)[173] illustrates, a wholly conclusive answer can rarely be gleaned from either text or original intent. In light of the Court's core constitutional function as a guardian of individual rights, when the basic document does not unmistakably place a government function exclusively in the hands of a political branch, a convincing case for judicial review can almost always be made, even though it may eventually be defeated by the manageable standards or generalized grievance criteria.[174]

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168. *See* U.S. CONST. art. I, § 4, cl. 1 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.").

169. *Wesberry*, 376 U.S. at 29–30 (Harlan, J., dissenting).

170. *Id.* at 29; *see also id.* at 47 (discussing Justice Frankfurter's opinion in *Colegrove v. Green*, 328 U.S. 549 (1946), which states that when "standards of fairness are offended, the remedy ultimately lies with the people," *id.* at 554).

171. *Id.* at 48.

172. *Id.* at 7.

173. *Id.* at 7–8.

174. Although Art. II, § 2, cl. 3's grant of power to the president—"to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire

3. *Electoral College*. Adjudication about the operation of the Electoral College raises similar issues.[175] Many concern only matters of federalism—the states' authority to determine how presidents are chosen.[176] Electoral College procedures also allocate power between branches of the national government by designating Congress to be overseer of presidential elections. Under my second criterion, neither of these matters should be justiciable. However, in the unusual case when a plausible individual rights claim can be made, the Constitution should not ordinarily be interpreted to preclude judicial review.

Suppose that an elector alleges that the Senate had racially discriminatory motives for failing to tally his vote in violation of the Equal Protection Clause. The judiciary should hear the merits, even though it involves an investigation into matters of internal congressional procedure. The same result should follow if the elector's grievance were against a state rather than Congress—for example, that a state law required electors to be of a particular religion or race. Indeed, even if no claim of racial discrimination were raised, and the elector's dispute with Congress concerned whether the elector had followed proper procedures for casting his vote or whether Congress had adhered to the vote-tallying requirements of Art. II, § 1, cl. 3, the Court should still be available to resolve claims that constitutionally secured individual rights have been abridged.

While it is likely that the Court would adjudicate at least some complaints of this kind, it has complicated the matter by having described state legislatures as possessing plenary power to choose the means of selecting electors. In *McPherson v. Blacker*,[177] prospective presidential electors challenged Michigan's process of selection by geographical districts rather than as a single statewide slate.[178] In finding this method to be constitutional, the Court emphasized that Art. II, § 1, cl. 2, providing for state appointment of electors "in such Manner as the Legislature . . . may direct," committed "the whole

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at the End of their next Session"—plainly interferes with the right to vote, its text strikes me as presenting a potentially strong exception to the presumption of an active role for the courts.

175. *See* Art. II, § 1, cls. 2, 3 (prescribing the allocation of electoral votes and the procedures for casting and counting those votes).

176. *See, e.g.*, Albert J. Rosenthal, *The Constitution, Congress, and Presidential Elections*, 67 MICH. L. REV. 1, 32–36 (1968) (discussing whether an act of Congress nullifying votes of unfaithful electors invades states' rights designated in Art. II, § 1).

177. 146 U.S. 1 (1892).

178. *Id.* at 26.

subject" to the "direction of the legislature."[179] More recently, in *Bush v. Gore*, although every member of the Court was willing to subject state rules governing elections to a judicial challenge under individual rights provisions of the Constitution, three Justices continued to espouse the idea that Art. II, § 1 grants near-complete authority to state legislatures.[180]

This view requires a judicial decision on the merits about the degree of discretion that the constitutional provision awards to the states. Even though the Court in *McPherson* explicitly rejected the argument that it should apply the political question doctrine,[181] in effect it did so pursuant to the textual commitment approach when it ruled that under the Constitution "the legislature possesses plenary authority to direct the manner of appointment."[182] Nonetheless, a better way of deciding the issue would have been pursuant to my second suggested criterion regarding national power versus states' rights. As the *McPherson* Court concluded, the manner in which a state selects its electors raises issues of the degree to which states should control the elector selection process free of "congressional and federal influence."[183] Congress and the states can usually negotiate questions about the scope of this power and judicial involvement is therefore unnecessary.

The Court's phrasing in *McPherson* indicated that state legislatures' discretion to choose the method of selecting electors is not bounded by *any* constitutional provisions. But in the absence of an unmistakable message from constitutional text or structure, this should not be the case. As discussed above, the federal judiciary should consider that, for example, a state prohibition on women or blacks serving as electors violates the Constitution. Even a complaint akin to that at issue in *McPherson* would call for judicial intervention if, for example, the plaintiff had been able to demonstrate an equal protection violation in the way in which Michigan's districts were apportioned. The "plenary" discretion of state legislatures to choose

179. *Id.*

180. *See* Bush v. Gore, 531 U.S. 98, 112 (2000) (Rehnquist, C.J., joined by Scalia and Thomas, JJ., concurring) (asserting that, while ordinarily the question of the division of powers among branches of state government is not a matter of federal law, "there are a few exceptional cases in which the Constitution imposes a duty or confers a power on a particular branch of a State's government. [Article II, § 1, cl. 2] is one of them").

181. *McPherson*, 146 U.S. at 23.

182. *Id.* at 25.

183. *Id.* at 35.

the way electors are selected may not be used to violate other constitutional clauses designed to protect the individual. If a state has exercised its Art. II, § 1 power in that way, the issue should be justiciable.

Even some constitutional claims relating to the Electoral College that raise individual rights issues, however, may not be amenable to judicial review if they fall into the generalized grievance category. For example, suppose an elector runs on a slate pledged to a particular individual but instead casts his vote for someone else, and a supporter of the frustrated candidate, who would have otherwise prevailed in the Electoral College, seeks to compel Congress to disqualify the unfaithful elector's ballot.[184] The integrity of the plaintiff's constitutionally protected right to vote (in contrast to any that the elector may possess), which has been rendered totally ineffective, plainly appears to be at issue. This would be similar to an allegation that the procedures of Art. II, § 1 have not been followed—for example, that the Senate has not formally tallied the votes as instructed.[185] The key question, however, is whether the disappointed voter has been harmed to any greater degree than all (or almost all) other members of the public. If not, this might present a situation analogous to the one described in the context of the Statement and Account Clause,[186] which would mean that a decision reached by the organs of Congress that resolve Electoral College disputes would be politically accountable to a majority of voting citizens and thus trustworthily represent all affected. Nonetheless, persuasive arguments in favor of judicial review may be made because of the complexities involved in concluding (1) that the majority that would win in the Electoral College if the plaintiff's challenge succeeds would otherwise have suffered a generalized grievance, and, even if so, (2) that this group of citizens has an effective political remedy in the hypothesized situation.

184. On the constitutionality of electors' discretion as a matter of original understanding and contemporary tradition, see Rosenthal, *supra* note 176, at 18–25.

185. For fuller development of the scope of this asserted right, see *infra* notes 268–69 and accompanying text. *See also supra* note 126 and accompanying text; *infra* note 253 and accompanying text.

186. *See supra* notes 66–72 and accompanying text.

C. Foreign Affairs

1. War Powers.

a. In General. Constitutional questions about the war power arise most frequently when the president takes military action without congressional approval. This implicates the division of authority between the political branches and, in the absence of additional circumstances, raises no individual rights claim. Thus, direct complaints by members of Congress or the public generally that the executive has sent troops abroad without a legislative declaration of war are nonjusticiable under my proposed framework.[187]

The particular basis for this position is that the judiciary should not intervene in a matter that can be appropriately resolved within the political process. Although the modern presidency is usually perceived as holding the much stronger hand in conflicts between the executive and legislative branches over military affairs, Congress has many effective tools available to express its disagreement. Consequently, presidents have normally sought congressional approval before launching warlike conduct and have consulted frequently with Congress during such engagements.[188] They have also been influenced by popular opinion more often in this arena than with most government actions.

Still, the equation changes when a matter of individual rights is involved, and the courts may be called on to interpret the Constitution in connection with use of the armed forces that has been approved by one or both of the political branches. This would occur, for example, if an American soldier is ordered to aggressively interrogate a prisoner held abroad who is suspected of terrorism and the soldier refuses because he believes that the captive should be treated as a prisoner of war under the Geneva Convention. His argument, which should be addressed by the judiciary, is that carrying

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187. *See generally* CHOPER, *supra* note 13, at ch. 5; *see also id.* at 296 (contending that the Prize Cases, 67 U.S. (2 Black) 635 (1863), "should have held the question of whether President Lincoln had the constitutional authority without the approval of Congress 'to institute a blockade of ports in possession of persons in armed rebellion against the Government' to be beyond judicial purview" (quoting The Brig Amy Warwick, 67 U.S. 635, 665 (1862))).

188. *See id.* at 281–305 for an extended discussion of Congress's capacity to influence the president's decisions in this area.

out the command would violate international law and subject him to criminal penalties, thus confronting him with a choice that would deny due process. This reasoning would also apply to a draftee, dispatched to a battle zone, who alleges that his participation would constitute a "war crime" under principles of international law.[189]

b. Habeas Corpus. Art. I, § 9, cl. 2 has historically provided an important constitutional question about the war power. It states an exception to the general rule that the writ of habeas corpus may not be suspended: "in Cases of Rebellion or Invasion the public Safety may require it."[190] When President Abraham Lincoln first and most famously used this special exemption during the Civil War, the fundamental question was whether Congress, and not the president, has the power because the Constitution is silent on this issue.[191] (That one of the two political branches may act has never been disputed.)[192] In *Ex parte Merryman*,[193] Chief Justice Taney, sitting as a circuit judge, held that the authority rested in the legislative department, relying on the placement of the provision in a section of the Constitution dealing with limitations on congressional power. Many state and lower courts agreed.[194] The issue never went to the Supreme Court, and some writers have subsequently doubted whether, as an historical matter, the placement of the clause has any significance.[195]

Under the second proposed criterion, the issue of which branch may suspend the writ presents questions as to whether each is capable of protecting its own interests. If the president withdraws the writ against the wishes of Congress, the legislators may vote to restore it,

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189. *Cf.* Holmes v. Laird, 459 F.2d 1211, 1212–14, 1222 (D.C. Cir. 1972) (concluding that a United States court was precluded by the NATO Status of Forces Agreement from overturning a German court's conviction of two American servicemen, despite possible deprivations of rights at their trial).

190. U.S. CONST. art. I, § 9, cl. 2.

191. *See* CLINTON ROSSITER, THE SUPREME COURT AND COMMANDER IN CHIEF 18 (1976) ("The Constitution grants this great emergency power to no one; it assumes its existence as a matter of fact and common law.").

192. *See supra* Part I.B.

193. 17 F. Cas. 144 (C.C.D. Md. 1861) (No. 9,487).

194. *See* Joseph C. Long, Ex Parte Merryman*: The Showdown Between Two Great Antagonists: Lincoln and Taney*, 14 S.D. L. REV. 207, 219 (1969) ("[T]he issue was to come before a number of state and lower federal courts. . . . The majority of the decisions supported Taney." (footnote omitted)).

195. *See id.* (arguing that the placement may have had more to do with "tying up of loose ends" than with any attempt to reference the powers of Congress). In any event, Lincoln simply ignored the rulings. *Id.* at 220.

although they may have to overcome a presidential veto.[196] Were the president's order also opposed by an aroused popular opinion,[197] it would even be more likely to fail. In the informed and astute judgment of Professor Robert Dahl

> a president who defies Congress cannot succeed in his defiance unless he and his policy have more support in the influential publics of the nation than the congressmen he opposes. A president who persists in opposing *both* the Congress *and* a large fraction of articulate opinion is headed for certain defeat, one way or another.[198]

Other questions might also arise, however, that do not turn on the respective authority of the elected branches. These include whether a state of "rebellion" currently exists, whether the "public safety" requires the suspension, and whether it is necessary for the body suspending the writ to continue to observe other constitutional provisions such as the Fourth Amendment.[199] Since negative answers to these questions would prohibit both Congress and the president from suspending the writ, they fall into the class of personal liberties that should be subject to judicial review. However, the first two questions I suggest are plainly candidates for substantial judicial deference to the properly constituted political bodies, if not for a conclusion of no manageable standards, which would foreclose any further judicial involvement whatsoever.

2. *Act of State Doctrine*. Under the "act of state" doctrine, the judiciary will recognize the official act of a foreign government without inquiring into its validity. This resembles the political question doctrine in that its premise is that there are some subjects that judges are less competent to examine than are the political branches. In *Banco Nacional de Cuba v. Sabbatino*,[200] the Court relied largely on the rationale that the judiciary should not interfere with

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196. In fact, Congress authorized Lincoln's suspension of the writ, but not until nearly two years later. *Id.* at 223 n.71.

197. *See id.* at 221 (discussing the possibility that the "mood of the country" may have changed since the mid-nineteenth century to make suspension of the writ far more difficult).

198. ROBERT A. DAHL, DEMOCRACY IN THE UNITED STATES: PROMISE AND PERFORMANCE 145 (1972). *See generally* CHOPER, *supra* note 13, at 311–14 (discussing the electorate's check on executive abuse).

199. *See* EDWARD S. CORWIN, THE PRESIDENT 146–47 (1957).

200. 376 U.S. 398 (1964).

primarily executive functions. The case involved Cuba's decision to nationalize sugar produced by an American company.[201] After a distributor turned over the proceeds from its sale of sugar to the American owners, the national bank of Cuba (Cuba's assignee) sued in a U.S. court to recover them.[202] Rejecting the defendant's argument that the bank's claim failed because it was founded on an expropriation that violated international law, the Court concluded that the act of state doctrine prohibited it from inquiring into the validity of the Cuban government's action.[203]

Although the opinion did not explicitly invoke the political question doctrine, it drew on similar reasoning in explaining its reluctance to monitor a foreign nation's official act. While the Constitution did not "require the act of state doctrine" nor "irrevocably remove from the judiciary the capacity to review the validity of foreign acts of state," the principle had "'constitutional' underpinnings."[204] The Court noted that "basic relationships between branches of government in a system of separation of powers" and questions of "the competency of dissimilar institutions"[205] both supported the executive's need for flexibility in matters of international relations and diplomacy. The judiciary might appropriately decide matters of international law when a great degree of "codification or consensus" existed, but there was no such unity of opinion on the legitimacy of expropriation.[206] In negotiating with countries that had American property, an eight-Justice majority reasoned, the executive might prefer not to be confined by a judicial determination of the action's illegality, and the Court should therefore refrain from pronouncing on it.[207]

The cases, however, have not always applied the precept so broadly. In *First National City Bank v. Banco Nacional de Cuba*,[208] also involving sugar and expropriation, the Court concluded that it *could* adjudicate the question of whether Cuba's actions were valid because the executive branch had explicitly requested that the act of

201. *Id.* at 401.
202. *Id.* at 406.
203. *Id.* at 428.
204. *Id.* at 423.
205. *Id.*
206. *Id.* at 428.
207. *Id.* at 432.
208. 406 U.S. 759 (1972).

state doctrine not be applied.[209] In *W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp.*,[210] the Court limited the doctrine in a different way, adopting a narrow view of what constitutes a foreign state's "official act." Holding that the doctrine should apply only when "the outcome of the case turns upon . . . the effect of official action by a foreign sovereign," the Court ruled that this did not bar consideration of whether a military procurement contract with the Nigerian government would be rendered invalid if, as alleged, it had been obtained through bribery.[211]

The act of state doctrine is not a true political question because the separation of powers issue it raises—allocation of responsibility between the executive and judiciary—is not driven by a textually- or functionally-based interpretation of the Constitution, but rather grounded in policy concerns—the belief that adjudicating the validity of foreign acts of state might hamper or embarrass the executive in certain circumstances. Therefore, the more flexible approach of *First National City Bank* and *W.S. Kirkpatrick* appears to be the preferable one because it permits judicial involvement particularly when there appears to be no possibility of interference with foreign relations. It may periodically be true that matters relating to the validity of foreign acts of state are better handled through the executive branch, which can consider them with special expertise and sensitivity. However, in the absence of the Court ruling, for functional reasons or because of original understanding, that the Constitution *requires* that all such decisions rest with the political branches,[212] foreclosing all opportunity for judicial review of such issues probably goes too far.

An appropriate method for achieving this balance would be that courts treat the principle expounded in *Sabbatino* as one of federal common law, not mandated by any constitutional separation of powers principle. As with other questions of federal common law, the

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209. *Id.* at 768.

210. 493 U.S. 400 (1990).

211. *Id.* at 406.

212. *See* Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 106, 111 (1948) (holding that the president's decision to approve or deny a certificate for foreign air transportation under a statute providing that such decisions should be "unconditionally subject to the President's approval" was not subject to judicial review because it is a matter of "foreign policy. . . . wholly confided by our Constitution to the political departments"). The opinion did not address the issue of whether denial of all judicial review in respect to this decision denied due process. For further consideration, see Louis Henkin, *Viet-Nam in the Courts of the United States: "Political Questions,"* 63 AM. J. INT'L L. 284, 287 n.11 (1969).

Court's default position could be altered by legislation—that is, Congress could direct the courts to adjudicate a particular category of cases involving an act of state. In addition, the executive could choose to waive the doctrine's protection by taking an official position, as it did in *First National City Bank*, that judicial review of a specific action would not interfere with diplomatic concerns.

3. *Other "Nonconstitutional" Matters*. There are additional instances, somewhat akin to the "act of state" cases, in which federal courts have been called upon to construe a statute or treaty that hinges on matters of foreign affairs normally considered to be within the domain of the executive or legislative departments. In some of these situations, the Court may find that the law or treaty plainly vests a certain decision with the president or Congress. Though interpreting such statutes or treaties is obviously different in kind from expounding the ultimate meaning of the Constitution, there is an obvious parallel to the Court's reading the Constitution so as to find a political question. Similarly, the Court may defer to the understanding of the political branches when determining the meaning of an ambiguous provision in a statute or treaty.

The Justices have also frequently decided contract cases according to analogous principles, even though the political question doctrine has no direct bearing. *Williams v. Suffolk Insurance Co.*,[213] for example, concerned an insurance claim for cargo and a ship seized near the Falkland Islands by the government of Buenos Aires, which had asserted jurisdiction over the islands.[214] Since the plaintiff had been ordered by Buenos Aires not to hunt seals there on penalty of having his cargo seized, the insurer argued that the plaintiff had not acted "with ordinary prudence."[215] The plaintiff responded that he was not required to heed the order because the U.S. government had refused to recognize Buenos Aires's claim to the Falklands and had "insisted . . . that the seal fishery at those islands is a trade free and lawful to the citizens of the United States."[216] Finding that "[t]he action of the political branches of the government, in a matter that

213. 38 U.S. (13 Pet.) 415 (1839).

214. *Id.* at 419–20.

215. *Id.* at 421.

216. *Id.* at 419.

belongs to them, is conclusive," the Court held that the plaintiff was entitled to recover for the loss.[217]

A like issue arose in *Kennett v. Chambers*,[218] which considered the validity of an 1836 contract to provide military assistance and volunteers on behalf of the independent state of Texas. The Court noted that, although Texas had declared itself independent at the time the contract had been entered into, the United States had not recognized this and was still bound by treaties with Mexico that declared Texas to be part of its territory.[219] Finding the contract void, the Court held that "the question whether Texas had or had not at that time become an independent state . . . was a question for that department of our government exclusively which is charged with our foreign relations."[220] For the Court to decide such a question would be to "take upon ourselves the exercise of political authority, for which a judicial tribunal is wholly unfit."[221]

The import of these decisions is that the central legal question in each civil case was found to be wholly within the executive's constitutional power to decide, whether or not the Justices agreed with it or would prefer to fashion a different rule of law. It is important to note, however, that the Court's analysis was grounded in national policy (or federal common law), which the Justices felt was best served by deferring to the decision of another department. The Court was not relying on fundamental questions of constitutional structure and the legitimacy of judicial review that are implicated in true political questions as defined in this Article.

Statutory questions that encompass foreign policy have also arisen concerning judicial capacity to determine whether a state of war exists.[222] Though the political question doctrine is not implicated here because the question is not constitutional, there is a clear

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217. *Id.* at 420, 422. For a more extensive discussion of *Williams* and several similar cases, see Michael E. Tigar, *Judicial Power, the "Political Question Doctrine," and Foreign Relations*, 17 UCLA L. REV. 1135, 1155–58 (1969).

218. 55 U.S. (14 How.) 38, 45 (1852).

219. *Id.* at 46.

220. *Id.* at 50–51.

221. *Id.* at 51. For further descriptions of a series of early cases reaching a range of outcomes, see Scharpf, *supra* note 52, at 546 ("Whatever may explain these differing results, I fail to see how such an explanation could be reduced to any internally consistent interpretation of the constitutional grant of the treaty power."); Edwin D. Dickinson, *The Law of Nations as National Law: "Political Questions,"* 104 U. PA. L. REV. 451, 485–92 (1956).

222. For consideration of this problem in the context of the manageable standards criterion, see *supra* note 56.

parallel between the two situations. In *Ludecke v. Watkins*,[223] the Court considered whether the Alien Enemy Act of 1798, which authorized the president to deport resident aliens at his discretion in the event of a "declared war" or an actual or threatened "invasion or predatory incursion,"[224] could be applied to a German national who had been ordered removed from the United States in early 1946.[225] The deportee's habeas corpus petition argued that the delegated power "did not survive cessation of actual hostilities."[226] The Court held that, "[b]arring questions of interpretation and constitutionality," the Alien Enemy Act was among a group of statutes that preclude judicial review.[227] While not foreclosing the possibility that there might be circumstances under which "it would be open to this Court to find that a war though merely formally kept alive had in fact ended," the Court nevertheless concluded that the termination of a state of war was a "political act," to be accomplished through "legislation or Presidential proclamation" rather than judicial decision.[228] Moreover, although the president's authority under the Act "beg[an] when war [was] declared," it was "not exhausted when the shooting stop[ped]."[229] The Court, while recognizing the possibility that "[s]uch great war powers may be abused," believed "that is a bad reason for having judges supervise their exercise."[230]

Four dissenters reasoned that the statute did not say that whether a state of war continued was outside judicial examination, and that it should not be so construed. They noted that the petitioner would be deported without "any judicial inquiry whatever into the truth of his allegations"[231] and that a state of war still existed with Germany in 1946 was a mere "fiction" that should not "afford[] a basis for [the] holding that our laws authorize the peacetime banishment of any person on the judicially unreviewable conclusion of a single individual. The 1798 Act did not grant its extraordinary

223. 335 U.S. 160 (1948).

224. *Id.* at 161 (quoting the Alien Enemy Act, ch. 66, § 1, 1 Stat. 577, as amended, ch. 55, 40 Stat. 531 (1798) (codified as amended at 50 U.S.C. § 21 (2000))).

225. *Id.* at 162–63.

226. *Id.* at 163, 166.

227. *Id.* at 163–64.

228. *Id.* at 168, 169.

229. *Id.* at 167.

230. *Id.* at 172.

231. *Id.* at 174.

and dangerous powers to be used during the period of fictional wars."[232]

The German deportee's claim could easily have been framed as a due process violation and would therefore presumptively qualify for judicial review under my approach. This should lead the Court to look at the Act with special care because a statutory interpretation of the question of whether a "declared war" still existed could avoid the constitutional question. Nor was there any indication in *Ludecke* that this path was precluded by the Constitution. The majority opinion's ruling that the law commits to the president the right to determine the existence of a "declared war" involved ordinary statutory interpretation. A finding that a statute requires judicial deference on a particular point is wholly different from the Court's judgment that it should refrain entirely from deciding a question.

D. Congressional Rules and Procedures

1. *In General.* As already indicated, most constitutional provisions that specify how Congress should act in respect to its internal governance are primarily housekeeping provisions and are not mainly intended to secure individual rights. Congress may amend these rules at will and, in most cases, has adequate incentives to enforce compliance with them. If it chooses neither to formally change the procedures nor to demand adherence to them, a waiver on its part may readily be implied. Thus, little stands to be gained from judicial involvement.

Legislative enactments alleged as violating constitutionally required procedures have been generally held to be political questions.[233] In most instances this is the proper treatment since the rules, usually found in Article I, ordinarily concern protections for one house of Congress. This is analogous to constitutional issues of separation of powers between the political branches, when the contention is that Congress has exceeded its authority vis-à-vis the executive or vice versa. Just as each of these departments has numerous, effective techniques that may be used to protect its

232. *Id.* at 178.

233. *See, e.g.*, Field v. Clark, 143 U.S. 649 (1892).

interests against the other,[234] so also do the Senate and House of Representatives.

A contrary example of the Court's treatment of this matter, however, arose in *United States v. Munoz-Flores*.[235] A criminal defendant, ordered to pay a special assessment to a congressionally created "Crime Victims Fund," challenged the statute on the ground that it had not originated in the House of Representatives, as Art. I, § 7, cl. 1 requires for revenue bills.[236] The government urged nonjusticiability on the ground that a challenge to Congress's judgment in this matter would show a "lack of respect" for a coordinate branch,[237] and that the House could protect itself by "refusing to pass a bill if it believes that the Origination Clause has been violated."[238] The government also noted the absence of an individual rights claim.[239] The Court, however, found that the House's ability to defend its own interests should not curtail judicial review to ensure that the Constitution's allocation of powers within the legislative branch was maintained.[240] Policing such constitutional restrictions, the Court reasoned, guarded individual rights, since "the Constitution diffuses power the better to secure liberty."[241] It then upheld the statute on the merits because the law establishing the fund did not constitute a "Bil[l] for raising Revenue" within the meaning of the Origination Clause.[242]

It seems clear to me that the government's position in *Munoz-Florez*, rather than the Justices', was right. To the extent that Article I may have forbidden the statute to have been introduced in the Senate, it is difficult to see any threat to personal liberty posed by the House's waiver of that mandate by supporting the bill's passage. It is

234. *See generally* CHOPER, *supra* note 13, at 275–314.

235. 495 U.S. 385 (1990).

236. *Id.* at 387.

237. *Id.* at 390–91.

238. *Id.* at 392.

239. *Id.*

240. *Id.* at 393.

241. *Id.* at 394 (quoting Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring)). For an extensive consideration (and rejection) of this view—that since the separation of powers principle was perceived from the time of its origin as a keystone for guaranteeing the liberty of the people, its preservation is eminently entitled to judicial protection—see CHOPER, *supra* note 13, at 263–315.

242. *Munoz-Flores*, 495 U.S. at 398.

undisputed that this is not a situation in which no organ of government could act.[243]

There are a number of other examples of constitutional text that fall into this category. They include Article I, § 5, cl. 2, requiring that a quorum of each House must be present to "do Business," the various clauses setting minimum ages for various elected officials, and the dictate of Art. I, § 5, cl. 4 that neither house adjourn for more than three days without the other's consent.[244] These are all housekeeping provisions, concerning only the internal workings of a single branch. Apart from the unlikely event that a person can fashion an individual rights claim regarding one of these conditions, there is no justification for judicial review.

2. *Individual Rights.* Not all constitutional provisions that govern the internal operations of Congress, however, are unconcerned with individual rights. Probably the most obvious is that "[n]o Bill of Attainder . . . shall be passed."[245] Another example of one that does implicate personal liberties is the Speech and Debate Clause, which provides that Senators and Representatives "shall not be questioned in any other Place" for "any Speech and Debate in either House."[246] There are two ways in which this provision might be interpreted to raise an individual rights issue. First, and most obviously, to the extent that the elected official's speech falls within the scope of the First Amendment's protection, few special issues are involved. At the least, the expression of unpopular views by a member of Congress is at the core of the Constitution's commitment to a robust democratic process. Indeed, active judicial review would secure not simply the rights of the legislative representative, but those of his constituents as well.

Second, the Court has also suggested that the Clause might create an immunity for members of Congress that reaches beyond the coverage of the free speech guarantee. In *United States v. Johnson*,[247] for example, the provision was construed as granting a broad "legislative privilege."[248] The Court found that a Representative could

243. *See supra* note 37 and accompanying text.

244. 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 380 (3d ed. 2000).

245. U.S. CONST. art. I, § 9, cl. 3.

246. U.S. CONST. art. I, § 6, cl. 1.

247. 383 U.S. 169 (1966).

248. *Id.* at 179.

not be prosecuted for a speech he had made on the House floor, allegedly "in return for remuneration from private interests"[249] (i.e., a bribe), in which he urged the Justice Department to dismiss indictments against savings and loan companies.[250] The Clause was characterized as preserving the separation of powers among the federal branches, by protecting members of Congress "against possible prosecution by an unfriendly executive and conviction by a hostile judiciary."[251] To the extent that the Speech and Debate principle shelters not only "words spoken in debate," but anything "generally done in a session of the House by one of its members in relation to the business before it,"[252] it plainly exceeds the boundaries of the First Amendment, thus making any individual rights claim much more difficult. Whether a theory can be developed that the Clause, as interpreted in this way, protects a different sort of personal liberty—one that is derived from the Member's supporters to ensure the effectiveness of their vote[253] or an alleged constitutional right to be represented in the halls of Congress by the candidate they successfully supported—is beyond the present discussion.

3. *Membership Qualifications*. A different kind of question about congressional procedure concerns Congress's rights to assess the qualifications of its members. In *Powell v. McCormack*,[254] a House resolution excluded Representative Adam Clayton Powell from the 90th Congress. The House did not deny that Powell had been duly elected by his constituents and met the Art. I, § 2, cl. 2 criteria of age, citizenship, and residence.[255] Instead, the resolution responded to Powell's refusal to testify about alleged improprieties during his prior term as chairman of the Committee on Education and Labor.[256]

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249. *Id.* at 180.

250. *Id.* at 171–72, 184–85.

251. *Id.* at 179.

252. Kilbourn v. Thompson, 103 U.S. 168, 204 (1881).

253. For fuller development of the scope of this asserted right, see *infra* notes 268–69 and accompanying text.

254. 395 U.S. 486 (1969).

255. *Id.* at 489.

256. *See id.* at 491–93 (noting that a Select Committee of the House had reported that Powell had asserted an unwarranted privilege in a New York court, misappropriated House funds for personal use, and made false expenditure reports to the Committee on House Administration).

By the time the case reached the Supreme Court, the House had decided to allow Powell to take his seat in the 91st Congress,[257] and it was certainly possible for the Court to have avoided the question of the House resolution's constitutionality on the basis of mootness.[258] The Court, however, found that Powell's claim for back pay during the time he was excluded remained a live issue.[259] The central question was whether the scope of Congress's power to determine the qualifications of its members constituted a political question. The defendants (the Speaker of the House et al.) contended that Art. I, § 5's language, that "[e]ach House shall be the Judge of the . . . Qualifications of its own Members,"[260] was a "'textually demonstrable constitutional commitment' to the House of the 'adjudicatory power' to determine Powell's qualifications."[261] Powell responded that Congress's authority was limited to determining whether the age, citizenship, and residence terms had been met, and the House had specifically decided they had been in his case.[262] After reviewing historical materials from the Constitutional Convention and the ratification debates,[263] the Court concluded that Powell's view was the more historically plausible.[264] It further rejected the argument that interfering in this intra-House controversy would produce an "'embarrassing confrontation'" with a coordinate branch.[265]

Whatever the merits of the Court's historical and textual analysis on whether age, residence, and citizenship exhausted the factors, it

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257. *Id.* at 495–96.

258. *See id.* at 495–500 (discussing and rejecting the respondents' claim of mootness); *id.* at 559 (Stewart, J., dissenting) (stating that, because of mootness, the Court should not have decided the "novel, difficult, and delicate constitutional questions" at issue). Professor Terrance Sandalow submits that the Court did not take this seemingly simpler way out, perhaps because it was influenced by the popular view that racism played a role in Powell's exclusion, but mainly because of the Court's belief that it should serve as "the ultimate interpreter and defender of the Constitution." *See* Terrance Sandalow, in Symposium, *Comments on* Powell v. McCormack, 17 UCLA L. REV. 164, 165–68 (1969).

259. 395 U.S. at 496.

260. U.S. CONST. art. I, § 5, cl. 1.

261. 395 U.S. at 519.

262. *See id.* at 520 (stating Powell's claim that "an elected representative may be denied his seat only if the House finds he does not meet one of the standing qualifications expressly prescribed by the Constitution").

263. *See id.* at 522–47 (examining pre-Convention precedent, Convention debates and decisions, and post-ratification cases).

264. *See id.* at 547–48 (holding that Art. I, § 5 reserves exclusively to Congress only the power to judge upon the express qualifications in the Constitution).

265. *Id.* at 548.

ultimately evaded the real political question criterion of textual commitment. The position of the defendant members of Congress was that "the House, and the House *alone*, has power to determine who is qualified to be a member."[266] That is, the Constitution excluded judicial review of the matter of "who is qualified to be a member," and while there might be instances when the Court believes that Congress has acted ultra vires, this cannot be corrected by the Justices. The Court, however, answered a very different question by focusing on the issue of whether the three stated qualifications were the exclusive ones Congress could consider. The Justices never explored the scope of Congress's power to be the final arbiter of constitutional qualifications.[267]

On this ultimate issue of justiciability, I have argued throughout this Article that, to the extent that an individual rights claim is present, the Court should be reluctant to find that the text of the Constitution completely forecloses judicial review. Indeed, it will often be possible to state a personal liberty violation when a member of Congress is excluded, for example, because of an impermissible factor such as race or religion.[268] Moreover, even when a specific, textually designated right of this kind is not at stake, a more general objection might be raised—that Congress erred in administering the relevant criteria, for example. The House of Representatives' refusal to seat Congressman Powell falls into this category. In such situations, the rejected candidate might assert an abridgement of his constituents' fundamental right to vote. Similar reasoning would apply to the charge that Congress seated someone who lacked the requisite qualifications. In both of these scenarios, a minority of the nation's citizens would have their ballots totally disregarded in violation of a constitutional guarantee by members of the legislative branch elected by a majority. Whether the Court should recognize such an individual franchise right (alluded to at several points in earlier discussion),[269] and, if so, how broadly it reaches, is beyond present consideration. Still, it is worth noting the foundation on which it rests: in all the instances that it has been raised, the official

266. *Id.* at 519 (emphasis added).

267. *See* Sandalow, *supra* note 258, at 171–73.

268. *See, e.g.*, Bond v. Floyd, 385 U.S. 116, 118, 137 (1966) (holding that the Georgia House could not exclude a duly elected member for criticizing the federal government's policy on Vietnam).

269. *See supra* notes 126, 184–86, and 253 and accompanying text.

successfully supported by the complaining voters has been wholly disabled. This is comparable to the government flatly preventing citizens from casting their ballots or refusing to count them altogether. It appears to be distinguishable in kind from most other situations in which an elector's preferences have been thwarted by subsequent action that is assertedly unconstitutional—for example, when voters complain that their ballots have been rendered ineffective because the representative they elected lost in opposing an allegedly unconstitutional law. The Court's recognition of an abridgement of a constitutional liberty under such circumstances is little different than a ruling that citizens have an enforceable right to have their government act constitutionally.

E. Constitutional Amendments

The mechanics of the Article V amendment process have also played a significant role in the Supreme Court's development of the political question doctrine. Two special concerns arise regarding judicial review. First, because amending the Constitution is the only method available to overrule Supreme Court decisions by political means, the Court's invalidation of a constitutional amendment on procedural grounds would rightfully face challenges about such action's legitimacy.[270] Second, many questions concerning ratification of amendments involve details of legislative procedure about which the judiciary lacks particular competence, and, most importantly for the message of this Article, to the extent such issues pose serious questions of law, they generally raise matters of federalism rather than individual rights. Because of these factors, particularly the first, it may be contended that *all* questions respecting the amendment process should fall into the realm of the political branches. The argument might run as follows: although Article V does not explicitly qualify as a textual commitment to a coordinate branch, it is nonetheless evident from the Constitution's structure, theory, and

270. *See* Scharpf, *supra* note 52, at 588–89 (noting the tension between judicial review of the Article V amendment process and democratic principles); Laurence H. Tribe, *A* Constitution *We Are Amending: In Defense of a Restrained Judicial Role*, 97 HARV. L. REV. 433, 444–45 (1983) (recognizing the need for limits on judicial construction of Article V processes to prevent the "enormous vices" of "exclusive judicial control"); *see also* David Orentlicher, *Conflicts of Interest and the Constitution*, 59 WASH. & LEE L. REV. 713, 745–62 (2002) (discussing the political question doctrine and judicial supremacy).

surrounding context that this was the Framers' intention as well as the most sensible way to construe it.

This view has considerable merit. Still, where questions of individual rights are involved, I would urge that judicial involvement is needed to ensure that the procedures prescribed by Article V have been followed. It must be noted that I do not suggest that anything in the Constitution precludes the alteration (or elimination) of individual rights by amendment. Thus, for example, a *properly adopted* amendment that prohibits flag-burning should be acknowledged and enforced by the Court. But such allowable abrogations of existing personal liberties, under the First Amendment or other clauses securing these guarantees, are constitutionally valid *only* when the requirements of Article V have been satisfied. Otherwise, a simple majority may accomplish through the amendment process what the Constitution does not permit it to do.

The distinction drawn above hinges on the constitutional source of the objections to an amendment. To illustrate, in *Leser v. Garnett*,[271] the Court, in a brief opinion, rejected on the merits claims that the Nineteenth Amendment (guaranteeing women's suffrage) was invalid. The plaintiffs argued, first, that to subject Maryland to an amendment it had failed to ratify would "destroy[] its autonomy as a political body"; second, that the amendment was contrary to the constitutions of several approving states; and third, that two states' ratifications had been procedurally defective.[272]

Under my proposed framework, these claims should all have been treated as political questions. The two "substantive" contentions in *Leser* concern state sovereignty and the balance of power between states and the federal government. Consequently, the Court should have left them, as well as the underlying "procedural" problem, to the political process. The Justices should have reviewed the matter, however, if the plaintiffs had instead stated their substantive objections to the Nineteenth Amendment in terms of individual rights. The challengers might have argued, for example, that by permitting women to vote, the Nineteenth Amendment diluted their existing voting rights (a frivolous claim, especially when made against

271. 258 U.S. 130 (1922).
272. *Id.* at 136–37.

a constitutional amendment).[273] Or, more persuasively, the contention might have been that the ratifying state legislatures were the product of unconstitutional apportionment.[274] The claim might be framed in respect to the individual right to vote recognized in *Baker v. Carr*.[275] If abridgement of individual rights, rather than infringement of Maryland's sovereignty, had been the issue in *Leser*, it would have been appropriate for the Court to scrutinize the procedural issues that the plaintiffs raised about Article V's strictures not being followed.

At the risk of drawing a somewhat vulnerable distinction, made in an effort to limit the Court's participation in the amendment process, the principle of adjudicating a procedural challenge to an amendment when individual rights are involved should not apply when an amendment purports to expand existing individual rights in the Constitution or to announce new ones. The Justices should only review procedural questions about the ratification process when an amendment will diminish *established* protections. Many proposed amendments, from the Equal Rights Amendment to the removal of the disqualification of foreign-born presidents, fall into the former category. The Court's exercise of the awesome, antimajoritarian power of judicial review is justified when existing individual rights are being diminished in the amendment process because it serves to safeguard the constitutionally *secured* interests of certain minorities who could not be expected to prevail through the normal democratic process. That rationale does not apply, however, to amendments that enlarge rights or add new ones, even when those amendments plainly involve personal liberties. To illustrate, suppose the Supreme Court decides that it is unconstitutional for states to prohibit gay marriage.

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273. *Cf*. Katzenbach v. Morgan, 384 U.S. 641, 657 (1966) ("[T]he distinction challenged by appellees is presented only as a limitation on a reform measure aimed at eliminating an existing barrier to the exercise of the franchise.").

274. For discussion of the merits of this matter, compare Peter H. Wolf, *An Antireapportionment Amendment: Can It Be Legally Ratified?*, 52 A.B.A. J. 326, 326–31 (1966) (discussing whether an antireapportionment amendment, passed by malapportioned state legislatures, could be invalidated by the Supreme Court), with Arthur Earl Bonfield, *The Dirksen Amendment and the Article V Convention Process*, 66 MICH. L. REV. 949, 972–76 (1968) (contending that, while a malapportioned legislature should not be allowed to perpetuate its unconstitutional condition, a mere application by such a body to create an Article V state convention might not be unreasonable), and Robert G. Dixon, Jr., *Article V: The Comatose Article of Our Living Constitution?*, 66 MICH. L. REV. 931, 940 (1968) (arguing that the "one man, one vote" principle violated by malapportionment would be only partially upheld by state ratifying conventions or statewide popular referenda, but would be completely honored by nationwide popular referenda).

275. 369 U.S. 186 (1962).

Then, to overturn that decision, an amendment is ratified that permits states to define marriage as being only between a man and a woman. Alternatively, suppose the Supreme Court decides that states *may* constitutionally prohibit gay marriage. The amendment to change this ruling says that states cannot do so. In this second scenario, the amendment effectively establishes a *new* constitutionally guaranteed personal liberty—the right of gay people to marry—just as one that prohibited states from levying an income tax. Therefore, the Court should not review its ratification process. Although the amendment does impose new restrictions on *states' rights*,[276] it does not place limits on interests that the Court must safeguard in order to fulfill its critical role in our system.[277]

The oft-cited case of *Coleman v. Miller* illustrates a situation where the Court properly ruled against justiciability. The plaintiffs contended that Kansas's approval of the proposed Child Labor Amendment (enabling Congress to prohibit employment of minors) was ineffective because (1) the lieutenant governor had no right to cast the deciding vote in the state senate on this matter,[278] (2) Kansas's earlier rejection of the amendment precluded later ratification,[279] and (3) as almost thirteen years had passed since Congress initially proposed the amendment, it had "lost its vitality through lapse of time."[280] The Court found the latter issues to be political questions on which Congress possessed superior expertise.[281]

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276. This was true of the Fourteenth Amendment, whose "procedural" validity was questioned regarding "the efficacy of ratifications by state legislatures, in light of the previous rejection or attempted withdrawal." Coleman v. Miller, 307 U.S. 433, 450 (1939). For the rejection of a judicial challenge to the ratification of the Fourteenth Amendment, see *Maryland Petition Committee v. Johnson*, 265 F. Supp 823, 826–27 (D. Md. 1967) (noting the completion of the procedural requirements for ratification and adoption and the persuasiveness of the Supreme Court's repeated reliance on the amendment).

277. Another variant on this set of hypotheticals may be helpful in describing the contours of my approach. Suppose the following sequence of events: (1) After a Supreme Court ruling that there is no constitutional right to marry someone of the same gender, a constitutional amendment proposes that same-sex marriage may not exist in the United States; (2) while the submitted amendment is pending, the Justices overrule their earlier decision and hold that there *is* a fundamental right to marry a person of either gender; and (3) a gay or lesbian couple then bring suit for a declaration that the now-approved amendment is procedurally flawed. Assuming no jurisdictional or procedural hurdles, the Court should treat the issue as justiciable since the substance of the amendment contradicts a judicially determined individual constitutional right.

278. 307 U.S. 433, 436 (1939).

279. *Id.* at 447.

280. *Id.* at 451.

281. *Id.* at 450, 454. The Court was equally divided as to the first issue. *Id.* at 447.

In respect to the third, for example, the Court concluded that a variety of "political, social, and economic conditions" might affect the question of how long an amendment should remain pending and that such questions should be decided by a body possessing "full knowledge and appreciation" of such matters.[282]

At the root of the claims in *Coleman* were questions about how Congress should exercise its delegated authority with respect to the states. The first two issues concerned procedures during state ratification of proposed constitutional amendments,[283] and the third involved a matter that Congress could indisputably have addressed (and now regularly does with a designated period) in its submission to the states. These are all constitutional issues that affect only the balance of political power between the states and the national government. Especially since the Child Labor Amendment itself involved only states' rights and since individual liberty was not at stake, the substance of the challenges was better settled within the political process and judicial involvement was not called for.[284]

Among the several reasons for *Coleman*'s notability is the plurality opinion's suggestion that it might be difficult to develop manageable standards to determine whether a "reasonable time had elapsed" since an amendment was first sent to the states.[285] Although the Justices observed that reasonableness varies with circumstances, and that "the question of a reasonable time in many cases would involve . . . an appraisal of a great variety of relevant conditions, political, social, and economic" that the judiciary was ill-equipped to

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282. *Id.* at 454.

283. A similar matter arose in *Hawke v. Smith*, 253 U.S. 221 (1920), as to whether Article V permits ratification to be accomplished by referendum. *Id.* at 224. Note that if the Court in *Hawke* had only engaged in statutory interpretation of the joint resolution proposing the amendment—which "provided that the Amendment should be inoperative unless ratified . . . by the legislatures of the several States," *id.* at 225—then a true political question issue would be absent.

284. Professor Walter Dellinger has argued that nearly all questions pertaining to the procedural validity of constitutional amendments present a strong case for judicial review; that there is no contrary support in the Constitution or in the Court's past practice; and that allowing such questions of an amendment's validity to be decided on an ad hoc basis by Congress will only foster uncertainty on the important matter of whether a particular amendment is currently in effect. Walter Dellinger, *The Legitimacy of Constitutional Change: Rethinking the Amendment Process*, 97 HARV. L. REV. 386, 405 (1983). Professor Laurence Tribe responds that Dellinger overstates the dangers in leaving questions about the amendment process to Congress and too easily dismisses the legitimacy concerns of extensive judicial involvement. Tribe, *supra* note 270, at 434–35.

285. *Coleman*, 307 U.S. at 453.

make,[286] I believe that if the substance of the proposed amendment had involved a claim of individual rights (rather than states' rights), a manageable standard could have been worked out.

The *Coleman* opinion in fact implied as much in its discussion of *Dillon v. Gloss*,[287] which held that Congress could set time limits for an amendment's ratification.[288] The plurality noted that the *Dillon* Court's description of proposal and ratification as "but succeeding steps in a single endeavor" created a "fair implication that ratification must be sufficiently contemporaneous in the required number of States to reflect the will of the people in all sections at relatively the same period."[289] Because this interpretation of the Constitution provides meaningful guidance as to how closely in time ratification must follow congressional approval, articulating manageable standards should not have been appreciably more challenging than in many other situations in which the Court has done so. Moreover, the Court could simplify its task further by adopting an appropriate standard of deference to any time limits Congress initially sets. Since the subject of constitutional modification submitted for ratification must involve established personal liberties in order to invoke judicial review under my approach, the degree of deference due to Congress's conclusion should be similar to other cases respecting legislative fact finding for laws allegedly abridging individual rights.[290]

F. Separation of National and State Authority

Most issues of federalism—dividing power between the central government and the states—are readily identifiable as involving an exercise of authority by the national political branches (usually by Congress, but occasionally by the executive, either alone or in concert with the Senate) that allegedly intrudes into an area reserved to the states. There are some constitutional provisions, however, that prohibit certain action by the states but do not expressly grant it to

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286. *Id.*

287. 256 U.S. 368 (1921).

288. *See id.* at 375–76 ("Of the power to Congress, keeping within reasonable limits, to fix a definite period for the ratification we entertain no doubt.").

289. *Coleman*, 307 U.S. at 452.

290. *Cf.* Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 506 n.24 (1984) (discussing Supreme Court review of findings of fact by a state court when a federal right has been denied).

Congress. This kind of situation arose in the *Legal Tender Cases*,[291] where the question was whether Congress possessed the power under the Constitution to make treasury notes legal tender for debts.[292] Overruling its year-old decision in *Hepburn v. Griswold*,[293] the Court concluded that it did.[294]

The Court first rejected the argument that Art. I, § 8, cl. 5, permitting Congress "[t]o coin Money [and] regulate the Value thereof," impliedly precluded Congress from making *notes* legal tender.[295] Instead, the Court found, Art. I, § 10, cl. 1's denial to the states of power to "coin Money" or to "make any Thing but gold and silver Coin a Tender in Payment of Debts,"[296] suggested by inference that Congress could issue notes as well as coin money. The Court stated that "[w]hatever power there is over the currency is vested in Congress. If the power to declare what is money is not in Congress, it is annihilated."[297] The Court noted that in other circumstances when the Constitution withheld a certain power from both the federal government and the states, the prohibition had not been "left to inference" but "expressly denied to both," and that when authority "was expressly denied to the States only, it was for the purpose of rendering the Federal power more complete and exclusive."[298]

Although the Court alluded to "general power over the currency" as something the states had "surrendered,"[299] the reference did not specifically involve the Tenth Amendment. Because of the explicit constitutional bar on state issuance of paper notes, there could be no argument that such authority was reserved to the states. Nevertheless, as the Court recognized, the underlying issue can be characterized as one of federalism. That is, an expansion of the scope of the federal government's powers, even within an area in which the states are unable to act, may nevertheless indirectly weaken the

291. 79 U.S. 457 (1871).
292. *Id.* at 529.
293. 75 U.S. 603 (1870).
294. *Legal Tender Cases*, 79 U.S. at 553.
295. *Id.* at 544–45.
296. U.S. CONST. art. I, § 10, cl. 1.
297. 79 U.S. at 545.
298. *Id.* at 546.
299. *Id.*

states' position. If no individual rights claim is present, this should be nonjusticiable under my view of the political question doctrine.[300]

In fact, there was no assertion in the *Legal Tender Cases* that the purpose of the coinage limitation was to protect personal liberty—simply that it denied power to Congress.[301] Because there appears to be no direct individual rights claim comprehended within the question of Congress's capacity to coin money or similar constitutional provisions, such issues should be treated as ones of federalism and, consequently, as political questions.

G. Impeachment

The role of impeachments in the constitutional structure suggests that they should not generally be subject to judicial review. The impeachment of judges in particular is, along with constitutional amendment, one of the two clearest means by which the Constitution provides a political check on the judicial power. That function would obviously be undermined if the courts were to assume any significant role in assessing the validity of the removal of judges. In addition, constitutional structure provides both internal and external checks on congressional abuse of its impeachment power, especially in connection with executive branch officials. By assigning a prosecutorial function to the House and a quasi-judicial one to the Senate, the Constitution ensures that impeachment will be subject to

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300. A constitutional provision that functions similarly is Art. I, § 9, cl. 5, which prohibits the federal government from imposing an export tax. Although states lack this ability as well, the clause exists at least partially for their protection—to ensure that state economies are not hampered by excessive outside interference. Questions relating to this, like those concerning Art. I, § 8, cl. 5, should properly be considered nonjusticiable issues of federalism.

301. There was some suggestion in the case that issuing paper money would impair the obligation of contracts, although the reasoning was not that the Contract Clause bound the federal government, but rather that the purpose of denying Congress the power to make notes legal tender was to prevent the evil of national abridgment of private agreements. *See Legal Tender Cases*, 79 U.S. at 549 (rejecting this argument and proclaiming that "[e]very contract for the payment of money . . . is necessarily subject to the constitutional power of the government over the currency, whatever that power may be, and the obligation of the parties is, therefore, assumed with reference to that power"); *see also* Legal Tender Case, 110 U.S. 421, 451 (1884) (Field, J., dissenting) (arguing that Congress' alteration of the form of legal tender "disturb[s] the relation of commerce" and "ought not to be readily accepted"). If this claim were fashioned as a due process violation by Congress because of improper retroactive effect, *cf.* E. Enters. v. Apfel, 524 U.S. 498, 539 (1998) (Kennedy, J., concurring in the judgment and dissenting in part) (agreeing with the plurality that the Coal Act of 1992 unconstitutionally imposed retroactive liability on the petitioner, but arguing that, in doing so, it violated due process principles rather than the Takings Clause), then it would present an independent individual rights issue. *See supra* note 38.

the independent deliberation of two bodies of government with separate electoral bases.[302] Externally, legislators who undertake an unpopular impeachment may fear popular retaliation—an influential factor for House Republicans in deciding whether to impeach President Clinton.[303] In all, these nonjudicial mechanisms for controlling rash or unfounded impeachments make the case for judicial nonintervention particularly strong.

The general policy that holds impeachments not subject to judicial review applies to questions about (1) the process of impeachment, such as the allegations by the impeached judge in *Nixon v. United States* that allowing evidence against him to be heard by a Senate committee was not in keeping with the *Senate*'s obligation to "try" him,[304] and (2) the substance of impeachable offenses, such as whether the meaning of the term "high crimes and misdemeanors" in a presidential impeachment should be left to congressional, not judicial determination.[305] This principle of judicial forbearance also means that congressional decisions not to impeach (or to impeach and not to convict) are nonjusticiable.[306] Several other matters would be encompassed within the nonjusticiable category by a Court ruling that the Impeachment Power grants Congress unreviewable authority to determine its scope. These issues—true political questions—include claims by a defendant that the Senate rather than the House voted for impeachment, that the House's vote to impeach fell short of a majority, that the Senate's vote for conviction was less than two-thirds, that the Senators never took the "Oath or Affirmation"

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302. For additional thoughts on this point, see Akhil Reed Amar, *On Impeaching Presidents*, 28 HOFSTRA L. REV. 291, 301 (1999) (asserting that impeachment is actually a "special case" of judicial review, granting the Senate exclusive jurisdiction to hear impeachment cases and render final judgments).

303. *See id.* at 294 ("[I]f Congress is too hard or soft [on impeached presidents], they will pay at election time."); *see also* John Harwood, *GOP Assesses Possible Backlash Following Vote on Impeachment*, WALL ST. J., Dec. 21, 1998, at A9 (discussing the political implications of the Clinton impeachment on the 2000 elections).

304. 506 U.S. 224, 229 (1993).

305. *See* Amar, *supra* note 302, at 301 (noting that no court will review Congress' interpretation of that phrase).

306. *See* Michael J. Gerhardt, *The Lessons of Impeachment History*, 67 GEO. WASH. L. REV. 603, 621–22 (1999) (discussing Congress' power to choose not to impeach or convict and recognizing its apparent authority to pass a resolution censuring the president).

required by Art. I, § 3, or that the Chief Justice did not preside at the Senate trial.[307]

Slightly different questions arise when Congress attempts to apply impeachment procedures in a way that the Constitution does not explicitly authorize. If the Senate fails to convict an impeached president, for example, may it nonetheless impose a lesser sanction, such as censure, as was discussed with respect to President Clinton?[308] Similarly, if the Senate convicts a president, does Art. II, § 4 mandate removal as the sanction, or may a greater or lesser punishment, such as a brief suspension from office, be imposed?[309] Or suppose that the Chief Justice believed that it was impossible at this particular time for him to continue to direct the Court's regular business and to preside on Capitol Hill, and consequently assigned the Senior Associate Justice to the impeachment trial. In the absence of an individual rights claim, I believe that constitutional structure leaves the determination of such potentially close questions to Congress. Judicial review is not called for because the issues concern the relationship between the executive and legislative branches; both are fully capable of looking after their own interests and ultimately subject to effective electoral check.

The issues just set out plainly do not appear to involve personal liberties grounded in some other constitutional provision, such as the Due Process or Equal Protection Clauses, or the freedoms of speech, press, and religion. There are circumstances, however, under which the accused officeholder may present a valid individual rights claim independent of the provision on impeachment. For example, suppose Congress removed a federal judge who claimed that this was motivated solely by race. The judge would have a powerful equal protection claim, presumptively calling for the normal operation of nondeferential judicial review respecting alleged violations of

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307. For approval of this view, see Michael J. Gerhardt, *Rediscovering Nonjusticiability: Judicial Review of Impeachments After* Nixon, 44 DUKE L.J. 231, 275–76 (1994).

308. *See* Michael J. Gerhardt, *The Historical and Constitutional Significance of the Impeachment and Trial of President Clinton*, 28 HOFSTRA L. REV. 349, 377–78 (1999) (arguing that the Constitution does not limit Congress' avenues of addressing misconduct to impeachment and permits public announcement of the views of members of Congress).

309. *See* U.S. CONST., art. II, § 4 ("The President, Vice President and all civil Officers of the United States, *shall be removed* from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.") (emphasis added). *See generally* Amar, *supra* note 302, at app. (reprinting an exchange Professor Amar conducted with Stuart Taylor, Jr. on these and related questions).

constitutionally secured personal liberties. Similarly, while the judge in *Nixon v. United States* did not specifically allege an individual rights violation, his argument—that the full Senate did not participate in the evidentiary hearing on the charges brought against him and thus abused the Senate's authority to "try" all impeachments[310]—could readily have been framed as a due process infraction.[311]

In respect to some types of alleged improprieties, the Court's conclusion of nonjusticiability could be grounded in a textual commitment—that Art. I, §3's grant to the Senate of "the sole Power to try all Impeachments" "makes clear that the Senate sits as judge and jury, and its rulings of fact and law therefore stand as res judicata in all other tribunals."[312] I probably would not interpret this, however, as applying beyond the Senate's determination of the adjudicative facts alleged for impeachment.[313] For example, the constitutionality of procedural protections are, at least in most instances, distinct from trial of the substantive charges. Also, factors like racial prejudice are wholly external to the litigation proceedings.[314] In both situations, this res judicata rationale would not apply. Or a political question ruling may be based on the Court's judgment that it lacks "judicially

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310. Nixon v. United States, 506 U.S. 224, 229 (1993).

311. In fact, a subsequently impeached federal judge made this claim, which was initially accepted by the federal district court, *see* Hastings v. United States, 802 F. Supp. 490, 504 (D.D.C. 1992) ("The fundamental constitutional concept of due process . . . demands that impeachments be tried by the full Senate."), but then dismissed after *Nixon* was decided, *see* Hastings v. United States, 837 F. Supp. 3, 15 (D.D.C. 1993) ("In no sense of the word was Judge Hastings 'tried' by the full Senate. That having been said, because of the *Nixon* decision, there is no further relief that can be afforded Judge Hastings.").

312. PAUL BREST ET AL., PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS 735 (4th ed. 2000); *accord* Amar, *supra* note 302, at 301.

313. *Cf.* Powell v. McCormack, 395 U.S. 486, 547 (1969) (reasoning that even if the intent of the Framers had not been clear, the Court would have "resolved[d] any ambiguity in favor" of the people's right to choose its representatives).

314. For the view that neither the text nor intention of the "sole Power to try all Impeachments" language, U.S. CONST. art. I, § 3, cl. 6, supports the conclusion that the judiciary has no role whatever, see RAOUL BERGER, IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS 120–21 (1973) (arguing that the impeachment power does not insulate acts from judicial review for due process violations); Rebecca L Brown, *When Political Questions Affect Individual Rights: The Other* Nixon v. United States, 1993 SUP. CT. REV. 125, 127–134 (claiming that the Court's decision in *Nixon* improperly restricts judicial review and thereby disrupts the separation of powers); Daniel A. Rezneck, *Is Judicial Review of Impeachment Coming?*, 60 A.B.A. J. 681, 683 (1974) ("[I]f 'try' was used in its familiar sense . . . , it would not preclude judicial determination of purely legal issues—for example, what constitutes an impeachable offense?"). *But see* CHARLES L. BLACK, JR., IMPEACHMENT: A HANDBOOK 53–63 (1974) (finding no evidence of the Framers' intent to create the "preposterous situation," *id.* at 57, of judicial review of impeachment trials).

discoverable and manageable standards,"[315] whose complexities are discussed above,[316] because of the difficulties of ferreting out the needed adjudicative facts, or of determining the motivation of the relevant government actors—535 members of Congress are different from a handful of Senators on the Judiciary Committee for this purpose.[317] (The president's nomination and appointments powers present similar scenarios.[318])

Whether the Impeachment Power (and a few other provisions with similar characteristics) should be construed to overcome the usually strong presumption in our governmental system favoring resolution of the scope of constitutionally secured individual rights by Article III judges is exceedingly difficult. On the one hand, I believe that while the *Nixon* Court was right to rule against the judge, it would have been preferable, in my view, to have decided the merits of the due process claim (if properly presented) by finding that the Senate's action, while not posing a political question, was not unconstitutional.[319] On the other hand, it bears repeating my belief

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315. Baker v. Carr, 369 U.S. 186, 217 (1962).

316. *See supra* Part I.C. As to whether the judiciary lacks manageable standards for defining "high crimes and misdemeanors," it has been argued that the Framers chose the phrase precisely because it had an "ascertainable content in the English practice," and that this historical standard "may yet be reduced to recognizable categories that serve as an outline," even if an "imprecise" one, for courts. Raoul Berger, *Impeachment for "High Crimes and Misdemeanors,"* 44 S. CAL. L. REV. 395, 446 (1971).

317. For a strongly presented description of the formidable problems connected with ascertaining the motives of even a single legislator, see Justice Scalia's dissenting opinion in *Edwards v. Aguillard*, 482 U.S. 578, 636–39 (1987) (Scalia, J., dissenting), stating that "how or where" to find a legislator's actual intentions is "almost always an impossible task." *Id.* at 636.

318. Other constitutional provisions have also been said to fall into this category. See Pushaw, *supra* note 15, at 1197, for the view that the president's decision whether to veto a bill is unreviewable by the courts because of the president's absolute veto power. Similarly, see then-Judge Scalia's opinion in *Morgan v. United States*, 801 F.2d 445 (D.C. Cir. 1986), where, in a closely contested congressional election, registered Republicans in Indiana who supported the losing candidate challenged the decision by the House of Representatives to seat his rival, *id.* at 446. Affirming the district court's dismissal of the case for lack of jurisdiction, *id.* at 446, 451, the opinion reasoned that the text and history of the Elections Clause were "entirely consistent with [the] plain exclusion of judicial jurisdiction" because the Clause provides that the House is not merely a judge but "'*the* Judge'" of its members' qualifications, *id.* at 447. Scalia does not argue that Congress's power under the Elections Clause is unlimited—only that it is unreviewable by the judiciary. In practice, however, the result may be the same as in the veto case—that is, the Court may be required to dismiss a claim that the coordinate branch has exercised its power in a way that violates individual rights.

319. This is the position taken by Justice White's concurrence; indeed, it is strongly suggested in Chief Justice Rehnquist's opinion for the Court, which undertook an historical inquiry into the meaning of the word "try" before pronouncing the matter a political question.

that conferring final authority on the president and Congress may well provide better protection for individual rights in at least some circumstances than would a judicial ruling on the merits that affords substantial deference to the political decisionmakers.[320]

CONCLUSION

Whether there should be a political question doctrine and, if so, how it should be implemented continue to be contentious and controversial issues, both within and outside the Court. This Article urges that the Justices should reformulate the detailed definition that they have utilized (at least formally) since 1962, and adopt four criteria to be applied in future cases. The least disputed—textual commitment—is the initial factor listed in *Baker v. Carr*. The other three are based on functional considerations rather than constitutional language or original understanding. The first of these—"structural issues: federalism and separation of powers"—has been advanced and developed at length in my earlier work. It is based on a comparative advantage of the political process over the Court in sound constitutional decisionmaking respecting the relevant issues, as well as the trustworthiness respecting fundamental values of the national legislative and executive branches in doing so. The remaining two criteria involve removing questions of individual rights from the judiciary's realm—something that would (and should) occur very infrequently. The manageable standards test recognizes that there may be constitutional provisions for which the Court lacks the capacity to develop clear and coherent principles. The generalized grievance guide is similar in many ways to "structural issues" in that it is also grounded in matters of comparative advantage and trustworthiness of results.

320. For forceful criticism of anything greater than a "certain degree" of judicial deference so as to avoid "grave potential dangers to individual liberty," see Redish, *supra* note 12, at 1061.