

HEINONLINE

Citation: 102 Colum. L. Rev. 237 2002



Content downloaded/printed from
HeinOnline (<http://heinonline.org>)
Mon Nov 2 14:21:49 2015

- Your use of this HeinOnline PDF indicates your acceptance of HeinOnline's Terms and Conditions of the license agreement available at <http://heinonline.org/HOL/License>
- The search text of this PDF is generated from uncorrected OCR text.
- To obtain permission to use this article beyond the scope of your HeinOnline license, please use:

[https://www.copyright.com/ccc/basicSearch.do?
&operation=go&searchType=0
&lastSearch=simple&all=on&titleOrStdNo=0010-1958](https://www.copyright.com/ccc/basicSearch.do?&operation=go&searchType=0&lastSearch=simple&all=on&titleOrStdNo=0010-1958)

ARTICLES

MORE SUPREME THAN COURT? THE FALL OF THE POLITICAL QUESTION DOCTRINE AND THE RISE OF JUDICIAL SUPREMACY

*Rachel E. Barkow**

This Article traces the rise and the fall of the political question doctrine and explores the relationship of the doctrine to the Supreme Court's contemporaneous view of its institutional competency and the proper scope of judicial review. The Article provides this account for both the classical political question doctrine, which is rooted in the text and structure of the Constitution, and the prudential political question doctrine, which is a judicially created method of avoiding certain constitutional questions. The Article chronicles the Supreme Court's disregard in recent years for both versions of the doctrine, including an extensive analysis of the applicability of the political question doctrine to the Article II question in the 2000 presidential election cases. The Court's failure even to consider the doctrine in those cases reflects the doctrine's demise. The Article argues that the fall of the political question doctrine is part of a larger trend in which the Supreme Court has embraced the view that it alone among the three branches of government has the power and competency to provide the full substantive meaning of all constitutional provisions. The Article concludes that the demise of the political question doctrine is troubling because the doctrine forces the Court to confront the institutional strengths of the political branches—and the Court's weaknesses—in resolving some constitutional questions.

TABLE OF CONTENTS

INTRODUCTION	239
I. THE RISE AND FALL OF THE POLITICAL QUESTION DOCTRINE.....	244

* B.A., 1993, Northwestern University; J.D., 1996, Harvard University. This Article was written while the author was the John M. Olin Fellow in Law at the Georgetown University Law Center. I thank Anthony Bellia, Jr., Paul Berman, Walter Dellinger, Viet Dinh, Richard Fallon, Jr., Vicki Jackson, Ronald Levin, John Manning, Henry Monaghan, Nelson Lund, John Oakley, Sri Srinivasan, Mark Tushnet, and John Yoo for their helpful comments and insights on earlier drafts. I thank the John M. Olin Foundation and the Georgetown University Law Center for financial and institutional support during the writing of this Article. Finally, I am especially indebted to Anthony Barkow, whose advice and encouragement made this Article possible.

A.	The Origins of the Classical Political Question Doctrine	246
1.	Chief Justice Marshall and the Classical Political Question Doctrine	248
2.	Early Judicial Review and the Political Question Doctrine	250
B.	Expanding the Classical Doctrine: The Development of the Prudential Political Question Doctrine	253
1.	Using Prudential Factors in Classical Interpretation	253
2.	The Prudential Political Question Doctrine as a Tool for Abstention	258
C.	The Beginning of the End of the Political Question Doctrine: <i>Baker v. Carr</i> and Its Aftermath	263
1.	<i>Baker v. Carr</i>	263
2.	The Narrowing of the Prudential Political Question Doctrine	267
II.	THE 2000 PRESIDENTIAL ELECTION CASES: THE NADIR OF THE POLITICAL QUESTION DOCTRINE AND THE ZENITH OF JUDICIAL SUPREMACY	273
A.	Application of the Classical Political Question Doctrine to the Article II Claim	277
1.	The Text	277
2.	The Original Understanding	280
3.	Subsequent Constitutional History	286
B.	Application of the Prudential Political Question Doctrine to the Election Cases	295
III.	THE DECLINE OF THE POLITICAL QUESTION DOCTRINE AND THE TREND TOWARD JUDICIAL SUPREMACY	300
A.	Judicial Immodesty and the Decline of Deference	300
1.	Section 5 of the Fourteenth Amendment	303
2.	The Commerce Clause	308
a.	The Political Process and the Commerce Clause	309
b.	The Substantial Effects Test and Congressional Factfinding and Policymaking	311
3.	Substantive Canons of Statutory Interpretation	314
4.	The Political Question Doctrine and the New Judicial Supremacy	317
B.	A Call for Judicial Modesty: Resuscitating the Classical Political Question Doctrine	319
1.	The Spectrum of Deference	319
2.	Subjecting Political Questions to Political Pressures and Political Judgment	323
3.	The Importance of the Classical Political Question Doctrine	330
	CONCLUSION	336

INTRODUCTION

The most memorable line from *Marbury v. Madison* is its simply worded yet monumentally powerful assertion that it is “emphatically the province and duty of the judicial department to say what the law is.”¹ This phrase could be read in isolation to establish seemingly limitless constitutional authority in the Supreme Court. The Constitution is law; it is the Supreme Court’s province—its *duty*—to say what the law is; therefore it is the Supreme Court’s province and duty to answer all constitutional questions.

The problem, of course, is that this eloquent excerpt from *Marbury* cannot be taken out of context. The duty “to say what the law is” does not necessarily imply a court monopoly on interpretation. This duty leaves room for deference to the constitutional interpretation of the political branches.² Indeed, the Constitution may contain provisions that dictate an interpretive role for the political branches. *Marbury* itself contains the seeds for the view that the authority to answer some constitutional questions rests entirely with the political branches. In *Marbury*, Chief Justice Marshall acknowledged the existence of certain questions that are wholly outside the purview of the courts—“[q]uestions, in their nature political.”³ Although this reference appears in a discussion of the remedial scope of the writ of mandamus, it reveals Marshall’s fundamental conception of the separation of powers and highlights both the limits of judicial authority and the interpretive role played by the political branches. When these political questions are presented, it is the province and duty of Congress or the Executive, not the courts, to say what the law is. These questions have come to form the substance of the so-called “political question doctrine.”

The political question doctrine reflects a constitutional design that does not require the judiciary to supply the substantive content of all the Constitution’s provisions. The judicial task at the outset of every case is to make a threshold determination as to whether the Constitution gives some interpretive authority to the political branches on the question being raised and to “specify the boundaries of what has been allocated elsewhere.”⁴ Just as a statute may give more or less interpretive power to agencies, the Constitution also creates different degrees of interpretive power in the political branches. Similarly, just as a statute may commit a question entirely to agency discretion, so, too, does the Constitution recognize that some questions rest within the absolute discretion of the political branches.

1. 5 U.S. (1 Cranch) 137, 177 (1803).

2. See Henry P. Monaghan, *Marbury and the Administrative State*, 83 Colum. L. Rev. 1, 7–9 (1983) [hereinafter Monaghan, *Marbury and the Administrative State*].

3. *Marbury*, 5 U.S. (1 Cranch) at 170.

4. Monaghan, *Marbury and the Administrative State*, supra note 2, at 9.

Underlying the political question doctrine and this constitutional design is the recognition that the political branches possess institutional characteristics that make them superior to the judiciary in deciding certain constitutional questions. That is, the Framers established three coordinate branches, each with unique attributes, to strike a balance between a workable government and the preservation of liberty. While the Supreme Court's independence from the electorate is ideal to preserve individual rights against majority sentiment, that same detachment renders the Court a poor factfinder and policymaker as compared to Congress and the Executive. Thus, to the extent that a constitutional question raises questions of policy or rests on factual findings, there may be sound reasons to defer to the judgment of Congress and the Executive. In a smaller category of cases, those identified by the political question doctrine, these same institutional differences make absolute deference appropriate.

That notion—that some constitutional questions ultimately must be decided by the political branches and not through judicial review—is beginning to seem antiquated. Yet the demise of the political question doctrine is of recent vintage, and it correlates with the ascendancy of a novel theory of judicial supremacy. While judicial supremacy is, of course, a complicated concept that can include many relationships and permutations,⁵ in this Article I use the term in a more specific sense. My focus is on the Supreme Court's view of its own power and ability, vis-à-vis Con-

5. Indeed, in the past several years, the meaning of judicial supremacy has been the topic of a lively academic debate. See, e.g., Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 Harv. L. Rev. 1359, 1362 (1997) (defending *Cooper v. Aaron* and "its assertion of judicial primacy without qualification"); Neal Devins & Louis Fisher, *Judicial Exclusivity and Political Instability*, 84 Va. L. Rev. 83, 106 (1998) ("No single institution, including the judiciary, has the final word on constitutional questions."); Christopher L. Eisgruber, *The Most Competent Branches: A Response to Professor Paulsen*, 83 Geo. L.J. 347, 348 (1994) (arguing for comparative institutional competence whereby "each institution must interpret the Constitution in order to decide how much deference to give to specific decisions by other institutions"); David E. Engdahl, *John Marshall's "Jeffersonian" Concept of Judicial Review*, 42 Duke L.J. 279, 280 (1992) (concluding that Marshall held the "Jeffersonian" view of judicial review whereby "each organ of government is obliged to decide independently . . . constitutional questions . . . none being bound by the others' opinions on the same question"); Gary Lawson & Christopher D. Moore, *The Executive Power of Constitutional Interpretation*, 81 Iowa L. Rev. 1267, 1270 (1996) (arguing that the President "is not bound by, or legally required to give deference to, the constitutional determinations of Congress or the courts"); Sanford Levinson, *Constitutional Protestantism in Theory and Practice: Two Questions for Michael Stokes Paulsen and One for His Critics*, 83 Geo. L.J. 373, 373-74 (1994) (agreeing largely with Paulsen's notion of constitutional rather than judicial supremacy); Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power To Say What the Law Is*, 83 Geo. L.J. 217, 221 (1994) [hereinafter Paulsen, *The Most Dangerous Branch*] ("The President's power to interpret the law is, within the sphere of his powers, precisely coordinate and coequal in authority to the Supreme Court's."); David A. Strauss, *Presidential Interpretation of the Constitution*, 15 Cardozo L. Rev. 113, 117 (1993) (refuting the view that "the President is sometimes entitled to claim direct access to 'the Constitution,' unmediated by constitutional law as the courts have developed it").

gress and the Executive, to decide constitutional questions.⁶ In particular, my emphasis is on the Supreme Court's view in recent years that it alone among the three branches has been allocated the power to provide the full substantive meaning of all constitutional provisions. This is a theory that recognizes only one half of *Marbury* and ignores the existence of political questions.

The seeds for this vision of the Supreme Court's power can be found in *Cooper v. Aaron* and its proclamation that the Court is "supreme in the exposition of the law of the Constitution."⁷ Again, however, context is important. *Cooper* was concerned with state obedience to a desegregation order.⁸ The Court's claim of supremacy was not addressed to Congress or the Executive. Thus, even in the wake of *Cooper*, the Warren Court deferred to Congress's factual findings under Section 5 of the Fourteenth Amendment and left questions of Congress's Commerce Clause power largely to the political process.

But that has changed. The current Supreme Court has taken the one-sided supremacy rhetoric from *Marbury* and *Cooper* to another level: the coordinate branches of the federal government. The Rehnquist Court's view of the relationship among the three branches of the federal government is decidedly more hierarchical than coordinate. And at the top of that hierarchy sits the Court itself. Thus, the current Court has restricted substantially Congress's remedial role under Section 5.⁹ As for the Commerce Clause, at the same time it struck down the Violence Against Women Act as exceeding Congress's Commerce Clause powers, the Court proclaimed, without qualification, that "ever since *Marbury* this Court has remained the ultimate expositor of the constitutional text."¹⁰

If the Court can cast aside so easily Congress's interpretive roles under Section 5 and the Commerce Clause, it would be difficult for the political question doctrine to survive in anything but the most anemic fashion. Unlike the Commerce Clause and Section 5, which both involve *degrees* of deference, the political question doctrine deals with *absolute* interpretive power in the political branches. The political question doctrine establishes the boundaries of the Supreme Court's jurisdiction by identifying those constitutional questions that are beyond the scope of a judicial "case" or "controversy."¹¹ While the Court itself is responsible for defining the limits of its own jurisdiction, its constitutional role as to the underlying substantive issue comes to an end once the issue is identified

6. I do not address the duty of Congress or the Executive to obey the Court's decisions.

7. 358 U.S. 1, 18 (1958).

8. *Cooper*, 358 U.S. at 4.

9. See, e.g., *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 121 S. Ct. 955, 963 (2001) (holding that the ADA was not a valid exercise of Congress's Fourteenth Amendment enforcement power).

10. *United States v. Morrison*, 529 U.S. 598, 617 n.7 (2000).

11. Other jurisdictional doctrines, such as standing and mootness, place similar limits on the powers of federal courts.

as a political question. In contrast, the interpretive questions raised by cases under Section 5 and the Commerce Clause implicate the amount of deference the Court should give to Congress when a legal question is properly before the Court.

The areas are related, however, for they are part of a spectrum of deference that is inferred from the Constitution's text, structure, and history. At one end of the spectrum are the questions on which the political branches are entitled to no deference. This theory of interpretation makes most sense in cases involving the proper scope of individual rights. Moving away from that view along the spectrum are broadly worded grants of power to the political branches, such as the Commerce Clause and the Necessary and Proper Clause. Still further along the spectrum are express grants of interpretive power, such as Section 5 of the Fourteenth Amendment. The Court's interpretive shift away from deference to Congress in the Commerce Clause and Section 5 contexts reflects the Court's view that it possesses greater institutional competency to decide those questions independently, without deference to Congress's factual findings and policy judgments.

Given the erosion of deference in these contexts, it is not surprising that the questions at the other end of the spectrum—political questions—are all but disappearing. The premise of the political question doctrine is that the Constitution vests authority to decide some constitutional questions in the political branches because of their unique institutional characteristics and strengths. The political question doctrine, then, is at odds with the Court's view of its place in the constitutional order and of its superior competency vis-à-vis Congress and the Executive to decide *all* constitutional questions. To eliminate that tension, the Court must abandon either its theory of supremacy or the political question doctrine. It is hardly surprising that the Court has opted for the course that aggrandizes its own power.

There is perhaps no starker illustration of this development than the recent presidential election cases. As this Article demonstrates, the argument for applying the political question doctrine to the Article II question in *Bush v. Palm Beach County Canvassing Board* (*Bush I*)¹² and *Bush v. Gore* (*Bush II*)¹³ is a powerful one.¹⁴ Yet a unanimous Court in *Bush I* and

12. 531 U.S. 70 (2000).

13. 531 U.S. 98 (2000).

14. As discussed further below, see *infra* text accompanying note 212, I do not contend that the equal protection argument presented a political question. Although the *per curiam* opinion in *Bush II* rested on equal protection grounds, some scholars who have defended the Court's decision prefer the Article II rationale. See, e.g., Richard A. Epstein, "In Such Manner as the Legislature Thereof May Direct": The Outcome in *Bush v. Gore* Defended, in *The Vote: Bush, Gore, and the Supreme Court* 13, 14 (Cass R. Sunstein & Richard A. Epstein eds., 2001) (offering a defense of the Court's decision based on Article II of the Constitution); John C. Yoo, In Defense of the Court's Legitimacy, in *The Vote: Bush, Gore, and the Supreme Court*, *supra*, at 223, 239–40 [hereinafter Yoo, In Defense] (stating that the *Bush II* concurrence, based on Article II, makes much more sense than the

the concurrence in *Bush II* addressed the Article II question without even mentioning the doctrine, let alone applying it.¹⁵ Instead, the Justices took for granted that they had the “responsibility to resolve the federal and constitutional issues the judicial system has been forced to confront.”¹⁶

This Article explores the evolution of the political question doctrine and its relationship to the expansion of a hierarchical, as opposed to coordinate, view of the three-branch structure of government and the interpretive powers vested in each branch under the terms of the Constitution. Part I details the rise and fall of the political question doctrine, analyzing the correlation between the strength of the doctrine and contemporaneous attitudes regarding the scope of judicial review. Part I also tracks the development of both the classical and prudential strains of the doctrine, and argues that the development of the prudential variant explains, in large measure, the widespread resistance to the doctrine as a whole and the confusion it has engendered.

Part II illustrates the Supreme Court’s disregard for the classical and prudential versions of the political question doctrine through an extensive analysis of the applicability of the doctrine to the Article II question in the recent presidential election cases. Based on the Constitution’s text, structure, and history, I conclude that the Article II question in the election cases presented a strong case for an application of the classical political question doctrine. The prudential arguments for leaving the question to Congress are also powerful.

Part III explores the intellectual tension between the political question doctrine and the Rehnquist Court’s vision of how interpretive power is allocated under the Constitution. Part III concludes that the demise of the classical strand of the political question doctrine has troubling normative implications because it allows the Court to avoid confronting the limits of its interpretive competency. The political question doctrine requires the Court to determine as a threshold matter in all cases whether the question before it has been assigned by the Constitution to another

per curiam’s equal protection argument). For an argument that the entire case was not justiciable, see Erwin Chemerinsky, *Bush v. Gore Was Not Justiciable*, 76 Notre Dame L. Rev. 1093, 1094–95 (2001); see also Elizabeth Garrett, Leaving the Decision to Congress, in *The Vote: Bush, Gore, and the Supreme Court*, supra, at 38, 39 (arguing that the entire case should have been decided by Congress); Laurence H. Tribe, Comment, *Stoic or Apathetic and Its Disguises: Freeing Bush v. Gore from Its Hall of Mirrors*, 115 Harv. L. Rev. 170, 178, 276–83 (2001) [hereinafter Tribe, Freeing *Bush v. Gore*] (arguing that “the entire challenge to the recount presented a political question for resolution by Congress rather than a justiciable question for an Article III court”).

15. Although the Court may have felt comfortable not discussing the issue because of its prior decision in *McPherson v. Blacker*, 146 U.S. 1 (1892), as I point out below, that case is distinguishable. See *infra* text accompanying notes 329–346. Thus, the Court could not rely on *McPherson* as settling the question whether the Article II issue before it in the *Bush* cases presented a political question.

16. *Bush II*, 531 U.S. at 111.

branch of government. This initial determination of how much deference is appropriate serves a valuable function, for it reminds the Court that not all constitutional questions require independent judicial interpretation. Some provisions require deference to the other branches, and in the case of political questions, absolute deference. The continued existence of the doctrine therefore forces the Court to confront the institutional strengths of the political branches—and its own weaknesses. The end of the classical political question doctrine is a dangerous harbinger of where the Court is headed.

I. THE RISE AND FALL OF THE POLITICAL QUESTION DOCTRINE

The term “political question doctrine” is an unfortunate misnomer. As several courts and commentators have observed, the Constitution requires the Supreme Court and the lower federal courts to decide any number of “political” questions as a matter of course.¹⁷ Nor is the label “doctrine” fitting for the odd amalgam of constitutional, functional, and prudential factors that have been used by the courts in determining whether a case presents a nonjusticiable political question.¹⁸ Whatever its appellation, however, the political question doctrine would still spark a heated response from defenders of a supreme judiciary because it stands in tension with the notion of judicial review;¹⁹ it represents the idea that some constitutional questions fall outside the purview of the judiciary. To be sure, the courts still determine which branch decides the question, so there is an initial evaluation by the judiciary even when the political question doctrine applies. To that extent, the judiciary is still saying

17. See, e.g., *Baker v. Carr*, 369 U.S. 186, 209 (1962) (“[T]he mere fact that the suit seeks protection of a political right does not mean it presents a political question.”); *Colegrove v. Green*, 328 U.S. 549, 573 (1946) (Black, J., dissenting) (noting that “myriad[]” cases “refute[] the contention that courts are impotent in connection with evasions of all ‘political’ rights”); *Nixon v. Herndon*, 273 U.S. 536, 540 (1927) (Holmes, J.) (noting that the classification of voting rights as “political” and therefore unreviewable by courts is “little more than a play upon words”); Erwin Chemerinsky, *Federal Jurisdiction* § 2.6.1, at 143 (2d ed. 1994) (“[T]he political question doctrine is a misnomer; the federal courts deal with political issues all of the time.”).

18. See, e.g., *Baker*, 369 U.S. at 217 (listing six possible bases for finding that a case presents a “political question”). For criticisms of the Court’s inconsistent application of the doctrine, see Rebecca L. Brown, *When Political Questions Affect Individual Rights: The Other Nixon v. United States*, 1993 Sup. Ct. Rev. 125, 152–53; Michael E. Tigar, *Judicial Power, The “Political Question Doctrine,” and Foreign Relations*, 17 UCLA L. Rev. 1135, 1146, 1163 (1970).

19. See, e.g., Erwin Chemerinsky, *Interpreting the Constitution* 99–100 (1987) [hereinafter *Chemerinsky, Interpreting the Constitution*] (arguing that the political question doctrine “is inconsistent with the most fundamental purpose of the Constitution: safeguarding matters from majority rule”); Martin H. Redish, *Judicial Review and the “Political Question,”* 79 Nw. U. L. Rev. 1031, 1060 (1985) [hereinafter *Redish, Judicial Review and the “Political Question,”*] (claiming that the “moral cost both to society in general and to the Supreme Court in particular far outweighs whatever benefits are thought to derive from the judicial abdication of the review function”).

“what the law is.”²⁰ But the questions become “political” in the sense

20. See *Baker*, 369 U.S. at 211 (“Deciding whether a matter has in any measure been committed by the Constitution to another branch of government . . . is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution.”). Indeed, it is for this reason that some commentators have questioned whether a separate doctrine exists at all. See, e.g., Linda Champlin & Alan Schwarz, *Political Question Doctrine and Allocation of the Foreign Affairs Power*, 13 *Hofstra L. Rev.* 215, 224–25, 233–34 (1985) (arguing that, in deciding whether a political question exists, a court is making a merits determination that finality is more important than having a judicial assessment of constitutionality); Wayne McCormack, *The Political Question Doctrine—Jurisprudentially*, 70 *U. Det. Mercy L. Rev.* 793, 798 (1993) (noting that “a decision to allow one political branch to have the final say on an issue . . . is itself an interpretation of constitutional law” and arguing that there is no such thing as a political question doctrine); Michael Stokes Paulsen, *A General Theory of Article V: The Constitutional Lessons of the Twenty-Seventh Amendment*, 103 *Yale L.J.* 677, 713 (1993) [hereinafter Paulsen, *Theory of Article V*] (arguing that a court is really deciding a case on the merits when it concludes that a matter is committed to another branch).

Nevertheless, a decision that the constitutionality of an act cannot be reviewed by the judiciary is a different determination than a decision that the act ultimately taken by the political branch is constitutional. See *United States Dep’t of Commerce v. Montana*, 503 U.S. 442, 458 (1992); Michael J. Gerhardt, *Rediscovering Nonjusticiability: Judicial Review of Impeachments After Nixon*, 44 *Duke L.J.* 231, 244 (1994) (noting that in a political question case, the court “does not just look at the contours of a particular area of political decisionmaking and decide to defer to any decision made within that sphere because it is constitutional” but instead exercises its power of review only “to determine the scope or boundaries of an area about whose subject matter it should not express any opinion”); Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 *Harv. L. Rev.* 1212, 1224–26 (1978) (arguing that “[w]hen institutional concerns result in the invocation of the political question doctrine, we understand the constitutional norm at issue to retain its legal validity” but simply recognize that the judiciary is not enforcing it).

The line between a merits determination and a political question determination becomes blurred when the judiciary is asked to review the political branch’s determination after the fact. After the political branches have acted, it may appear that the judiciary is not only stating that the constitutionality of the act is for the political branches to decide, but is also implicitly condoning the action. See Thomas M. Franck, *Political Questions/Judicial Answers* 24–25 (1992) (arguing that the Court’s use of the political question doctrine in foreign relations cases is, in fact, “an ordinary adjudication in which the Court plays its usual role, albeit with some deference to the evidence adduced by government experts”); Louis Henkin, *Is There a “Political Question” Doctrine?*, 85 *Yale L.J.* 597, 601 (1976) (arguing that there is no political question doctrine because the cases in which it has been applied involved implicit merits determinations by the courts that “[t]he act complained of violates no constitutional limitation on that power, either because the Constitution imposes no relevant limitations, or because the action is amply within the limits prescribed”). Even in that circumstance, however, a court is not merely condoning the particular action but is also foreclosing a wide range of future constitutional litigation, even if the political branch exercises very poor judgment. See Gerhardt, *supra*, at 245–46, 249–50. Moreover, when the political branches have not yet acted, and it is unclear what course they will ultimately take, a ruling that a matter is a political question is plainly not at the same time an endorsement of the act itself, because that act is not yet known. See, e.g., *Luther v. Borden*, 48 U.S. (7 How.) 1, 42 (1849) (concluding that a question of whether a state government is republican is for Congress to decide, even though “Congress was not called upon to decide the controversy”).

that, after that determination, their resolution is left to the political branches.

The idea that some constitutional questions are left to the sole discretion of Congress or the Executive cannot coexist with a theory of judicial review that is one of judicial hegemony. If one subscribes to the view that, in all contexts, the Court alone must give independent meaning to the Constitution without deference to the political branches, there is no theoretical basis for the political question doctrine. In fact, the demise of the political question doctrine, as this Part explores, correlates with the ascendancy of that view in the Supreme Court. But, as this Part also explains, this view of the Constitution is at odds with its varied textual provisions, its structure, and its history.

This Part begins by tracing the constitutional roots of the political question doctrine and its relationship to a theory of interpretive deference. In particular, it shows a correlation between the political question doctrine's strength and the amount of deference given the political branches' interpretations in cases in which the Court has jurisdiction to determine the substantive meaning of a constitutional provision. The political question doctrine has been most powerful when the Court has given great deference to the constitutional judgments of the political branches as a general matter.

To establish this correlation, this Part explores the varying jurisprudential treatment the Court has given the doctrine. Section A describes the Court's early adherence to the classical version of the doctrine as part of a spectrum of broad deference given the political branches. Section B then traces the Court's endorsement of a prudential strand of the doctrine, which reached its peak during the New Deal Court's shift toward judicial restraint. Section C describes the waning of the prudential strand as the Warren Court developed a stronger vision of its own power of judicial review.

A. *The Origins of the Classical Political Question Doctrine*

Alexander Hamilton "foreshadowed"²¹ the political question doctrine's development when he stated in the Federalist Papers:

If it be said that the legislative body are themselves the constitutional judges of their own powers and that the construction they put upon them is conclusive upon the other departments it may be answered that this cannot be the natural presumption *where it is not to be collected from any particular provisions in the Constitution.*²²

In other words, although judicial review is the norm, there are exceptions, which are expressed in "particular provisions in the Constitu-

21. Robert J. Pushaw, Jr., *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 Cornell L. Rev. 393, 424 (1996).

22. The Federalist No. 78, at 467 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (emphasis added).

tion.”²³ Hamilton therefore recognized a constitutionally based political question doctrine, or what can be termed the “classical” formulation of the doctrine.²⁴ The Constitution carves out certain categories of issues that will be resolved as a matter of total legislative or executive discre-

23. Id. Unfortunately, Hamilton did not provide examples of those provisions. Thus, those provisions must be identified using the same methods of constitutional interpretation that are used to answer other constitutional questions. As discussed in Part I.B, *infra*, the Court has identified the Senate’s power to try impeachments, Congress’s control of the constitutional amendment ratification process, and issues arising under the Guarantee Clause as presenting political questions.

24. The “classical” formulation of the doctrine is distinct from the functional or prudential version. See, e.g., Fritz W. Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 *Yale L.J.* 517, 538–39, 548–49, 566–83 (1966) (describing the classical theory as constitutionally based; characterizing the prudential theory as based on notions of expediency and legitimacy; and attempting to forge a third, “functional” theory based on the variety of factors considered by the courts in finding political questions, including difficulties of access to information, the need for uniformity of decisions, and deference to wider responsibilities of the political departments); David Cole, Note, *Challenging Covert War: The Politics of the Political Question Doctrine*, 26 *Harv. Int’l L.J.* 155, 164 (1985) (recognizing three aspects of the political question doctrine: the classical or constitutional version, which is “the most important and most persuasive aspect of the doctrine”; the functional aspect, which “may be more descriptively accurate than normatively defensible”; and the prudential strand, which Alexander Bickel advocated). This Article treats the nonconstitutionally based strand of the doctrine as “prudential,” and does not distinguish between its functional and nonfunctional aspects. See Redish, *Judicial Review and the “Political Question,”* *supra* note 19, at 1043 (arguing that the functional approach is “merely a subset” of the prudential doctrine).

This Article therefore tracks the divide between the political question doctrine as Herbert Wechsler viewed it (advocating the classical point of view), and the doctrine as Alexander Bickel described it (defending the prudential strain of the doctrine). Compare Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 *Harv. L. Rev.* 1, 9 (1959) [hereinafter Wechsler, *Toward Neutral Principles*] (“[T]he only proper judgment that may lead to an abstention from decision is that the Constitution has committed the determination of the issue to another agency of the government than the courts.”), with Alexander M. Bickel, *The Supreme Court, 1960 Term—Foreword: The Passive Virtues*, 75 *Harv. L. Rev.* 40, 46 (1961) [hereinafter Bickel, 1960 Term Foreword] (“There is something different about it, in kind, not in degree, from the general ‘interpretive process’; something greatly more flexible, something of prudence, not construction and not principle.”). For a precursor to the Bickel/Wechsler debate, compare Maurice Finkelstein, *Judicial Self-Limitation*, 37 *Harv. L. Rev.* 338, 344–45 (1924) (arguing that political questions are “those matters of which the court, at a given time, will be of the opinion that it is impolitic or inexpedient to take jurisdiction” and may result from “the fear of the vastness of the consequences,” “the feeling that the court is incompetent to deal with the particular type of question,” or the feeling that “the matter is ‘too high’ for the courts”; and advocating more widespread use of the doctrine), with Melville Fuller Weston, *Political Questions*, 38 *Harv. L. Rev.* 296, 298–99, 331 (1925) (disagreeing with Finkelstein that the Court could have refused to decide the *Lochner* era social legislation on political question grounds, and arguing that “the line between judicial and political questions in a given constitutional situation is the line drawn by the constitutional delegation, and none other”).

tion.²⁵ Under this view of the doctrine, judicial abstinence is not merely prudential or expedient, but constitutionally required. Application of the classical political question doctrine does not depend on the particular parties in the case or on the particular remedy being sought. It is a doctrine that is rooted in the text and structure of the Constitution itself.

1. *Chief Justice Marshall and the Classical Political Question Doctrine.* — Alexander Hamilton was not alone in acknowledging that the resolution of certain constitutional questions belongs with the politically accountable branches. Chief Justice Marshall, another great defender of the judiciary, was also a vigorous advocate of what came to be known as the political question doctrine. Indeed, he acknowledged the political question doctrine in the same opinion in which he masterfully established the Supreme Court's authority to declare laws unconstitutional.²⁶ In *Marbury v. Madison*, Marshall argued for judicial modesty by making clear that the Supreme Court's remedial power did not extend to all legal questions.²⁷ "Questions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court."²⁸ In particular, because some questions are committed by the Constitution to the absolute discretion of Congress or the President, there is no place for judicial oversight.²⁹

The Chief Justice did make clear, however, that it was for the Court to determine whether an issue presented a political question, committed to the discretion of the political branches, or a judicial question, which

25. Pushaw, *supra* note 21, at 449. Determining which issues those are is, of course, a challenge, given that the Constitution does not mention judicial review, much less detail the exceptions to that review. See *infra* text accompanying note 58.

26. As Gordon Wood points out, it is simplistic to credit *Marbury* with establishing judicial review. "The sources of something as significant and forbidding as judicial review never could lie in the accumulation of a few sporadic judicial precedents, or even in the decision of *Marbury v. Madison*, but had to flow from fundamental changes taking place in the Americans' ideas of government and law." Gordon S. Wood, *The Origins of Judicial Review Revisited, or How the Marshall Court Made More out of Less*, 56 Wash. & Lee L. Rev. 787, 793 (1999). Other scholars, such as Martin Flaherty and Jack Rakove, similarly point out that the evolution of judicial review was a direct response to a growing distrust of legislative bodies. See Martin S. Flaherty, *The Most Dangerous Branch*, 105 Yale L.J. 1725, 1763-65 (1996); Jack N. Rakove, *The Origins of Judicial Review: A Plea for New Contexts*, 49 Stan. L. Rev. 1031, 1056-60 (1997). The fact that judicial review arose, at least in part, on the basis of a growing distrust of legislatures does not, however, tell us the scope of judicial or legislative power to interpret the Constitution. In fact, as Gordon Wood points out, "many revolutionaries or founders still thought that fundamental law, even when expressed in a written constitution, was so fundamental, so different in kind from ordinary law, that its invocation had to be essentially an exceptional and awesomely delicate political exercise." Wood, *supra*, at 796.

27. 5 U.S. (1 Cranch) 137, 170 (1803).

28. *Id.*

29. *Id.* at 165-66.

the Court could answer.³⁰ Although the allocation would “always depend on the nature of [the] act,”³¹ Marshall provided key guiding factors for identifying a political question: “The subjects are political. They respect the nation, not individual rights”³² They involve areas in which the Constitution vests the political branches with discretion. “The province of the court is, solely, to decide on the rights of individuals, not to enquire how the executive, or executive officers, perform duties in which they have a discretion.”³³ Marshall gave two examples in *Marbury* of such political questions: the President’s power of nominating to the Senate and of appointing the person nominated, and the acts of an executive officer in foreign affairs that are performed at the direction of the President.³⁴

Marshall’s stance in *Marbury* was hardly surprising. Three years earlier, when he was in the House of Representatives, Marshall explained to his fellow congressmen that some issues under the Constitution presented questions of political law that must be answered by the political branches.³⁵ Marshall noted that this was a jurisdictional limit, based on the Constitution’s enumeration of judicial powers to extend only to “cases.” “By extending the judicial power to all *cases in law and equity*, the constitution had never been understood to confer on that department any political power whatever.”³⁶ On the contrary, “[i]f the judicial power extended to every question under the constitution, it would involve almost every subject proper for legislative discussion and decision.”³⁷ That, according to Marshall, would destroy the separation of powers: “The division of power . . . could exist no longer, and the other departments would be swallowed up by the judiciary.”³⁸

The examples Marshall gave in his speech reflect his view that constitutional issues involving political judgment are not for the courts to decide. For example, he noted that a court could not determine “the boundary line between the American and British dominions,” nor could it determine whether to extradite a fugitive under a treaty with Britain.³⁹ Similarly, whether a vessel was legally captured presented political questions for the Executive, not the courts.⁴⁰ Marshall explained that there

30. *Id.* at 167, 170–71; see also Pushaw, *supra* note 21, at 445 & n.236 (noting that the Court considered itself uniquely empowered to distinguish judicial questions from political ones).

31. *Marbury*, 5 U.S. (1 Cranch) at 165.

32. *Id.* at 166.

33. *Id.* at 170.

34. *Id.* at 166–67.

35. Speech of the Honorable John Marshall (Mar. 7, 1800), in 18 U.S. (5 Wheat.) app. note 1, at 16–17 (1820).

36. *Id.* at 17.

37. *Id.* at 16.

38. *Id.*

39. *Id.* at 17, 28.

40. *Id.* at 25–26.

were reasons of institutional competence underlying this constitutional division of power. For instance, he argued that the Executive should make the determination to extradite under a treaty because it is the "department whose duty it is to understand precisely the state of the political intercourse and connection between the United States and foreign nations, to understand the manner in which the particular stipulation is explained and performed by foreign nations, and to understand completely the state of the Union."⁴¹ Walter Dellinger and Jefferson Powell recently summarized Marshall's position, noting that, from the examples he gave, it is clear that political questions include "a judgment about where the nation's interests lay, including its interests in justice to itself and others and in the preservation of national security," as opposed to questions involving individual rights.⁴² Marshall made clear that, although he believed the judiciary had the power to "say what the law is," he also believed that the judiciary was not the *only* branch with that power.⁴³ Indeed, as Dellinger and Powell note, "on some issues only the political capacity to make judgments of prudence and policy can fulfill the Constitution's requirements."⁴⁴ Thus, although its critics believe the doctrine has no place in a country where judicial review is a fundamental part of the constitutional structure,⁴⁵ the classical version of the political question doctrine can trace its pedigree to the Constitution itself and its original understanding.

2. *Early Judicial Review and the Political Question Doctrine.* — At the time Marshall was writing, judicial review and the political question doctrine did not present the courts with the strictly binary choice that appears today. Judicial review involved a spectrum of broad deference to the political branches, with the political question doctrine occupying one end. Also along the spectrum were issues on which the political branches enjoyed considerable, but not absolute, deference. Finally, at the other end were the questions that are so much more familiar to us today: those questions on which the Court alone provides interpretation without giving any deference to the other branches. As Larry Kramer has recently explained, it was this end of the spectrum that was more controversial at

41. *Id.* at 28.

42. Walter Dellinger & H. Jefferson Powell, *Marshall's Questions*, 2 *Green Bag* 2d 367, 372-74 (1999). Dellinger and Powell explained this distinction as resting on the federal courts' lack of information to make sound judgments about the national interest, their lack of power to enforce such decisions effectively, and their lack of political accountability, which is necessary to legitimate a claim to speak for the nation. *Id.* at 372. "[U]nlike the political branches, their decisions are not supposed to be influenced by 'consequences' or 'policy.'" *Id.*

43. *Id.* at 375 ("Marshall's more original thought was his inscription into the constitutional jurisprudence of the Supreme Court of the idea that the courts are not the only institutions whose province and duty includes the exposition and interpretation of the law.").

44. *Id.* at 376.

45. See *supra* note 19.

the founding. "[E]ven a limited power of judicial review remained controversial in the 1780s. At the time, the most that could be said . . . was that courts might exercise review where the legislature unambiguously violated an established principle of fundamental law."⁴⁶ Hamilton, for instance, believed that a court should declare a statute unconstitutional only if there were an "irreconcilable variance" between the Constitution and the statute.⁴⁷ In 1796, Justice Chase stated that he would declare an Act of Congress void only "in a very clear case."⁴⁸ Similarly, Justice Paterson stated in 1800 that the Court should strike only "a clear and unequivocal breach of the constitution, not a doubtful and argumentative application."⁴⁹ Courts at the founding recognized and respected the fact that "it is the duty of legislators as well as judges to consult [the Constitution] and conform their acts to it, so it should be presumed that all their acts do conform to it unless the contrary is manifest."⁵⁰ This idea of clear

46. Larry D. Kramer, Putting the Politics Back into the Political Safeguards of Federalism, 100 Colum. L. Rev. 215, 238–40 (2000). Kramer relies on "the handful of cases involving constitutional challenges to legislation that were brought in state courts prior to the Constitution's adoption." *Id.* at 238 (footnote omitted); see also Sylvia Snowiss, Judicial Review and the Law of the Constitution 5–6 (1990) (arguing that in the early Republic restraints on sovereign power, understood to be governed by "fundamental" and not "ordinary" law, were to be enforced by electoral or other political action); Wood, *supra* note 26, at 796 (explaining that some Founders envisioned constitutional law as being so different from ordinary law that courts should not routinely set aside legislation). Larry Kramer has provided an even more richly detailed discussion of this early constitutional history in his Supreme Court 2000 Term Foreword in the *Harvard Law Review*. See Larry D. Kramer, The Supreme Court, 2000 Term—Foreword: We the Court, 115 Harv. L. Rev. 4, 16–90 (2001) [hereinafter Kramer, We the Court].

47. The Federalist No. 78, *supra* note 22, at 467 (Alexander Hamilton); see also The Federalist No. 81, *supra* note 22, at 482 (Alexander Hamilton) (stating that statutes can be voided by courts if they are in "evident opposition" to the Constitution).

48. *Hylton v. United States*, 3 U.S. (3 Dall.) 171, 175 (1796) (Chase, J.).

49. *Cooper v. Telfair*, 4 U.S. (4 Dall.) 14, 19 (1800) (Paterson, J.); see also *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213, 270 (1827) ("It is but a decent respect due to the wisdom, the integrity, and the patriotism of the legislative body, by which any law is passed, to presume in favour of its validity, until its violation of the constitution is proved beyond all reasonable doubt."); 5 Jonathan Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution, as Recommended by the General Convention at Philadelphia, in 1787*, at 344 (Jonathan Elliot ed., 2d ed., Philadelphia, J.B. Lippincott Co., 1881) [hereinafter *Elliot's Debates*] (statement of James Wilson, Delegate, Pennsylvania) ("Laws may be unjust, may be unwise, may be dangerous, may be destructive, and yet may not be so unconstitutional as to justify the judges in refusing to give them effect."); *id.* at 347–48 (statement of George Mason, Delegate, Virginia) ("[W]ith regard to every law however unjust, oppressive, or pernicious, that did not come plainly under [the description as unconstitutional], they would be under the necessity, as judges, to give it a free course.").

50. James B. Thayer, The Origin and Scope of the American Doctrine of Constitutional Law, 7 Harv. L. Rev. 129, 142 (1893) (quoting Chancellor Waties of South Carolina) (internal quotation marks and citation omitted); see also William R. Casto, *The Supreme Court in the Early Republic: The Chief Justiceships of John Jay and Oliver Ellsworth* 222–27 (1995) (reviewing two early cases in which the Court concluded that "legislation should be declared unconstitutional only when it appeared [so] beyond dispute"). But see Gary Lawson & Christopher D. Moore, *The Executive Power of*

mistake "is not founded on the idea that only manifestly abusive legislative enactments are unconstitutional, but rather on the idea that only such manifest error entitles a court to displace the prior constitutional ruling of the enacting legislature."⁵¹

Thus, when Hamilton and Marshall recognized that there were political questions outside judicial review, they were simply acknowledging one end of a spectrum of congressional and executive discretion to interpret and enforce the Constitution.⁵² The constitutional judgments of the political branches were highly respected and the courts gave them great deference. It was appropriate at that time for courts to engage in a threshold inquiry to determine how much interpretive room a constitutional delegation of power gave the branch receiving that power.⁵³ While the courts remained responsible for declaring the boundaries, it was recognized that the Constitution contemplated room for the political actors to give substantive meaning within those boundaries.

Perhaps no other case illustrates this concept of interpretive deference better than *M'Culloch v. Maryland* and its treatment of the Necessary and Proper Clause.⁵⁴ Chief Justice Marshall's opinion for the Court recognized that, although "the powers of the government are limited," the sound interpretation of the Constitution "must allow the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people."⁵⁵ The Court described its role as policing the boundaries of legislative power, not dictating legislative conclusions within those bounds. If the Court were to inquire into whether an action were "necessary," it would "pass the line which circumscribes the judicial department,

Constitutional Interpretation, 81 Iowa L. Rev. 1267, 1277 (1996) ("It is true that many, if not most, descriptions of the power of judicial review during the founding era used the language of Thayerian deference, but those statements are not decisive . . ."); G. Edward White, Revisiting James Bradley Thayer, 88 Nw. U. L. Rev. 48, 74-76 (1993) (disputing the veracity of Thayer's thesis).

51. Sager, *supra* note 20, at 1223.

52. The other end of the spectrum would include the more searching review in cases involving individual rights. See John Hart Ely, *Democracy and Distrust* 87-104 (1980) (advocating a participation-oriented, representation-reinforcing theory of judicial review); Pushaw, *supra* note 21, at 450 n.267 (noting that cases involving individual rights did receive more searching judicial review).

53. See Thayer, *supra* note 50, at 144. Thayer cites Judge Cooley's remark that "one who is a member of a legislature may vote against a measure as being, in his judgment, unconstitutional" whereas that same individual, if the same measure, "having been passed by the legislature in spite of his opposition, comes before him judicially, may there find it his duty, although he has in no degree changed his opinion, to declare it constitutional." *Id.* (citation omitted).

54. 17 U.S. (4 Wheat.) 316, 421-23 (1819).

55. *Id.* at 421.

and . . . tread on legislative ground.”⁵⁶ In other words, the substantive content of “necessary” would be supplied by Congress, not the Court.⁵⁷

To a generation that recognized such different degrees of deference to the political branches in their interpretation of constitutional questions, the notion of some questions sitting entirely outside judicial review was far from shocking.

B. *Expanding the Classical Doctrine: The Development of the Prudential Political Question Doctrine*

The classical version of the political question doctrine, with its foundation in the text, structure, and history of the Constitution itself, was not the only strain of the doctrine that developed. A prudential version of the doctrine gradually grew out of the interpretive questions associated with the classical theory. Unlike the classical strand of the doctrine, the prudential political question doctrine is not anchored in an interpretation of the Constitution itself, but is instead a judge-made overlay that courts have used at their discretion to protect their legitimacy and to avoid conflict with the political branches. Courts have used this prudential theory to delegate judicial authority to political actors (even when the Constitution does not contemplate such a delegation) and to avoid deciding controversial cases.

This Section examines the ascendancy of the prudential political question doctrine. While not intended to be a complete history of the prudential political question doctrine, this Section demonstrates how prudential factors have been used by the Court in important cases, and how that treatment has related to the Court’s more general theories of judicial review.

1. *Using Prudential Factors in Classical Interpretation.* — Given that the Constitution does not contain an express textual commitment of judicial review in the Supreme Court, it is not surprising that provisions of the Constitution do not explicitly strip the Court of power and vest interpretive authority with Congress or the Executive. Instead, the interpretive deference given to the political branches must be inferred from a textual

56. *Id.* at 423.

57. A somewhat similar example is illustrated by the Court’s conclusion in *Martin v. Mott* that the President has absolute discretion to determine when a sufficient exigency arises that requires calling forth the militia. 25 U.S. (12 Wheat.) 19, 28 (1827). Under Article I, Congress has the power “to provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions.” U.S. Const. art. I, § 8, cl. 15. In an act passed in 1795, Congress delegated to the President the power to call forth the militia “whenever the United States shall be invaded, or be in imminent danger of invasion.” *Martin*, 25 U.S. (12 Wheat.) at 29. The Supreme Court concluded that, pursuant to this power, the determination of whether an exigency exists belongs to the President alone and is not subject to judicial review. *Id.* at 30. In reaching its decision, the Court relied on the nature of the power Congress delegated to the President and the need for prompt obedience to the President’s decision, without the second-guessing associated with judicial review. *Id.* at 29–30.

grant of power to a political branch and from structural clues that the grant of power cannot be shared with the judicial branch. In addition, some insight on whether the question is for the political branches alone can be gleaned from the historical background of the provision.⁵⁸

This is obviously a difficult interpretive enterprise, and the structural considerations in particular leave room for prudential or functional considerations to enter the analysis. Chief Justice Marshall in *Marbury* gave one structural characteristic for courts to use in deciding whether a constitutional question presents a political question: Does it involve an individual right, or does it involve a more general question of political judgment and discretion?⁵⁹ Another interpretive guidepost is provided by the type of information that will be needed to resolve the underlying constitutional determination. Will it require factfinding that is particularly suited to the resources and expertise of the political branches? Will it implicate sensitive questions of foreign relations or other national interests? A third interpretive clue is whether there are established legal standards to apply in resolving the constitutional question, the presence of which makes it more likely that the matter is suited for the courts.⁶⁰

Originally, these questions were answered as part of a larger inquiry into how a particular grant of authority to a political branch in the Con-

58. See Steven G. Calabresi, *The Political Question of Presidential Succession*, 48 *Stan. L. Rev.* 155, 157 (1995) [hereinafter Calabresi, *Presidential Succession*] ("[S]ince the argument for the power of judicial review is itself a brilliant structural inference supported by historical understanding, the argument for each and every political question exception to *Marbury*-style review must likewise be largely one of structural inference supported by history and tradition." (citation omitted)); see also *Nixon v. United States*, 506 U.S. 224, 240 (1993) (White, J., concurring in the judgment) (noting that there are "few, if any" textual commitments to the political branches, and therefore courts "are usually left to infer the presence of a political question from the text and structure of the Constitution"); Marcella David, *Passport to Justice: Internationalizing the Political Question Doctrine for Application in the World Court*, 40 *Harv. Int'l L.J.* 81, 129 (1999) (describing a "functional approach" to interpretation that "takes account of differences in the various branches' processes, their access to information, the roles and responsibilities of the branches, and the potential effect of inconsistent determinations on the legitimacy and effectiveness of the government overall"); Pushaw, *supra* note 21, at 501 (arguing that political question interpretation "must focus primarily not on the Constitution's language, but instead on its structure, political theory, history, and precedent"); cf. Redish, *Judicial Review and the "Political Question," supra* note 19, at 1042 (arguing that "the mere fact that a constitutional provision expressly refers to the exercise of power by the political branches but not to the review role of the judicial branch cannot justify an abdication of the review function, since judicial review is *nowhere* mentioned in the Constitution").

59. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 166 (1803).

60. See, e.g., Oliver P. Field, *The Doctrine of Political Questions in the Federal Courts*, 8 *Minn. L. Rev.* 485, 512 (1924) (arguing that the "most important factor in the formulation of the [political question] doctrine" is "a lack of legal principles to apply to the questions presented"). Indeed, as Lon Fuller has explained, a core function of an adjudication is resolving a demand on the basis of "principle of some kind." Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 *Harv. L. Rev.* 353, 369 (1978). Without such principles to apply, there is nothing to guide the judge and ensure impartiality.

stitution should be interpreted.⁶¹ For instance, in *Luther v. Borden*, the Court relied on a grant of authority to Congress in the Guarantee Clause, as well as the practical difficulties of deciding whether a particular state government was "republican," to conclude that the interpretation of the Guarantee Clause rests with Congress.⁶² There was, then, a textual anchor to the prudential analysis. The Guarantee Clause states that the "United States shall guarantee to every State in this Union a Republican Form of Government,"⁶³ and the Court interpreted "United States" to mean "Congress."⁶⁴

To this textual anchor, the Court added the structural inference that the Court could not share interpretive responsibility with Congress because of the difficulties of judicial involvement. The case grew out of the extraordinary events of the Rhode Island Dorr Rebellion in 1841 and 1842, which resulted in two different state governments claiming legitimacy.⁶⁵

Chief Justice Taney, writing for a majority of the Court, began his analysis by noting the practical effects of deciding which sovereign was legitimate.⁶⁶ He noted that a decision that the charter government was illegitimate would entail consequences such as invalidating its laws and taxes and nullifying its courts' judgments.⁶⁷ These practical concerns

61. See Franck, *supra* note 20, at 45 (explaining that "constitutional theory initially gave impetus to judicial abdication in foreign-affairs cases" but that "today judges more frequently abstain because of prudential concerns").

62. 48 U.S. (7 How.) 1, 47 (1849).

63. U.S. Const. art. IV, § 4 (emphasis added).

64. *Luther*, 48 U.S. (7 How.) at 42.

65. Under Rhode Island's charter government, which was not changed after the Revolutionary War, the legislature was authorized to prescribe the qualifications of voters. *Id.* at 35. Many of the citizens were dissatisfied with the charter government and organized a convention at which they adopted a new constitution to be submitted to the people for their adoption or rejection. After votes were returned, the convention declared that the constitution was adopted and ratified by a majority, and thereby became the paramount law of Rhode Island. Thomas Dorr, the elected governor under the new constitution, prepared to assert the new government by force and "many citizens assembled in arms to support him." *Id.* at 37. The charter government declared martial law and took measures to quash the Dorr supporters. Individuals in the military service of the charter government broke into the house of Martin Luther, a supporter of the new government, to arrest him. Luther argued that the charter government had no legal existence and therefore lacked the authority to break into his house and arrest him. *Id.*

For an interesting history of the Rhode Island judiciary's involvement in the politics of the Dorr Rebellion, see generally John S. Schuchman, *The Political Background of the Political-Question Doctrine: The Judges and the Dorr War*, 16 *Am. J. Legal Hist.* 111 (1972). Schuchman's article points out the irony of the Supreme Court's reliance on the premise that the judiciary will not interfere with political matters when several Rhode Island judges had entered the political arena to suppress the rebellion. *Id.* at 124-25.

66. *Luther*, 48 U.S. (7 How.) at 39-40.

67. *Id.* at 39-40. These consequences would not necessarily have to follow, however, because the Supreme Court could have endorsed, as it did in cases in the wake of rebel governments established during the Civil War, a doctrine of apparent authority. For example, in *Texas v. White*, the Court concluded:

colored the Court's perception and interpretation of the Constitution. As the Court argued, "[w]hen the decision of this court might lead to such results, it becomes its duty to examine very carefully its own powers before it undertakes to exercise jurisdiction."⁶⁸

The Court then focused on the text of the Guarantee Clause itself. Insofar as the Constitution "has provided for an emergency of this kind, and authorized the general government to interfere in the domestic concerns of a State," it "has treated the subject as political in its nature, and placed the power in the hands of that department."⁶⁹ The Court concluded that, under Article IV of the Constitution, "it rests with Congress to decide what government is the established one in a State. For as the United States guarantee to each State a republican government, Congress must necessarily decide what government is established in the State before it can determine whether it is republican or not."⁷⁰ When Congress accepts the state's representatives, it recognizes the authority of the government under which they were appointed and its republican nature. Congress's "decision is binding on every other department of the government, and could not be questioned in a judicial tribunal."⁷¹ In conclusion, Chief Justice Taney restated the classical theory of the political question doctrine and dismissed the notion that anything other than the Constitution itself could override the Court's responsibility to decide constitutional questions:

This tribunal, therefore, should be the last to overstep the boundaries which limit its own jurisdiction. And while it should always be ready to meet any question confided to it by the Con-

[A]cts necessary to peace and good order among citizens . . . acts sanctioning and protecting marriage and the domestic relations, governing the course of descents, regulating the conveyance and transfer of property, real and personal, and providing remedies for injuries to person and estate, and other similar acts, which would be valid if emanating from a lawful government, must be regarded in general as valid when proceeding from an actual, though unlawful government.

74 U.S. (7 Wall.) 700, 733 (1868).

68. *Luther*, 48 U.S. (7 How.) at 39.

69. *Id.* at 42.

70. *Id.*

71. *Id.* The Court reached the same conclusion regarding the last clause of Article IV, Section 4, which protects states "on application of the legislature . . . or of the executive (when the legislature cannot be convened) against domestic violence." *Id.* at 43 (quoting U.S. Const. art. IV, § 4). Congress had passed an act giving authority to the President to "call forth such number of the militia . . . as he may judge sufficient to suppress" an "insurrection in any State against the government thereof." *Id.* The Court concluded that, "[b]y this act, the power of deciding whether the exigency had arisen upon which the government of the United States is bound to interfere, is given to the President." *Id.* The guarantee would become a "guarantee of anarchy, and not of order," if a court could second-guess the President. *Id.* The power was best placed in the President's hands, because "the interposition of the United States must be prompt, or it is of little value. The ordinary course of proceedings in courts of justice would be utterly unfit for the crisis." *Id.* at 44. The President, moreover, had expressed his willingness to assist the charter government should it become necessary. *Id.* at 49 (Woodbury, J., dissenting).

stitution, it is equally its duty not to pass beyond its appropriate sphere of action, and to take care not to involve itself in discussions which properly belong to other forums. No one, we believe, has ever doubted [this] proposition⁷²

The Court's analysis in *Luther* thus shows how prudential factors colored the Court's application of the classical political question doctrine, but the opinion makes clear that the Court's holding was anchored in the text and structure of the Constitution itself.⁷³ It also establishes the importance of having the Court make the threshold inquiry as to what the Court's "appropriate sphere of action" in the case is. There was no assumption that the Court's sphere of action in all cases is complete interpretive power.

The Court engaged in a similar analysis in *Pacific States Telephone & Telegraph Co. v. Oregon*,⁷⁴ but it relied on prudential factors to a much greater extent. In *Pacific States*, the Court was faced with a challenge to an Oregon tax law on the ground that Oregon lacked a republican form of government. Specifically, the petitioners argued that the Oregon constitution improperly permitted the people to legislate by initiative and referendum.⁷⁵

The Court could have simply cited *Luther's* interpretation of the Guarantee Clause. Instead, it began by listing the parade of horrors that would ensue if the Court were to conclude that Oregon lacked a republican form of government.⁷⁶ First, the Court concluded that it would open the door for every citizen to challenge taxes or other government duties by "assail[ing] in a court of justice the rightful existence of the State."⁷⁷ Second, such a holding would "practically award a decree absolving from all obligation to contribute to the support of or obey the laws of such established state government."⁷⁸ Finally, just in case the disincentives were not already great enough, the Court added that "as a consequence of the existence of such judicial authority a power in the judiciary must be implied, unless it be that anarchy is to ensue, to build by

72. *Id.* at 46.

73. Justice Woodbury similarly expressed the classical view in his dissent. He dissented as to whether it was appropriate for Rhode Island to impose martial law, but he agreed with the majority that the legitimacy of the charter government was a political question. *Id.* at 51 (Woodbury, J., dissenting). His classical analysis was based more on the structure of the government and the separation of powers than on the particular text of the Guarantee Clause. He noted that "if the people, in the distribution of powers under the constitution, should ever think of making judges supreme arbiters in political controversies . . . they will dethrone themselves." *Id.* at 52. Rather, given the judiciary's "mode of appointment, long duration in office, and slight accountability," it is "rather fitted to check legislative power than political." *Id.* at 53.

74. 223 U.S. 118 (1912).

75. *Id.* at 137.

76. *Id.* at 141-42.

77. *Id.*

78. *Id.* at 142.

judicial action upon the ruins of the previously established government a new one.”⁷⁹

Faced with what it viewed as the prospect of having to establish a state government from scratch, it is not surprising that the Court concluded it had no authority to decide the question. What is interesting about *Pacific States*, however, is that the Court appeared to reach its result, to a much greater degree than even the *Luther* Court, by reasoning backward from these consequences without regard for the language or structure of the Constitution itself. The Court listed the implications of ruling that Oregon lacked a republican form of government, and then asked whether Article IV demands “these strange, far-reaching and injurious results.”⁸⁰ In answering its own seemingly rhetorical question, the Court relied on the prudential aspects of *Luther*, noting in particular that *Luther* detailed at the outset “the far-reaching effect and gravity of the consequences which would be produced” by a finding that a state lacked a republican form of government.⁸¹ Thus, the Court made the prudential concerns even more prominent than it had in *Luther*.

The Court’s analysis in both *Luther* and *Pacific States* demonstrates that the consequences of judicial involvement are legitimate considerations in determining how to interpret a constitutional provision. But the use of prudential factors as part of an interpretation of the Constitution eventually set the stage for those factors to take on independent significance—regardless of the text, structure, or history of the particular constitutional provision at issue.

2. *The Prudential Political Question Doctrine as a Tool for Abstention.* —

Cases like *Luther* and *Pacific States* established the groundwork for the Court’s subsequent expansion of the political question doctrine into a more general tool of avoidance. This became an especially attractive option for a New Deal Court seeking to reclaim its legitimacy. After its judicially activist substantive due process and Commerce Clause decisions sparked President Roosevelt’s Court-packing plan, the Supreme Court began a marked shift toward judicial restraint. Judicial review of congressional acts was at its most deferential.

As part of that pattern of deference, the Court stretched the contours of the political question doctrine and, in particular, the prudential strain.⁸² One such instance is *Coleman v. Miller*.⁸³ In 1924, Congress proposed an amendment, known as the Child Labor Amendment, to the

79. *Id.*

80. *Id.*

81. *Id.* at 144.

82. See Henkin, *supra* note 20, at 625 (“The political question doctrine saw its heyday in the New Deal Court”); Robert A. Schapiro, *Judicial Deference and Interpretive Coordinality in State and Federal Constitutional Law*, 85 *Cornell L. Rev.* 656, 685 (2000) (“[T]he political question doctrine reached its zenith with the New Deal Court—a Court that sought to allow the federal government freedom to address the needs of the emerging national economy.”).

83. 307 U.S. 433 (1939).

Constitution in response to the Court's rejection of legislation to the same effect.⁸⁴ In 1925, the Kansas Legislature rejected the amendment.⁸⁵ In 1937, however, the amendment was still pending, and the Kansas Legislature sitting at that time voted to ratify.⁸⁶ A group of Kansas state legislators opposed to the amendment challenged the ratification, arguing that it violated Article V because the state legislature failed to ratify within a reasonable time.⁸⁷

The Court was therefore faced with a question involving a constitutional amendment to overturn one of its decisions. Unsurprisingly, given the political pressure it was under, the Court did not take the bait.⁸⁸ Seven of the Justices concluded that the validity of the legislature's ratification was a "political question" for Congress to judge.

Three of the seven concluded that whether a proposed amendment "lost its vitality through lapse of time" is for Congress to decide.⁸⁹ In writing the opinion for himself and the two other Justices who held that view, Chief Justice Hughes distinguished the Court's decision in *Dillon v. Gloss*,⁹⁰ a case decided eighteen years earlier. In *Dillon*, the Court had reviewed whether Congress could properly place a seven year ratification limit on the Eighteenth Amendment, and had upheld the limit as a "reasonable time."⁹¹ Chief Justice Hughes explained that *Dillon* had not reached the question as to whether the Court should determine what constitutes a reasonable time when Congress has not exercised its power to fix one. Rather, that case established only that Congress has the power to fix the time limit.⁹² The Court itself could not establish a time when Congress has not acted, Chief Justice Hughes explained, because there are no criteria for a judicial determination, and such a decision would involve "an appraisal of a great variety of relevant conditions, political, social and economic."⁹³

Justice Black, in an opinion joined by three other Justices, would have gone even further to hold that the constitutional amendment process is "'political' in its entirety, from submission until an amendment becomes part of the Constitution, and is not subject to judicial guidance,

84. See *Child Labor Tax Case*, 259 U.S. 20, 44 (1922); *Hammer v. Dagenhart*, 247 U.S. 251, 276–77 (1918).

85. *Coleman*, 307 U.S. at 435.

86. *Id.* at 435–36.

87. *Id.* at 436.

88. See Thomas Millet, *The Supreme Court, Political Questions, and Article V—A Case for Judicial Restraint*, 23 Santa Clara L. Rev. 745, 756–57 (1983) (pointing out the "high level of tension" in the case and noting that a ruling on the merits in favor of the petitioners "[i]n light of [the Court's] recent controversies over President Roosevelt's New Deal legislation," would have likely produced "a hostile reaction by the political branches").

89. *Coleman*, 307 U.S. at 451, 456.

90. 256 U.S. 368 (1921).

91. *Coleman*, 307 U.S. at 452 (citing *Dillon*).

92. *Id.*

93. *Id.* at 453–54.

control or interference at any point."⁹⁴ Therefore, they would not have reviewed the issue presented in *Dillon*.⁹⁵

What is interesting about *Coleman* is the extent to which the Justices relied on prudential factors alone to reach their conclusion. The seven Justices who thought the case raised a political question did not make the text, history, or structure of Article V central to—or even part of—their analysis. Instead, “the lack of satisfactory criteria for a judicial determination”⁹⁶ drove the Hughes opinion, and the four concurring Justices offered almost no analysis to support their view.⁹⁷ Yet, there is a strong textual and structural argument to be made that the Article V question rests with Congress.⁹⁸

The Supreme Court made similar use of prudential factors in *Colegrove v. Green*.⁹⁹ Justice Frankfurter, in an opinion joined by Justices Reed and Burton,¹⁰⁰ concluded that a suit brought by Illinois voters alleging unconstitutional vote dilution in the establishment of congressional election districts was “beyond [the Court’s] competence.”¹⁰¹ Justice Frankfurter observed that the history of apportionment reveals its “embroilment in politics” and concluded that “[c]ourts ought not to enter this political thicket.”¹⁰² Justice Frankfurter’s opinion did not even bother to address whether the determination of each constitutional claim raised by petitioners had been delegated to Congress. To be sure, he stated that Congress’s power under Article I, Section 4 to make or alter regulations regarding the time, place, or manner of House elections¹⁰³ vests exclusive

94. *Id.* at 459 (Black, J., concurring, joined by Roberts, Frankfurter, & Douglas, JJ.).

95. *Id.* at 458 (Black, J., concurring).

96. *Id.* at 454–55.

97. *Id.* at 458–59. For arguments that the Constitution does not commit the question of whether Article V contains a time limit to Congress, see Walter Dellinger, *The Legitimacy of Constitutional Change: Rethinking the Amendment Process*, 97 *Harv. L. Rev.* 386, 398–405 (1983); Paulsen, *Theory of Article V*, *supra* note 20, at 707–15. Laurence Tribe has previously argued, in contrast, that “[i]t is up to . . . Congress to decide what is a reasonable [time] period.” *Equal Rights Amendment Extension: Hearings on S.J. Res. 134 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary, 95th Cong., 2d Sess.* 239 (1978) (statement of Laurence H. Tribe, Professor, Harvard Law School). But he has since backed away from that position and no longer argues that there should be a rule of absolute deference. See Laurence H. Tribe, *A Constitution We Are Amending: In Defense of a Restrained Judicial Role*, 97 *Harv. L. Rev.* 433, 433–34 (1983) [hereinafter *Tribe, A Constitution We Are Amending*]. As Henry Monaghan has explained, Article V protects the independence and political importance of individual states by making it difficult for the heavily populated states to alter the terms of the union. Henry Paul Monaghan, *We the People[s], Original Understanding, and Constitutional Amendment*, 96 *Colum. L. Rev.* 121, 129 (1996).

98. See *infra* text accompanying notes 230–237.

99. 328 U.S. 549, 552–56 (1946).

100. Only seven Justices participated in the decision in *Colegrove*. *Id.* at 556.

101. *Id.* at 552.

102. *Id.* at 554–56.

103. U.S. Const. art. I, § 4.

control of those elections with Congress.¹⁰⁴ But he did not address separately the petitioners' Fourteenth Amendment claim.¹⁰⁵ Instead, he stated generally that "no court can affirmatively remap the Illinois districts so as to bring them more in conformity with the standards of fairness for a representative system. At best we could only declare the existing electoral system invalid."¹⁰⁶ This would "bring courts into immediate and active relations with party contests."¹⁰⁷ Instead, he argued, the remedy for unfair districting lies with state legislatures or with Congress.¹⁰⁸

Justice Rutledge's concurrence argued that the concerns raised by Justice Frankfurter were better addressed as a matter of equitable remedies.¹⁰⁹ Justice Rutledge believed that the Court's precedent made clear that the issue did not present a political question,¹¹⁰ but he would have nevertheless dismissed the complaint for want of equity, given that the cause was "of so delicate a character."¹¹¹ He therefore disagreed that a prudential political question doctrine was necessary to decide the case.

To understand this development of a wholly prudential political question doctrine, it is helpful to turn to Alexander Bickel, who gave what is perhaps its finest defense.¹¹² Bickel was writing in the aftermath of *Brown v. Board of Education*¹¹³ and the Court's desegregation orders, and it was imperative in his view that the Court maintain its legitimacy at that critical juncture in its history.¹¹⁴ Bickel believed that the Court's treatment of cases had to be principled, but he also agreed with Charles Black that the Court's actions upholding legislation would be perceived as legitimating the policies underlying the law.¹¹⁵ Bickel believed the Court could avoid legitimating "bad" laws and still stay true to principle by refus-

104. *Colegrove*, 328 U.S. at 554.

105. Justice Black's dissent pointed out that petitioners' complaint raised claims under both Article I and the Fourteenth Amendment. *Id.* at 567 (Black, J., dissenting).

106. *Id.* at 553.

107. *Id.*

108. *Id.* at 556.

109. *Id.* at 565 (Rutledge, J., concurring).

110. See *id.* at 564-65 (Rutledge, J., concurring) (citing *Smiley v. Holm*, 285 U.S. 355 (1932)).

111. *Id.* at 565 (Rutledge, J., concurring). Justice Black dissented, joined by Justices Douglas and Murphy, rejecting Justice Frankfurter's opinion as suggesting that all "political" questions are out of judicial bounds. Although "[i]t is true that voting is a part of elections and that elections are 'political,'" courts are not "impotent in connection with evasions of all 'political' rights." *Id.* at 572-73 (Black, J., dissenting).

112. See Alexander M. Bickel, *The Least Dangerous Branch* 69 (2d ed. 1986) [hereinafter Bickel, *The Least Dangerous Branch*]. Judge Learned Hand gave an equally eloquent defense of the more general proposition that the judiciary can decline judicial review because judicial review itself "is not a logical deduction from the structure of the Constitution but only a practical condition upon its successful operation." Learned Hand, *The Bill of Rights* 15 (1958) [hereinafter Hand, *The Bill of Rights*].

113. 347 U.S. 483 (1954).

114. Bickel, *The Least Dangerous Branch*, *supra* note 112, at 251-54.

115. *Id.* at 29-31; Charles L. Black, Jr., *The People and the Court* 56-86 (1977).

ing to reach the merits in controversial cases.¹¹⁶ For example, Bickel applauded the Court's decision to avoid deciding on the merits the case of *Naim v. Naim*,¹¹⁷ which was a suit to appeal a marriage on the basis that it violated a state miscegenation statute.¹¹⁸ Bickel argued that "legitimizing such statutes would have been unthinkable" on the heels of court-ordered school desegregation.¹¹⁹ But it would be equally problematic, in Bickel's estimation, to strike the laws when the new integration principle was so vulnerable to attack.¹²⁰

The Court thus needed means to avoid deciding such difficult matters, and the prudential political question doctrine was one such tool. Bickel argued that the "Court wields a threefold power."¹²¹ First, it can strike down legislation, but only if it is inconsistent with neutral principles.¹²² Second, the Court can perform a "legitimizing function," by upholding legislation as consistent with neutral principles, thus giving symbolic support for a particular governmental position.¹²³ Third, the Court can abstain from deciding the merits, and, according to Bickel, "therein lies the secret of its ability to maintain itself in the tension between principle and expediency."¹²⁴ Because Bickel believed that "bad" laws could only be struck down on a principled basis,¹²⁵ and that upholding a "bad" law would tend to legitimize it, the Court needed a mechanism that would allow it to stay out of a matter entirely, to avoid creating the popular perception that governmental behavior was acceptable simply because it was not unconstitutional.¹²⁶ Bickel further observed that "judicial re-

116. Bickel, *The Least Dangerous Branch*, supra note 112, at 169-70.

117. 350 U.S. 891 (1955).

118. Bickel, *The Least Dangerous Branch*, supra note 112, at 174.

119. *Id.*

120. *Id.*

121. *Id.* at 69.

122. *Id.*

123. *Id.* at 29-33, 69; see also Alexander M. Bickel, *The Durability of Colegrove v. Green*, 72 Yale L.J. 39, 44-45 (1962) (calling the danger of such legitimation "*Plessy v. Ferguson's* Error, after the case that legitimated segregation in 1896").

124. Bickel, *The Least Dangerous Branch*, supra note 112, at 69.

125. As Gerald Gunther has described it, Bickel's "rigorous insistence that constitutional adjudication must be truly principled" elevates him above "[t]he predilectional school of Court criticism, the vacuous commentary which is content with reciting agreements and disagreements with particular results." Gerald Gunther, *The Subtle Vices of the "Passive Virtues"—A Comment on Principle and Expediency in Judicial Review*, 64 Colum. L. Rev. 1, 24 (1964). Gunther adds, however, that Bickel's theory itself suffers from a lack of principle. *Id.* at 25; see also Scharpf, supra note 24, at 565 (arguing that Bickel's theory "may be worse than the danger" it tries to prevent, as "[i]t would sacrifice that realism of constitutional interpretation which is the necessary condition of its effectiveness").

126. "The Court's prestige, the spell it casts as a symbol, enable it to entrench and solidify measures that may have been tentative in the conception or that are on the verge of abandonment in the execution." Bickel, *The Least Dangerous Branch*, supra note 112, at 129. Put another way, the prudential political question doctrine gives the Court an option when it decides that an act is "constitutional but [does not] like it and therefore won't validate it." Champlin & Schwarz, supra note 20, at 229.

view is at least potentially a deviant institution in a democratic society," and the political question doctrine would enable courts to avoid "ram-pant activism" by staying out of certain matters.¹²⁷

The problem with the prudential theory, however, is that once the political question doctrine is unleashed entirely from the Constitution itself, what keeps a judge's use of the doctrine in check? What prevents a court from avoiding a case simply because it believes the issue is too complicated or is too politically charged? And what stops a judge from deciding questions constitutionally committed to another branch, as long as the judge believes it would be more expedient for the court to decide the issue instead? Bickel himself acknowledged that application of the prudential political question doctrine could not "be principled in the sense in which we have a right to expect adjudications on the merits to be principled."¹²⁸ But this was not, according to Bickel, "to concede judgment proceeding from impulse, hunch, sentiment, predilection, inarticulable and unreasoned."¹²⁹ Bickel expected the Court to exercise this discretion with *some* level of prudence and principle.¹³⁰ As Gerald Gunther pointed out, however, that was expecting too much.¹³¹

C. *The Beginning of the End of the Political Question Doctrine: Baker v. Carr and Its Aftermath*

The "passive virtues" of the prudential political question doctrine coincided with the judicial restraint and extreme deference of the New Deal Court. The Court's vision of its own powers—and, more importantly, its own limitations—admitted a strong political question doctrine. But the political question doctrine did not sit so comfortably alongside the aggressive judicial review of the Warren Court.

1. *Baker v. Carr*. — In 1962, four years after the Warren Court announced that federal courts are "supreme in the exposition of the law of the Constitution,"¹³² the Court began to cut back on the political question doctrine. In *Baker v. Carr*,¹³³ Justice Brennan set out to reverse the

127. Bickel, 1960 Term Foreword, *supra* note 24, at 47.

128. *Id.* at 51.

129. *Id.*

130. Bickel, *The Least Dangerous Branch*, *supra* note 112, at 70 (asserting that the Court's decision to "stay[] its hand" must "be justified as compatible with the Court's role as defender of the faith, proclaimer and protector of the [people's] goals," and that "in withholding constitutional judgment, the Court does not . . . abandon principle").

131. See Gunther, *supra* note 125, at 3.

132. *Cooper v. Aaron*, 358 U.S. 1, 18 (1958). Taken in context, the Court was stating only that a state executive could not disobey a federal court's desegregation orders. It became clear, however, that the Warren Court—and later the Burger and Rehnquist Courts—began to view itself as the supreme and final interpreter of the Constitution in a more general sense. See *infra* Part III.A.

133. 369 U.S. 186 (1962).

course laid out by Justice Frankfurter in *Colegrove v. Green*.¹³⁴ The Court in *Baker* held that a complaint alleging that a state apportionment statute violated the Equal Protection Clause presented a justiciable cause of action.¹³⁵

In so doing, the Court engaged in its most detailed discussion of the political question doctrine to date. Justice Brennan's opinion catalogued a host of political question doctrine cases, involving issues ranging from foreign relations to the validity of constitutional amendments to the status of Indian tribes.¹³⁶ This summary was necessary, according to the Court, "to expose the attributes of the doctrine—attributes which, in various settings, diverge, combine, appear, and disappear in seeming disorderliness."¹³⁷ The Court found two areas of common ground among the disarray. First, *Baker* held that the political question doctrine was inapplicable to cases involving the federal judiciary's relationship to the states.¹³⁸ Rather, the doctrine applied only to the relationships among the three branches of the federal government.¹³⁹ Thus, although the Court's prior Guarantee Clause cases had suggested that some questions were left to the state political process,¹⁴⁰ *Baker* made clear that the doctrine would not go so far. This view of the doctrine therefore coincided with *Cooper's* view of the federal-state relationship.

Second, and relatedly, the Court stated that the doctrine is "primarily a function of the separation of powers."¹⁴¹ The Court noted that "several formulations which vary slightly according to the settings in which the questions arise may describe a political question, although each has one or more elements which identify it as essentially a function of the separation of powers."¹⁴² The Court then synthesized its prior cases to

134. 328 U.S. 549 (1946); see *supra* text accompanying notes 99–111. One part of Justice Brennan's strategy in *Baker* was to argue that a majority of the seven Justices who participated in *Colegrove* had agreed there was subject matter jurisdiction. *Baker*, 369 U.S. at 202. Although correct, Justice Brennan ignored the fact that Justice Rutledge would have dismissed the case for the same prudential reasons as Justices Frankfurter, Reed, and Burton. See *supra* text accompanying notes 109–111; see also *Baker*, 369 U.S. at 277–78 (Frankfurter, J., dissenting) (describing the areas of agreement between Justice Frankfurter's opinion in *Colegrove* and Justice Rutledge's concurrence).

135. *Baker*, 369 U.S. at 237.

136. *Id.* at 211–17.

137. *Id.* at 210.

138. *Id.*

139. *Id.*

140. See *Luther v. Borden*, 48 U.S. (7 How.) 1, 47 (1849); *id.* at 51 (Woodbury, J., dissenting) (agreeing with the majority that "[t]he adjustment of these questions belongs to the people and their political representatives, either in the State or general government"); see also Note, Political Rights as Political Questions: The Paradox of *Luther v. Borden*, 100 Harv. L. Rev. 1125, 1134–36 (1987) (summarizing the holding of *Luther* and observing that the Court "assigned the task of deciding whether a state constitution has a 'republican form' to four different political entities: the legislative and executive branches of the extant state government, the Congress, and the President").

141. *Baker*, 369 U.S. at 210.

142. *Id.* at 217.

create a list of six factors that should be evaluated on a "case-by-case" basis:

Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.¹⁴³

The Court in *Baker* therefore recognized not only the classical theory of the political question doctrine (the first factor and perhaps the second, depending on whether it is used to inform the first),¹⁴⁴ but the prudential strand as well (the remaining four factors and perhaps the second).¹⁴⁵ "Unless one of these formulations is inextricable from the case at bar, there should be no dismissal for nonjusticiability on the ground of a political question's presence."¹⁴⁶ The Court then concluded that none of the factors was applicable, and that the petitioners' equal protection challenge could go forward.¹⁴⁷

Justice Frankfurter, joined by Justice Harlan, dissented. Although his opinion largely amplified the arguments he made in *Colegrove*, those arguments now seemed out of step with the Warren Court's more aggres-

143. *Id.*

144. As noted above, see *supra* text accompanying note 58, no provision of the Constitution, standing alone, represents a "textually demonstrable constitutional commitment of the issue to a coordinate political department." *Baker*, 369 U.S. at 217. Thus, this prong of the *Baker* test must instead mean that there is a textual commitment to give the political branch "a final, non-reviewable decision," not just the decision in the first instance. Pushaw, *supra* note 21, at 501.

145. The six factors are presented as alternative bases. Therefore, any of the last four (or five) factors standing on its own could, at least in theory, support a finding of nonjusticiability. Thus, the Court in *Baker* recognized that prudential factors alone could justify a federal court's refusal to hear a case.

146. *Baker*, 369 U.S. at 217.

147. *Id.* at 226, 237. In his separate concurrence, Justice Douglas indicated that his view of the political question doctrine was even narrower. *Id.* at 246 n.3 (Douglas, J., concurring). He noted, in particular, his disagreement with the Court's statements in *Luther v. Borden* that Guarantee Clause claims are enforceable only by Congress or the Executive. *Id.* at 242 n.2 (Douglas, J., concurring) (citing *Luther v. Borden*, 48 U.S. (7 How.) 1, 42 (1849)). Justice Clark's concurrence argued that the Tennessee apportionment scheme lacked any possible rational justification. *Id.* at 253-59 (Clark, J., concurring). Justice Stewart, in contrast, wrote separately to make clear that the decision was not deciding the case on the merits and that "the proper place for the trial is in the trial court, not here." *Id.* at 266 (Stewart, J., concurring).

sive judicial review. Nevertheless, echoing Alexander Bickel,¹⁴⁸ he cautioned that the Court's authority "ultimately rests on sustained public confidence in its moral sanction" and that "feeling must be nourished by the Court's complete detachment, in fact and in appearance, from political entanglements and by abstention from injecting itself into the clash of political forces in political settlements."¹⁴⁹

As he retraced the Court's Guarantee Clause cases, Justice Frankfurter noted only their prudential roots, not the classical constitutional basis for holding such cases to be "political questions."¹⁵⁰ He highlighted the Court's reluctance to interfere without clear standards for judicial enforcement and its unwillingness to become an arbiter of "broad issues of political organization historically committed to other institutions and for whose adjustment the judicial process is ill-adapted."¹⁵¹ Just as in *Colegrove*, Justice Frankfurter seemed to recognize that he could not make a classical argument for the political question doctrine to apply under the Fourteenth Amendment as the Court had done in *Luther v. Borden* for the Guarantee Clause. His solution was to engage in a somewhat revisionist version of judicial history. He claimed that "Art. IV, § 4, is not committed by express constitutional terms to Congress."¹⁵² "It is the nature of the controversies arising under it," he proclaimed, "nothing else, which has made it judicially unenforceable."¹⁵³ Thus, he attempted to turn the entire political question doctrine into a prudential one.¹⁵⁴

Although Justice Frankfurter's arguments had held sway in 1946, those same arguments could not be reconciled with the theory of judicial review that prevailed in the 1960s. The judiciary had brought an end to segregation and was seen as the political savior for the disenfranchised, without seeming to pay much of a price in terms of its legitimacy.¹⁵⁵ The

148. Indeed, Justice Frankfurter's dissent cites Bickel's *Harvard Law Review* Foreword. *Id.* at 281 n.10 (Frankfurter, J., dissenting).

149. *Id.* at 267 (Frankfurter, J., dissenting).

150. *Id.* at 277-97 (Frankfurter, J., dissenting).

151. *Id.* at 289 (Frankfurter, J., dissenting).

152. *Id.* at 297 (Frankfurter, J., dissenting).

153. *Id.* (Frankfurter, J., dissenting).

154. Justice Harlan's dissent similarly ignored the classical version of the doctrine, arguing that "[t]he federal courts have not been empowered by the Equal Protection Clause to judge whether this resolution of the State's internal political conflict is desirable or undesirable, wise or unwise." *Id.* at 333 (Harlan, J., dissenting). Judge Louis Pollak has argued that both Justices Frankfurter and Harlan based their decisions not on justiciability grounds, but on their views of the merits—that, "taking their complaint at full value, the appellants in *Baker v. Carr* should not prevail." Louis H. Pollak, *Judicial Power and "The Politics of the People,"* 72 *Yale L.J.* 81, 85 (1962).

155. See David, *supra* note 58, at 131 n.212 (observing that "[o]ne way of explaining the Supreme Court's increasingly active review of federal and state voting practices over time . . . is to recall the backdrop of the American civil rights movement and the quest for racial equality," and citing *Gomillion v. Lightfoot*, 364 U.S. 339 (1960), for the proposition that the political question doctrine does not relieve courts of jurisdiction where the state is discriminating on racial grounds); Samuel Issacharoff, *The Structures of Democratic Politics*, 100 *Colum. L. Rev.* 593, 595 (2000) (noting that the Supreme Court's

prevailing sentiment was in favor of an active judiciary—and that sentiment continues in large measure today, although the activism tends to run in a different direction. In this climate, “abstaining” from questions not because the Constitution demands it, but because the Court prefers it, would be unthinkable. Indeed, for this reason, the political question doctrine—especially its prudential aspects—has drawn scathing rebukes from scholars,¹⁵⁶ with some calling for complete abandonment of the doctrine.¹⁵⁷

2. *The Narrowing of the Prudential Political Question Doctrine.* — As it turned out, critics of the prudential political question doctrine had little to fear. Although *Baker* gave us a new test for political questions that seemed quite flexible, the case actually signaled the beginning of the end of the prudential political question doctrine.¹⁵⁸ In fact, in the almost

reapportionment cases and its “declaration that effective political participation was indeed a first-order constitutional right . . . inserted substantive participatory content into the Constitution’s conspicuous voids”).

156. See, e.g., Charles L. Black, *Inequities in Districting for Congress: Baker v. Carr and Colegrove v. Green*, 72 Yale L.J. 13, 13–14 (1962) (paraphrasing De Tocqueville’s observation that judicial oversight “is a settled and regular weight in our governmental balance”); McCormack, *supra* note 20, at 822 (“[T]he political question doctrine is nothing other than a subterfuge for masking explicit review on the merits of particular claims that come before a court.”); Michael Stokes Paulsen, *Nixon Now: The Courts and the Presidency After Twenty-Five Years*, 83 Minn. L. Rev. 1337, 1378 (1999) (arguing that “[s]uch a free-form principle of pseudo-‘restraint’ (abdication, really) has no place in our constitutional order”); Redish, *Judicial Review and the “Political Question,” supra* note 19, at 1045–46 (arguing that “the inherently undemocratic character of judicial review” cannot be used to support the prudential doctrine, “as long as one accepts the concept of judicial review in the first place”); Tigar, *supra* note 18, at 1154–58, 1163 (arguing that the prudential strand of the doctrine is a “recent invention”); cf. R. Brooke Jackson, *The Political Question Doctrine: Where Does It Stand After Powell v. McCormack, O’Brien v. Brown and Gilligan v. Morgan*, 44 U. Colo. L. Rev. 477, 500–01 (1973) (criticizing the classical version of the doctrine because giving exclusive power to a political branch “is fundamentally at odds with the notion of checks and balances” and because “[o]ne does not think of Congress as functionally equipped or designed to interpret the Constitution without review, nor, under our system, does one wish to leave to Congress the unbridled authority to determine the constitutionality of its own acts”).

157. See, e.g., Redish, *Judicial Review and the “Political Question,” supra* note 19, at 1060; Chemerinsky, *Interpreting the Constitution, supra* note 19, at 95–105. Another group of scholars, critical of the courts’ treatment of foreign relations cases, has also argued for abandonment of the doctrine. See, e.g., John H. Ely, *War and Responsibility: Constitutional Lessons of Vietnam and Its Aftermath* 55–57 (1993) [hereinafter Ely, *War and Responsibility*]; Franck, *supra* note 20, at 4–5; Harold H. Koh, *The National Security Constitution: Sharing Power After the Iran-Contra Affair* 221–24 (1990).

158. The political question doctrine “is largely out of favor today in the Supreme Court, even with respect to foreign affairs controversies.” David J. Bederman, *Deference or Deception: Treaty Rights as Political Questions*, 70 U. Colo. L. Rev. 1439, 1441 (1999). The doctrine is still applied with some frequency, however, by lower courts in cases involving foreign relations. See Franck, *supra* note 20, at 19–20; Champlin & Schwarz, *supra* note 20, at 217. The “crest of the abstention principle” in the foreign policy context is arguably the 1936 decision of *United States v. Curtiss-Wright Export Corp.* Bederman, *supra*, at 1442; see also *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936) (cautioning that the Court should hesitate before limiting the powers of the President in

forty years since *Baker v. Carr* was decided, a majority of the Court has found only two issues to present political questions,¹⁵⁹ and both involved strong textual anchors for finding that the constitutional decision rested with the political branches. At the same time, the Court has sent signals that the prudential doctrine was disfavored.

For example, seven years after *Baker*, the Court considered on the merits Representative Adam Clayton Powell, Jr.'s claim that the House of Representatives improperly excluded him from the Ninetieth Congress, even though many scholars thought the case presented a political question.¹⁶⁰ The House had concluded that Powell satisfied the standing qualifications of Article I, Section 2, but voted to exclude him based on a finding that he had wrongfully diverted House funds for the use of others and himself.¹⁶¹ Respondent members of the House argued to the Supreme Court that "a careful examination of the pre-[Constitutional] Convention practices of the English Parliament and American colonial assemblies demonstrates that by 1787," the legislature's power to assess the qualifications of its members included the power to exclude or expel a member "on the ground that an individual's character or past conduct rendered him unfit to serve."¹⁶² Despite the broad grant of authority given the House to judge the qualifications of its members in Article I, Section 5,¹⁶³ the Court held that it could decide the matter on the mer-

the area of foreign relations). On the other hand, Jack Goldsmith has argued that *Baker's* discussion of the prudential factors gave courts a discretionary tool "to abstain whenever *they decide*, based on an independent analysis of U.S. foreign relations, that an adjudication would harm U.S. foreign relations or the political branches' conduct of those relations." Jack L. Goldsmith, *The New Formalism in United States Foreign Relations Law*, 70 U. Colo. L. Rev. 1395, 1402 (1999). As discussed in Part I.B, *supra*, this move towards a functional or prudential political question doctrine began before *Baker*. See Louis L. Jaffe, *Standing To Secure Judicial Review: Public Actions*, 74 Harv. L. Rev. 1265, 1304 (1961) (observing, before *Baker* was decided, that whether a question is deemed political is not based on subject matter but on whether there are "no well-developed principles, or the issue is felt to be so closely related to a complex of decisions not within the court's jurisdiction that its resolution by the court would either be poor in itself or would jeopardize sound decisions in the larger complex"); Redish, *Judicial Review and the "Political Question"*, *supra* note 19, at 1035 (arguing that a prudential version of the doctrine existed "long before *Baker*"). *Baker's* six factor summary, however, may have prompted more lower courts than had done so previously to embrace the prudential doctrine in the foreign relations context. In any event, Goldsmith acknowledges that there has been a move away from the use of the prudential political question doctrine, even in the foreign relations context. See Goldsmith, *supra*, at 1427-28 (observing that the Supreme Court's decision in *Japan Whaling Ass'n v. American Cetacean Society*, 478 U.S. 221 (1986), signaled a shift away from the prudential doctrine).

159. See *infra* text accompanying notes 171 & 184.

160. *Powell v. McCormack*, 395 U.S. 486 (1969).

161. *Id.* at 492-93.

162. *Id.* at 521-22.

163. "Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members . . ." U.S. Const. art. I, § 5.

its.¹⁶⁴ It therefore rejected the applicability of the political question doctrine in an area that some believed presented a strong case for it.¹⁶⁵

In reaching this conclusion, the Court followed the "classical" model. The Court conducted an extensive analysis of the historical background of Article I, Section 5, and, based on that evaluation, concluded that the House is "without authority to *exclude* any person, duly elected by his constituents, who meets all the requirements for membership expressly prescribed in the Constitution."¹⁶⁶ "Art. I, § 5, is at most a 'textually demonstrable commitment' to Congress to judge only the qualifications expressly set forth in the Constitution."¹⁶⁷ Prudential factors had no bearing on the Court's decision, leaving some to question whether that strand of the doctrine had died completely.¹⁶⁸

Three years later, the Court sent a brief signal that the prudential strand of the doctrine was not yet dead. In *O'Brien v. Brown*, the Supreme Court granted a stay of a D.C. Circuit judgment that held justiciable a dispute about which groups of delegates should be seated from Illinois and California at the Democratic Convention in 1972.¹⁶⁹ Although the Court's decision to grant the stay was not a determination of whether a political question was presented, the Court strongly suggested that the matter would be deemed a political question. That is, although the Court was "unwilling to undertake final resolution of the important constitutional questions presented without full briefing and argument," it did note that the case "involve[d] claims of the power of the federal judiciary to review actions heretofore thought to lie in the control of political parties."¹⁷⁰ There was little classical analysis in the Court's opinion, suggesting that prudential concerns could still support abstention.

That signal proved to be a false one, however, as the classical analysis prevailed in the two post-*Baker* cases in which the Court found a political

164. *Powell*, 395 U.S. at 550.

165. See Wechsler, *Toward Neutral Principles*, supra note 24, at 7–8 (arguing that "the Constitution has committed to [Congress] the autonomous determination" of two constitutional questions: the fitness of its members and the impeachment of the president); see also Millet, supra note 88, at 761 (arguing that a textual reading of Article I, Section 5 "would certainly lead to the conclusion that controversies over the qualifications of members of Congress were committed to each House and, consequently, non-justiciable").

166. *Powell*, 395 U.S. at 522.

167. *Id.* at 548.

168. See, e.g., Jackson, supra note 156, at 481–82 & n.24 (1973) (collecting authorities pronouncing the death of the prudential factor, but arguing that *Powell* may not represent the end of discretionary judicial abstention).

169. 409 U.S. 1, 4–5 (1972).

170. *Id.*; see also Jackson, supra note 156, at 487–88 (arguing that the Court seemed to reach its decision based on prudential political question factors). It is also noteworthy that in the same year, the Court recognized another political question, albeit in dicta. In *Roudebush v. Hartke*, the Court noted that "[w]hich candidate is entitled to be seated in the Senate is, to be sure, a nonjusticiable political question—a question that would not have been the business of this Court." 405 U.S. 15, 19 (1972).

question. The first such case was *Gilligan v. Morgan*, in which the Court dismissed a suit brought by Kent State students alleging that student protestors were killed due to the government's negligent training of the National Guard.¹⁷¹ The students asked the Court to "assume continuing regulatory jurisdiction over the activities of the Ohio National Guard."¹⁷² This would include "establish[ing] standards for the training, kind of weapons and scope and kind of orders to control the actions of the National Guard."¹⁷³ The Court rejected the request, stating that Article I, Section 8, Clause 16 vests in Congress the "responsibility for organizing, arming, and disciplining the Militia (now the National Guard)."¹⁷⁴ Chief Justice Burger's opinion noted that "[t]he 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."¹⁷⁵

It took another twenty years for a majority of the Court to conclude that another issue presented a political question.¹⁷⁶ In the meantime, the Court sent other signals that the doctrine was disfavored.¹⁷⁷ For instance, in *New York v. United States*, Justice O'Connor's opinion for the Court noted that both case law and scholarship had called into question the nonjusticiability of Guarantee Clause claims, and suggested that the

171. 413 U.S. 1, 4, 12 (1973).

172. *Id.* at 5.

173. *Id.* at 6.

174. *Id.*

175. *Id.* at 10. In addition, Justice Blackmun's concurrence, joined by Justice Powell, agreed that "[t]he relief sought by respondents . . . is beyond the province of the judiciary" because "judicially manageable standards are lacking." *Id.* at 14 (Blackmun, J., concurring) (internal quotation marks omitted).

176. For instance, only four Justices could be mustered to support the proposition that whether the President could terminate a treaty with Taiwan without approval from Congress presented a political question. See *Goldwater v. Carter*, 444 U.S. 996, 1003 (1979) (Rehnquist, J., concurring) (noting that the Constitution "is silent as to [the Senate's] participation in the abrogation of a treaty" and that "different termination procedures may be appropriate for different treaties"). A statement by then-Justice Rehnquist, joined by three other Justices, noted that the dispute was "between coequal branches of our Government, each of which has resources available to protect and assert its interests, resources not available to private litigants outside the judicial forum." *Id.* at 1004.

177. As an initial matter, it rejected arguments that a variety of issues presented political questions, frequently over dissenting opinions. See, e.g., *Davis v. Bandemer*, 478 U.S. 109, 118-27 (1986) (holding political gerrymandering case justiciable under the Equal Protection Clause); *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 248-50 (1985) (rejecting nonjusticiability challenge in case involving Indian affairs); *INS v. Chadha*, 462 U.S. 919, 940-43 (1983) (concluding that a challenge to Congress's power to pass a statute with a one-House veto did not present a political question); *Elrod v. Burns*, 427 U.S. 347, 351-53 (1976) (concluding that a political patronage case involving a county sheriff's dismissal of an employee did not present a political question); *Williams v. Rhodes*, 393 U.S. 23, 28 (1968) (rejecting political question argument in case challenging on equal protection grounds an Ohio election law making it difficult for a new political party to gain access to a state hallot).

Court might no longer adhere to the view that questions under the Guarantee Clause present political questions.¹⁷⁸ This was hardly mere dicta, as the Court went on to decide that the Guarantee Clause claim failed on the merits.¹⁷⁹ In *Webster v. Doe*, the Court's conclusion that the CIA Director's decision to fire an employee was judicially reviewable led Justice Scalia to observe that "[t]he assumption that there are any executive decisions that cannot be hauled into the courts may no longer be valid."¹⁸⁰ In *Japan Whaling Ass'n v. American Cetacean Society*, the Court suggested that statutory issues could not present political questions.¹⁸¹ The Court's failure to apply the doctrine led many commentators to pronounce the entire doctrine, not just its prudential strand, dead.¹⁸² Most commentators hardly mourned its departure, as they viewed the doctrine as a harmful relic from the past that could not coexist with an active federal bench.¹⁸³

Their predictions proved premature, however, when the Court concluded in *Nixon v. United States* that whether the Senate could impeach a federal judge pursuant to Article I, Section 3, Clause 6 based on the report of a factfinding committee presented a nonjusticiable political question.¹⁸⁴ Chief Justice Rehnquist's opinion for the Court was based

178. 505 U.S. 144, 184–86 (1992).

179. *Id.* at 185. But see *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998) (holding that a court cannot "assume" jurisdiction to decide a question on the merits).

180. 486 U.S. 592, 621 (1988) (Scalia, J., dissenting). In his dissent in *Morrison v. Olson*, Justice Scalia similarly observed that the majority opinion failed to offer a "justiciable standard" for determining when the executive power belongs to the President. 487 U.S. 654, 711–12 (1988) (Scalia, J., dissenting).

181. 478 U.S. 221, 230 (1986) ("[U]nder the Constitution, one of the Judiciary's characteristic roles is to interpret statutes, and we cannot shirk this responsibility merely because our decision may have significant political overtones."). This opinion suggests that questions under the War Powers Resolution must be decided by the judiciary—a proposition rejected by many lower courts, which have found the statutory threshold of whether U.S. forces are engaged in hostilities to "call[] for a political judgment . . . [un]suitable for judicial determinations." *Campbell v. Clinton*, 203 F.3d 19, 25 (D.C. Cir. 2000) (Silberman, J., concurring) (citing cases).

182. See Ely, *War and Responsibility*, *supra* note 157, at 55 ("[I]t's doubtful that [the political question doctrine] even exists any more (at least at the Supreme Court level)."); Franck, *supra* note 20, at 61 ("Particularly in the Supreme Court, the political-question doctrine is now quite rarely used and may be falling into desuetude."); Nat Stern, *The Political Question Doctrine in State Courts*, 35 S.C. L. Rev. 405, 406 (1984) ("[T]he invocation of the political question doctrine appears to have nearly fallen into desuetude; only once in the past two decades has the Court decided that an issue raised a nonjusticiable political question."); see also *Ramirez de Arellano v. Weinberger*, 745 F.2d 1500, 1514 (D.C. Cir. 1984) ("Recent cases raise doubts about the contours and vitality of the political question doctrine, which continues to be the subject of scathing scholarly attack."); *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 796 (D.C. Cir. 1984) (Edwards, J., concurring) ("Nonjusticiability based upon 'political question' is at best a limited doctrine . . .").

183. See *supra* note 19.

184. 506 U.S. 224, 226 (1993). Justice White, joined by Justice Blackmun, disagreed that the case presented a political question. "Even taking a wholly practical approach, I

predominantly on the classical political question doctrine. In fact, he made an effort to cut back the prudential aspect of the doctrine. The opinion listed only the first two *Baker* factors—a textually demonstrable commitment to a coordinate political branch and the lack of judicially manageable standards—as relevant to the inquiry.¹⁸⁵ In addition, the opinion used the second factor only to inform the first—as the Court had done previously, before the New Deal Court expanded the doctrine: “[T]he lack of judicially manageable standards may strengthen the conclusion that there is a textually demonstrable commitment to a coordinate branch.”¹⁸⁶

In *Nixon*, the textual, structural, and historical evidence all pointed to an interpretation of Article I, Section 3, Clause 6 that vests the Senate with the interpretive authority to determine what the Constitution means by the “tr[ial]” of impeachments.¹⁸⁷ The text of the provision itself gives “sole” power to the Senate, and the history of the impeachment provision demonstrates that the Framers thought this judicial power belonged exclusively to the Senate and not to the courts.¹⁸⁸ Moreover, as the Court’s opinion in *Nixon* points out, impeachment is a political check on the judicial branch,¹⁸⁹ providing a structural reason for not vesting coordinate interpretive powers with the judicial branch itself.¹⁹⁰ For these reasons, commentators frequently cited impeachment as the prototypical example of a political question, if one is to be found at all.¹⁹¹ As Judge Williams

would prefer not to announce an unreviewable discretion in the Senate to ignore completely the constitutional direction to ‘try’ impeachment cases.” *Id.* at 239 (White, J., concurring in the judgment). Justice Souter also concurred only in the judgment, “envision[ing] different and unusual circumstances that might justify a more searching review of impeachment proceedings.” *Id.* at 253 (Souter, J., concurring in the judgment).

185. *Id.* at 228.

186. *Id.* at 228–29. The Court in *Nixon* did add, however, that “[i]n addition to the textual commitment argument, we are persuaded that the lack of finality and the difficulty of fashioning relief counsel against justiciability.” *Id.* at 236. Thus, although the Court minimized the independent significance of the prudential factors, it does not appear that it meant to foreclose their use entirely, even apart from their relationship to the textual commitment prong. Gerhardt, *supra* note 20, at 243.

187. U.S. Const. art. I, § 3, cl. 6.

188. *Id.* Impeachment was traditionally a judicial function, and the Framers noted that it was “[the Senate’s] only judicial cognizance.” 4 Elliot’s Debates, *supra* note 49, at 121; see also *Nixon*, 506 U.S. at 233–35 (explaining why the Founders explicitly rejected giving impeachment power to the courts). For discussions of this history, see Gerhardt, *supra* note 20, at 252–58; Pushaw, *supra* note 21, at 429 n.166.

189. The Article V amendment process also provides a check on the judiciary, and the Court in *Coleman v. Miller* made clear that it is also reluctant to police that process. 307 U.S. 433, 453–54 (1939).

190. *Nixon*, 506 U.S. at 235. The Court also pointed out that there would be “two sets of proceedings for individuals who commit impeachable offenses—the impeachment trial and a separate criminal trial,” and that “[t]he Framers deliberately separated the two forums to avoid raising the specter of bias and to ensure independent judgments.” *Id.* at 234.

191. See, e.g., Erwin Chemerinsky, Cases Under the Guarantee Clause Should Be Justiciable, 65 U. Colo. L. Rev. 849, 855 (1994) [hereinafter Chemerinsky, Cases Under the

pointed out in his opinion for the D.C. Circuit in *Nixon*, “[i]f the political question doctrine has no force where the Constitution has explicitly committed a power to a coordinate branch and where the need for finality is extreme, then it is surely dead.”¹⁹²

Nixon, then, presented perhaps the most powerful case for applying the classical strand of the political question doctrine. Yet even in that case, three Justices concluded that the judiciary had a role to play in determining what kind of “trial” the Constitution contemplated.¹⁹³ After *Nixon*, it was unclear whether *Nixon* would be an outlier—the last exception to the rule of judicial supremacy—or whether the classical political question doctrine would undergo a renaissance. As the history of the doctrine establishes, the answer to that question would depend on the Court’s view of its interpretive role as a more general matter. Would the Court continue its move toward constitutional hegemony over the other branches, or would it return to the classical roots of the political question doctrine and consider as a threshold matter in all cases how much interpretive power the Constitution vests with the political branches?

II. THE 2000 PRESIDENTIAL ELECTION CASES: THE NADIR OF THE POLITICAL QUESTION DOCTRINE AND THE ZENITH OF JUDICIAL SUPREMACY

In the eight years since *Nixon*, the Supreme Court has yet to conclude that another case presents a political question. This cannot be explained by the lack of a case presenting colorable questions of the Court’s power. No illustration proves the point as starkly as the Court’s treatment of the Article II question in the cases involving the 2000 presidential election.

The contest came down to the outcome in Florida: Whoever won the state’s electors would win the presidency. On November 8, 2000, the day after the presidential election, the Florida Division of Elections announced that then-Governor George W. Bush had a 1,784-vote lead over then-Vice President Al Gore.¹⁹⁴ Because the margin of victory was less than one half of one percent of the votes cast, state law required a ma-

Guarantee Clause] (“A second area where the Court has approved the use of the political question doctrine is judicial review of congressional impeachment and removal actions.”); Gerhardt, *supra* note 20, at 233–34 (claiming that “impeachment is the best example of a political question”); Pushaw, *supra* note 21, at 505 (stating that “impeachments are inherently political and thus committed entirely to Congress”); Ronald D. Rotunda, An Essay on the Constitutional Parameters of Federal Impeachment, 76 Ky. L.J. 707, 728 (1987–1988) (“Commentators have usually concluded that any impeachment proceeding, particularly a presidential impeachment, is a political question.”). But see Raoul Berger, *Impeachment: The Constitutional Problems* 103–21 (1973) (arguing for denial of “insulation from review of impeachments”).

192. *Nixon v. United States*, 938 F.2d 239, 246 (D.C. Cir. 1991).

193. See *supra* note 184. *Nixon* does not address whether the substantive outcome of an impeachment proceeding would be unreviewable.

194. *Bush v. Palm Beach County Canvassing Bd.* (*Bush I*), 531 U.S. 70, 73 (2000).

chine recount.¹⁹⁵ After the automated recount, Bush's lead shrank even further. At that point, Gore petitioned four Florida county canvassing boards for manual recounts.¹⁹⁶ A dispute ensued over the state law deadline for conducting such recounts and submitting the returns to the Secretary of State.¹⁹⁷ The case made its way to the Florida Supreme Court, which ordered a manual recount of the ballots to proceed based on its interpretation of state law.¹⁹⁸ Bush petitioned the U.S. Supreme Court for a writ of certiorari, arguing that the case raised questions under 3 U.S.C. § 5; Article II, Section 1, Clause 2; and the Equal Protection and Due Process Clauses.¹⁹⁹ The conventional wisdom among many scholarly commentators and legal pundits was that the high Court would deny the writ because the case presented a question of Florida state law.²⁰⁰

The Supreme Court, however, saw itself playing a significant role. It granted certiorari on the 3 U.S.C. § 5 and Article II questions, but denied certiorari on the equal protection and due process questions.²⁰¹ Then, in a unanimous opinion,²⁰² it asserted jurisdiction over the petitioners' claim that the case presented a question under Article II, Section 1,

195. *Id.* (citing Fla. Stat. § 102.141(4) (2000)).

196. *Id.* at 73–74.

197. *Id.* at 74–76.

198. *Palm Beach County Canvassing Bd. v. Harris*, 772 So. 2d 1220, 1239–40 (Fla. 2000).

199. Petition for a Writ of Certiorari at i, *Bush I* (No. 00-836) [hereinafter Petition for a Writ of Certiorari]. Bush's petition also mentioned a possible First Amendment argument, although that argument was given only cursory treatment in the petition. See *id.* at 26.

200. See, e.g., Raju Chebium, *Constitutional Scholars Surprised by U.S. Supreme Court Decision To Hear Florida Election Case*, at <http://www.cnn.com/2000/LAW/11/24/scotus.election.02/index.html> (last visited Oct. 15, 2001) (on file with the *Columbia Law Review*) (noting that some scholars expressed surprise that the Court took the case, and reporting various scholars' explanations of why the Court may have accepted the writ); see also Tribe, *Freeing Bush v. Gore*, *supra* note 14, at 299 (“[N]ot one major constitutional scholar . . . predicted before the Court granted certiorari on November 24 that it would intervene.”).

201. *Bush I*, 531 U.S. at 73.

202. To be sure, some Justices later expressed dissatisfaction with the Court's decision to take the case. *Bush v. Gore* (*Bush II*), 531 U.S. 98, 129 (2000) (Souter, J., dissenting) (“The Court should not have reviewed either [*Bush I*] . . . or this case.”); *id.* at 142 n.2 (Ginsburg, J., dissenting) (“Even in the rare case in which a State's ‘manner’ of making and construing laws might implicate a structural constraint, Congress, not this Court, is likely the proper governmental entity to enforce that constraint.”); *id.* at 144 (Breyer, J., dissenting) (“The Court was wrong to take this case.”); *id.* at 153 (Breyer, J., dissenting) (“Of course, the selection of the President is of fundamental national importance. But that importance is political, not legal. And this Court should resist the temptation unnecessarily to resolve tangential legal disputes, where doing so threatens to determine the outcome of the election.”). While their arguments echoed the concerns of the political question doctrine, the fact remains that those same Justices did not dissent from the assertion of jurisdiction in *Bush I* and its vacatur of the Florida Supreme Court's opinion. Although they may have resisted raising the point initially for the sake of having a unanimous decision, their failure to object until the second case leaves the impression that the principles behind the political question doctrine were not of great importance to them

Clause 2 of the United States Constitution.²⁰³ Although the Court claimed that it was “declin[ing] at this time to review the federal questions asserted to be present,”²⁰⁴ it did, in fact, take jurisdiction over the case. The Court did not simply remand to the Florida Supreme Court for clarification “as to the extent to which the Florida Supreme Court saw the Florida Constitution as circumscribing the legislature’s authority under Art. II.”²⁰⁵ Rather, it *vacated* the Florida Supreme Court’s judgment—an action that arguably can occur only if the Court asserts that it has jurisdiction over the case.²⁰⁶

The Court did not pause for even a sentence in *Bush I* to explain why the Article II question was within its jurisdiction and why it did not present a political question for resolution by Congress. To be sure, neither respondent Gore nor respondent Palm Beach County Canvassing Board relied on the political question doctrine in opposing petitioner Bush’s claim, and the Court was under enormous time pressure to reach a decision. But neither the absence of full briefing nor the press of time can absolve the Court of its independent obligation to determine whether it has jurisdiction. The Court has recently reiterated that “the judicial power to decide cases and controversies does not . . . permit the federal courts to resolve nonjusticiable questions.”²⁰⁷ Even without briefing by

at the outset. It is unclear why the value of unanimity should outweigh the important institutional concerns at the heart of the political question doctrine.

203. The Court seemed to discuss 3 U.S.C. § 5 largely insofar as it related to the Article II claim. That is, the possibility that the state legislature might have wished to take advantage of its “safe harbor” provisions, see 3 U.S.C. § 5 (1994), would have “counsel[ed] against any construction of the Election Code that Congress might deem to be a change in the law.” *Bush I*, 531 U.S. at 78. Thus, the Court’s basis for asserting jurisdiction in *Bush I* stemmed largely, if not entirely, from the Article II claim. According to respondent Gore’s brief in *Bush I*, however, the Article II claim “was neither pressed nor passed upon below.” Brief of Respondents Al Gore, Jr., and Florida Democratic Party at 33–34, *Bush I* (No. 00-836).

204. *Bush I*, 531 U.S. at 78.

205. *Id.*

206. See *ASARCO, Inc. v. Kadish*, 490 U.S. 605, 621 n.1 (1989) (noting that if the Court lacks jurisdiction it “also [lacks] the power to disturb the state court’s judgment,” and therefore the proper course is to “dismiss the case and leave the judgment of the state court undisturbed”). The Court did not, therefore, simply assert jurisdiction to determine if it had jurisdiction. A remand would have been sufficient for that purpose. The vacatur proved premature, in any event, as the Florida Supreme Court clarified that its decision rested solely on an interpretation of state statutory law, not the state constitution. *Palm Beach County Canvassing Bd. v. Harris*, 772 So. 2d 1273, 1282 (Fla. 2000). It should be noted, however, that there is some precedent for the proposition that the Court can both vacate and remand to determine whether there is an independent and adequate state ground for the state court’s decision. See, e.g., *California v. Krivda*, 409 U.S. 33, 35 (1972) (vacating and remanding to California Supreme Court where basis of judgment could not be ascertained).

207. *Clinton v. Jones*, 520 U.S. 681, 700 & n.34 (1997).

the parties,²⁰⁸ it was clear that the case presented an obvious question of power.

Moreover, the amicus brief of the Florida state legislature directly raised the applicability of the political question doctrine, even though it did not discuss the issue in detail.²⁰⁹ The Florida legislature argued that "questions regarding whether the electoral process has conformed with pre-existing law" are "non-justiciable questions to be resolved by the political branches."²¹⁰ The Florida legislature pointed out that "[i]t is neither surprising nor inappropriate that the law should lodge that authority" in the political branches because "[w]hat is at stake here is after all a political determination of who shall be the next President."²¹¹ Thus, at the very least, the Florida legislature's brief highlighted the jurisdictional issue.

A closer look at the Article II question shows that a powerful case can be made that the issue presented a political question for determination by Congress, not by the Supreme Court. That is not to say, however, that all of the questions in the election cases presented colorable political questions. In particular, nothing about the Fourteenth Amendment equal protection claim in *Bush II* suggests that it should rest anywhere but the judiciary.²¹² But the equal protection claim in the second case may not have arisen if the Court had not vacated the Florida Supreme Court's initial opinion on the basis of Article II. This Article focuses on the Article II question because it presents such a strong case for finding a political question and because that question was critical to the Court's decision to intervene initially in *Bush I*. Indeed, even under the most conservative method of constitutional interpretation—using the text, structure, and history alone—it appears that the Supreme Court may have usurped a

208. See, e.g., *Mansfield, Coldwater & Lake Mich. Ry. v. Swan*, 111 U.S. 379, 382 (1884) (holding that the circuit court's assumption of jurisdiction was in error, irrespective of the parties' failure to raise the issue on review).

209. See Brief of the Florida Senate and House of Representatives as Amici Curiae in Support of Neither Party at 2, *Bush I* (No. 00-836) [hereinafter Brief of the Florida Senate and House of Representatives].

210. *Id.* at 7.

211. *Id.* at 8. The American Civil Rights Union similarly argued that "political decisions must be made by political bodies" and that the election of the President is "the *uber*-political question" that should be made by the political process. Brief of the American Civil Rights Union for Leave to File Amicus Curiae Brief and Brief of Amicus Curiae in Support of the Petitioner at 8, *Bush I* (No. 00-836). The American Civil Rights Union did not, however, see the irony of asking the Supreme Court to inject itself into this "*uber*-political" process. See *id.* at 12 (asking the Court to strike "down the unconstitutional actions of the Florida Supreme Court" and then "recognize that its own jurisdiction is then exhausted").

212. The *per curiam* opinion in *Bush II* rested on equal protection grounds, and this Article does not contend that that claim presented a political question. See *infra* text accompanying notes 542-545 (discussing the distinction between individual rights claims and structural arguments). Moreover, because the focus of this Article is on the political question doctrine, whether the Court properly decided any of the questions on the merits is irrelevant to this discussion.

role that properly belongs to Congress. If prudential factors are considered as well, the case appears to be even stronger. Thus, if either the classical or the prudential versions of the political question doctrine still survive, the Supreme Court should not have vacated the Florida Supreme Court's opinion in *Bush I*. Similarly, in the follow-up case of *Bush II*,²¹³ the concurring Justices improperly relied on Article II as a separate basis for their votes.²¹⁴

A. *Application of the Classical Political Question Doctrine to the Article II Claim*

The Article II question presented to the Court in *Bush I* was whether the state court improperly interfered with the state legislature's directive regarding how electors shall be appointed.²¹⁵ Put another way, the question was whether the state court had erroneously interpreted state law such that electors would be appointed contrary to the manner selected by the state legislature. The relevant question under the classical political question doctrine is which constitutional actor—Congress or the Supreme Court—should determine whether the state legislature's procedures were followed.

Section A.1 of this Part begins by analyzing the language in Article II, Section 1, Clause 2. The meaning of this language is then informed by the original understanding of this provision, which is discussed in Section A.2. Section A.3 then explores the subsequent constitutional history of this language. All three lines of inquiry present a strong case that it was for Congress to decide the Article II question.

1. *The Text.* — Article II, Section 1, Clause 2 provides that:

Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress.²¹⁶

Article II, as amended by the Twelfth Amendment, goes on to state that, after the "Electors shall meet in their respective States, and vote . . . they

213. 531 U.S. 98 (2000). *Bush II* involved a challenge under the state's *contest* procedures, because at that point, "the Florida Elections Canvassing Commission [had] certified the results of the election and declared Governor Bush the winner." *Id.* at 101. Vice President Gore challenged the certification under a Florida law that provides that "[r]eceipt of a number of illegal votes or rejection of a number of legal votes sufficient to change or place in doubt the result of the election' shall be grounds for a contest." *Id.* (alteration in original) (quoting Fla. Stat. § 102.168(3)(c) (2000)). The Florida Supreme Court disagreed with Gore's challenge in two counties, but concluded that he had satisfied his burden of proof regarding Miami-Dade County. *Id.* at 102.

214. To the extent that the three Justices most vocal about respecting the Court's jurisdictional limits—Chief Justice Rehnquist, Justice Scalia, and Justice Thomas—argued that the Court had the power to decide the election under Article II, the concurrence's treatment of Article II in *Bush II* is significant.

215. See *Petition for a Writ of Certiorari*, *supra* note 199, at 18–20.

216. U.S. Const. art. II, § 1, cl. 2.

shall sign and certify"²¹⁷ their selections for President and Vice President and "distinct lists of all persons voted for as President, and of all persons voted for as Vice-President."²¹⁸ These lists shall be "transmit[ted] sealed to the seat of the government of the United States, directed to the President of the Senate."²¹⁹ The President of the Senate must then, "in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted."²²⁰ If no candidate for President commands a majority, the House of Representatives shall choose from among the top three vote getters.²²¹ Thus, the text of the Constitution vests authority with the state legislatures to select electors and with Congress to count the votes and to select the President in the event that no candidate commands a majority. Congress also has the authority to "determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States."²²²

The text of Article II—as amended by the Twelfth Amendment—makes clear, then, that Congress plays a vital role in the election of the President.²²³ The House and Senate, respectively, have the power to cast the deciding ballots in elections. If the Constitution vests the House and Senate with the authority to cast the deciding votes in presidential and vice presidential elections, it would seem that Congress also possesses the far less significant power of determining whether a state elector was selected in the manner chosen by the state legislature. That Congress has this authority is underscored by its counting power under Article II, which arguably includes determining whether a ballot is valid and can therefore be counted. In making the determination of whether the ballot is valid, Congress may be permitted to determine whether it was submitted by an elector chosen in the manner directed by the state legislature. Indeed, that appears to be Congress's own reading of Article II, Section I, because it enacted an elaborate statutory scheme that describes

217. *Id.* cl. 3, amended by U.S. Const. amend. XII.

218. U.S. Const. amend. XII.

219. *Id.*

220. *Id.*

221. "[I]n choosing the President, the votes shall be taken by states, the representation from each state having one vote." *Id.* Similarly, if no candidate for Vice President commands a majority, the Senate shall choose from among the top two vote getters. *Id.*

222. *Id.* art. II, § I, cl. 4. Some individuals at the debates on the ratification of the Constitution expressed concern that this gave Congress a great power. One delegate to the North Carolina ratification debates worried that Congress, "by their army, and the election being on the same day in all the states, . . . might compel the electors to vote as they please." 4 Elliot's Debates, *supra* note 49, at 104.

223. Several Justices have suggested as much. See, e.g., *O'Brien v. Brown*, 409 U.S. 1, 14 n.7 (1972) (Marshall, J., dissenting) ("Congress has the ultimate authority over presidential elections."); *Oregon v. Mitchell*, 400 U.S. 112, 124 (1970) ("[I]t is the prerogative of Congress to oversee the conduct of presidential and vice-presidential elections and to set the qualifications for voters for electors for those offices.").

how it will select from among competing state ballots if they should be submitted.²²⁴ Thus, although far from decisive, the text of Article II, Section 1 itself appears to give Congress the ability to determine whether a state judiciary has overstepped its bounds and improperly interfered with the state legislature's authority under Article II to determine the manner in which electors are chosen.

If the Florida Supreme Court had ordered procedures contrary to those established by the state legislature in its statutory scheme, the electors chosen pursuant to the Florida Court's order could have been challenged in Congress. Or, perhaps a competing set of electors would have emerged from the state legislature.²²⁵ In either case, it would rest with Congress to determine whether the ballots should be counted, or whether the Florida Supreme Court had overstepped its bounds. Although the matter had not made its way to Congress when the Supreme Court intervened, that does not strip Congress of its power. As the Supreme Court noted in *Luther v. Borden*, Congress was vested with the authority to interpret the Guarantee Clause even though "the contest in [*Luther*] did not last long enough to bring the matter to this issue" and "Congress was not called upon to decide the controversy."²²⁶ Similarly, if Congress has the authority to determine whether electors have been chosen in the manner directed by the state legislature as part of its counting power, the Supreme Court cannot nullify Congress's power by intervening before Congress has the opportunity to face the issue.

This analogy to *Luther* highlights a broader parallel between Article II, Section 1, and the textual arrangement in Article IV. Article IV, Section 4 states that "[t]he United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion."²²⁷ Unlike Article II, Section 1, Congress is not even expressly mentioned. Yet, as noted above, the Supreme Court has interpreted "United States" to mean "Congress," and has concluded that subsumed within Congress's authority to "guarantee" a republican form of government, is its ability to decide whether a government is, in fact, republican.²²⁸ Under similar logic, subsumed within Congress's authority to count the ballots is its authority to recognize whether those ballots were received from valid electors. Indeed, Justice Ginsburg relied on *Luther* in her dissent to point out that, "in the rare case in which a state's 'manner' of making and construing laws might implicate a structural con-

224. See 3 U.S.C. § 15 (1994). As the Florida legislature argued in its brief in *Bush I*, "[t]hese elaborate rules would not have been necessary if Congress had envisioned the courts would decide the issue of which Electors' votes were 'regularly given'" under 3 U.S.C. § 5. Brief of the Florida Senate and House of Representatives, *supra* note 209, at 7.

225. See *infra* text accompanying note 366.

226. *Luther v. Borden*, 48 U.S. (7 How.) 1, 42 (1849).

227. U.S. Const. art. IV, § 4.

228. *Luther*, 48 U.S. (7 How.) at 42-43; see *supra* text accompanying note 62.

straint, Congress, not this Court, is likely the proper governmental entity to enforce that constraint."²²⁹

The Article II question also shares parallels with Article V. Article V provides:

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments²³⁰

If the latter method is selected, questions may arise (and, indeed, have arisen) whether the state legislature has properly ratified an amendment.²³¹ Even though the Constitution does not expressly vest the authority in Congress to count the number of state legislatures that have ratified an amendment²³²—as it grants Congress the authority to count the electors' votes in Article II—the text suggests that the power is subsumed within Congress's duty to call the convention, as well as its power to propose "one or the other Mode of Ratification."²³³ The Supreme Court has agreed that Congress has this power.²³⁴ As the above discussion of *Coleman v. Miller* indicates,²³⁵ the Court did not engage in a textual, structural, or historical analysis to conclude Congress has this power, but instead relied on the fact that judicial standards for determining whether ratification was appropriate were lacking.²³⁶ Even though the Court itself did not make the express link between the text of Article V and the question before it, the Court's reasoning shows that it believed Congress had the authority to determine the efficacy of a ratification as part of the "exercise of its control over the promulgation of the adoption of the amendment."²³⁷ Again, a similar analysis of Article II suggests that Congress has the power to determine whether a ballot submitted by an elector was chosen in the manner directed by the state legislature.

2. *The Original Understanding.* — The original understanding of Article II supports the textual analysis that questions regarding the validity of votes by electors are to be determined by the political branches, not the courts. In particular, an analysis of the ratification debates shows that the Framers intended Congress, not the courts, to play a strong role in resolv-

229. *Bush v. Gore* (*Bush II*), 531 U.S. 98, 142 n.2 (2000) (Ginsburg, J., dissenting).

230. U.S. Const. art. V.

231. See *supra* text accompanying notes 83–98 (discussing *Coleman v. Miller* and *Dillon v. Gloss*).

232. See Dellinger, *supra* note 97, at 398 (pointing out that "there is in fact no provision for any congressional role at the end of the ratification process"); see also *id.* at 400 (observing the lack of involvement by Congress in the process of ascertaining or promulgating constitutional amendments).

233. U.S. Const. art. V.

234. *Coleman v. Miller*, 307 U.S. 433, 450 (1939).

235. See *supra* text accompanying notes 83–98.

236. *Coleman*, 307 U.S. at 453–54.

237. *Id.* at 450.

ing disputes over electors. An evaluation of the historical materials indicates that the selection of electors was intended to be placed within the control of the people through their representatives.

The question of how to choose the President was one of the most contentious of all the issues at the Federal Convention. One delegate stated that the issue was "in truth the most difficult of all on which we have had to decide."²³⁸ Another noted that "[t]he Convention . . . were perplexed with no part of this plan so much as with the mode of choosing the President of the United States."²³⁹ Although key details were fiercely debated, the delegates all agreed that "the sense of the people should operate in the choice of the person to whom so important a trust was to be confided."²⁴⁰

The Virginia Plan proposed that the national legislature should select the President.²⁴¹ This option was frequently suggested in the debates, and it garnered substantial support throughout the proceedings.²⁴² The delegates in support noted that the national legislature would be appropriate because it "was the depository of the supreme will of society."²⁴³ Some delegates expressed strong concerns, however, that giving Congress total authority to select the President would subject the President to too much control by Congress. For instance, some believed this would require the President to be ineligible for a second term, or else the legislature's power would be too great during the President's first term in office.²⁴⁴ As Elbridge Gerry of Massachusetts stated, the concern was that

238. 2 *The Records of the Federal Convention of 1787*, at 501 (Max Farrand ed., rev. ed. 1966) [hereinafter *Farrand*].

239. 2 *Elliot's Debates*, supra note 49, at 511 (statement of James Wilson, Delegate, Pennsylvania).

240. *The Federalist* No. 68, supra note 22, at 412 (Alexander Hamilton). The delegates ultimately preferred a slate of electors instead of a purely popular vote because they believed that "[a] small number of persons, selected by their fellow-citizens from the general mass, will be most likely to possess the information and discernment requisite to so complicated an investigation." *Id.*; see also 3 Joseph Story, *Commentaries on the Constitution of the United States* § 1450, at 313-15 (Carolina Acad. Press 1987) (1833) (explaining that use of electors to choose the president was motivated by a desire to have the "sense of the people operate in the choice").

241. 1 *Farrand*, supra note 238, at 69; see also 1 *Elliot's Debates*, supra note 49, at 143-44 (listing resolutions offered by Edmund Randolph to the Convention on May 29, 1787); *id.* at 143-45 (describing the resolutions submitted by Edmund Randolph to the Convention, including the proposal to have the Executive chosen by the national legislature).

242. See 5 *Elliot's Debates*, supra note 49, at 324 (recording that the vote at one point was unanimously in favor); *id.* at 359 (recording votes in favor of national legislature appointing the Executive, seven to four); 1 *Farrand*, supra note 238, at 80; 2 *id.* at 29, 99, 105, 120-21.

243. 5 *Elliot's Debates*, supra note 49, at 140.

244. See 2 *Farrand*, supra note 238, at 100 ("[I]t will be necessary to make the Executive ineligible a 2d time, in order to render him independent of the Legislature."); see also 4 *Elliot's Debates*, supra note 49, at 304 (statement of Charles Cotesworth Pinckney, Delegate, South Carolina) (noting that, coupled with the power of impeachment, the power to choose the President would make the President "altogether

"[t]he Legislature [and] the candidates [would] bargain and play into one another's hands."²⁴⁵ But the delegates resisted a limit on reelection of the President, with one delegate, Rufus King of Massachusetts, noting that "he would therefore prefer any other reasonable plan that could be substituted."²⁴⁶

To avoid the potential for the corruption of the Executive's independence or a limit on the Executive's reelection, members of the Convention considered alternatives.²⁴⁷ One proposal that received strong consideration was having the Executive "elected by the people at large."²⁴⁸ James Wilson of Pennsylvania noted that "[e]xperience, particularly in New York and Massachusetts, showed that an election of the first magistrate by the people at large was both a convenient and successful mode."²⁴⁹ Gouverneur Morris, who opposed election by the national legislature as threatening "usurpation and tyranny" of the Executive,²⁵⁰ stated that "[i]f the people should elect, they will never fail to prefer some man of distinguished character or services; some man, if he might

[Congress's] creature, and [the President] would not have independence enough"); 5 *id.* at 335 (statement of Gouverneur Morris, Delegate, Pennsylvania) (stating that he "saw no alternative for making the executive independent of the legislature, but either to give him his office for life, or make him eligible by the people"); *id.* at 337 (statement of James Wilson, Delegate, Pennsylvania) ("It seems to be the unanimous sense that the executive should not be appointed by the legislature, unless he be rendered ineligible a second time."); James Madison, *Observations on Jefferson's Draft of a Constitution for Virginia* (1788), reprinted in *1 The Founders' Constitution* 649, 650 (Phillip B. Kurland & Ralph H. Lerner eds., 1987) [hereinafter *The Founders' Constitution*] (emphasizing the concern that the President would not be strong enough vis-à-vis Congress).

245. 1 Farrand, *supra* note 238, at 80; see also 5 *Elliot's Debates*, *supra* note 49, at 473 (statement of Gouverneur Morris, Delegate, Pennsylvania) (arguing that "[c]abal and corruption are attached to" selection by the national legislature); 2 Farrand, *supra* note 238, at 29 (recording that Gouverneur Morris of Pennsylvania was concerned that an Executive chosen by the national legislature would "be the mere creature of the Legis[ature]" and likened such a selection to "the election of a pope by a conclave of cardinals"); 3 Story, *supra* note 240, § 1450, at 314 ("Compromises and bargains would be made, and laws passed, to gratify particular members, or conciliate particular interests; and thus a disastrous influence would be shed over the whole policy of the government.").

246. 5 *Elliot's Debates*, *supra* note 49, at 336 (statement of Rufus King, Delegate, Massachusetts).

247. See *id.* at 368–69 (statement of George Mason, Delegate, Virginia) (summarizing the various alternatives proposed).

248. 2 Farrand, *supra* note 238, at 29. Luther Martin, a delegate from Maryland at the Federal Convention, wrote a letter to the Maryland state legislature reporting the proceedings, and noted that "repeated attempts were made to have the President chosen by the people at large. On this the sense of the Convention was taken, I think, not less than three times while I was there, and as often rejected." 1 *Elliot's Debates*, *supra* note 49, at 378.

249. 5 *Elliot's Debates*, *supra* note 49, at 142 (statement of James Wilson, Delegate, Pennsylvania).

250. *Id.* at 323 (statement of Gouverneur Morris, Delegate, Pennsylvania).

so speak, of Continental reputation.”²⁵¹ That proposal met with defeat, however, when delegates raised several concerns with direct election by the people. One concern appeared to be the disadvantage such an election would give the smaller states.²⁵² Some delegates were also concerned that the people would not be sufficiently informed to make an appropriate choice.²⁵³ Still others expressed fear that a purely democratic election would be associated with “the most dangerous commotions.”²⁵⁴ Finally, some delegates were worried that a majority of the people would never concur.²⁵⁵

To remedy the perceived shortcomings of direct election by the people, but to retain the critical link between the President and the people, the delegates proposed having the President selected by electors appointed by the state legislatures.²⁵⁶ Electors were desirable because “[a] small number of persons, selected by their fellow citizens from the general mass for this special object, would be most likely to possess the information, and discernment, and independence, essential for the proper discharge of the duty.”²⁵⁷ It was also thought that selection by electors, unlike selection by the people directly, would afford as “little opportunity, as possible, to tumult and disorder.”²⁵⁸ Some delegates still thought the people were better represented through the national legislature, however, so the matter was referred to a committee. That committee proposed vesting authority with the state legislatures to choose the manner of selecting electors.²⁵⁹

Although the national legislature was not given the power to select the electors directly, the Framers still intended the national legislature to police the process. They gave the House of Representatives the power to

251. *Id.* at 322; see also *id.* at 337 (statement of James Madison, Delegate, Virginia) (“The people generally could only know and vote for some citizen whose merits had rendered him an object of general attention and esteem.”).

252. 2 Farrand, *supra* note 238, at 29–30, 111, 113.

253. *Id.* at 29, 114.

254. *Id.* at 30.

255. *Id.* at 29.

256. *Id.* at 32; see also 5 Elliot’s Debates, *supra* note 49, at 338 (statement of Oliver Ellsworth, Delegate, Connecticut) (proposing appointment “by electors, appointed by the legislatures of the states in the following ratio, to wit: one for each state not exceeding two hundred thousand inhabitants; two for each above that number, and not exceeding three hundred thousand; and three for each state exceeding three hundred thousand”).

257. 3 Story, *supra* note 240, § 1451, at 315.

258. *Id.* Alexander Hamilton answered this fear in the Federalist Papers, noting that the selection of several electors would “be much less apt to convulse the community, with any extraordinary or violent movements” and that because electors would assemble and vote in each state, “this detached and divided situation will expose them much less to heats and ferments, which might be communicated from them to the people, than if they were all to be convened at one time, in one place.” The Federalist No. 68, *supra* note 22, at 412 (Alexander Hamilton).

259. 2 Elliot’s Debates, *supra* note 49, at 127–28. One delegate at the Massachusetts ratification debates posited that “[t]his manner of choosing was probably taken from the manner of choosing senators under the constitution of Maryland.” *Id.*

choose the President from among the ballots in case no candidate commanded a majority.²⁶⁰ Significantly, the delegates fully expected that, because “nineteen times in twenty” no candidate would command a majority,²⁶¹ the House would frequently determine the winner of the election.²⁶² The delegates were not concerned that this would “open cabal anew, as it would be restrained to certain designated objects of choice, and as these must have had the previous sanction of a number of the States.”²⁶³ Moreover, the Framers viewed the counting power as including an evaluation of the authenticity of the electors’ act. Abraham Baldwin of Georgia stated that “it leaves no possible question for the Senators and Representatives, when met together to count the votes agreeably to the Constitution, but to judge of the authentication of the act of the Electors, and then to proceed and count the votes as directed.”²⁶⁴

260. See U.S. Const. art. II, § 1; *id.* amend. XII.

261. 2 Farrand, *supra* note 238, at 500; see also 3 Elliot’s Debates, *supra* note 49, at 493 (statement of George Mason, Delegate, Virginia) (arguing that “it would not be once out of fifty times that [the President] would be chosen by [the electors] in the first instance, because a majority of the whole number of votes was required”); 2 Farrand, *supra* note 238, at 512 (statement of George Mason, Delegate, Virginia) (“It will rarely happen that a majority of the whole votes will fall on any one candidate.”).

262. 2 Farrand, *supra* note 238, at 527. The delegates ultimately voted to give authority to select the President in the event no candidate garnered a majority to the House instead of the Senate, as the committee had proposed. *Id.*

263. *Id.* at 502; see also 4 Elliot’s Debates, *supra* note 49, at 107 (statement of James Iredell, Delegate, North Carolina) (noting that the limited list given to the Congress for President and Vice President in the event no one commanded a majority ensures that “[n]o faction or combination can bring about the election” and “[i]t is probable that the choice will always fall upon a man of experienced abilities and fidelity”).

264. 10 Annals of Cong. 31 (1800). In *Commentaries on the Constitution*, Joseph Story observed:

[N]o provision is made for the discussion or decision of any questions, which may arise, as to the regularity and authenticity of the returns of the electoral votes, or the right of the persons, who gave the votes, or the manner, or circumstances, in which they ought to be counted. It seems to have been taken for granted, that no question could ever arise on the subject; and that nothing more was necessary, than to open the certificates, which were produced, in the presence of both houses, and to count . . . Yet it is easily to be conceived, that very delicate and interesting inquiries may occur, fit to be debated and decided by some deliberative body.

3 Story, *supra* note 240, § 1464, at 327. Thus, Story anticipated the very sort of controversy that was to arise in the 2000 election but did not think it clear which body could resolve the controversy. He did note that, in 1821, there was a question of whether Missouri’s votes should be counted, but because it would make no difference in the outcome, “the senate immediately withdrew.” *Id.* Similarly, the various methods chosen by the state legislatures for appointing electors “ha[ve] been firmly established in practice, ever since the adoption of the constitution, and do[] not now seem to admit of controversy, *even if a suitable tribunal existed to adjudicate upon it.*” *Id.* § 1466, at 329 (emphasis added). Again, Story did not assume that Congress would decide the matter, but, of equal if not greater importance, this Supreme Court Justice did not assume that the federal judiciary would decide the question, as the *Bush* Court did.

Congress's central role contrasts sharply with that of the judiciary. One issue on which the delegates seemed to agree from the outset was that selection by the judiciary was "out of the question."²⁶⁵ "The power . . . to regulate the elections of our federal representatives must be lodged somewhere," and, according to the prevailing thought, there are "but two bodies wherein it can be lodged—the legislatures of the several states, and the general Congress."²⁶⁶ Thus, from the beginning the delegates contemplated a role for the national legislature in making the selection, but never considered a judicial selection, which would be as far removed from selection by the people as possible. Although the delegates did not discuss judicial review of the process directly—indeed, they rarely mentioned judicial review at all during the debates—it seems clear from the convention and debates on ratification that a judicial determination like the one in the election cases is at odds with the purpose of Article II.

Placing the decision in the state legislatures was intended to give the people the power to select the manner of choosing electors without creating the perceived dangers of direct election by the people. That is, state legislatures were granted authority to select the manner of choosing electors not because state legislatures possess unique institutional competence, but because "the people act through their representatives in the legislature."²⁶⁷ The Framers thought that using state legislatures would bring the choice of President "as nearly home to the people as is practicable"²⁶⁸ because "[t]he people . . . have formed their state governments, and can alter them at [their] pleasure."²⁶⁹ Some, moreover, expected that the state legislatures "might direct it to be done by the people at large."²⁷⁰

The Framers recognized that Congress, too, is an "agent[] of the people, amenable to them."²⁷¹ "If the elections be regulated in the best manner in the state government, can it be supposed that the same man will lose all his virtue, his character and principles, when he goes into the general government, in order to deprive us of our liberty?"²⁷² Thus, per-

265. 2 Farrand, *supra* note 238, at 109.

266. 2 Elliot's Debates, *supra* note 49, at 24 (recording the Massachusetts ratification debate).

267. *McPherson v. Blacker*, 146 U.S. 1, 27 (1892).

268. 2 Elliot's Debates, *supra* note 49, at 512 (statement of James Wilson, Delegate, Pennsylvania).

269. 4 *id.* at 161; see also *id.* at 589 (statement of Pres. Jackson) ("We are ONE PEOPLE in the choice of the President and the Vice President. Here the states have no other agency than to direct the mode in which the votes shall be given. . . . The people, then, and not the states, are represented in the executive branch."); 2 *id.* at 145 ("The President is chosen by the electors, who are appointed by the people.").

270. 4 *id.* at 105.

271. *Id.* at 68–69; see also *id.* at 506 (reprinting Senate debate from January 1830 on states' rights, and reporting assertion that Congress "is as popular, just as truly emanating from the people, as the state governments").

272. *Id.* at 69.

mitting Congress to resolve electoral disputes would also place the decision close to the people themselves.

3. *Subsequent Constitutional History.* — The subsequent history of Article II buttresses the textual and historical analysis, for it shows that subsequent Congresses uniformly concluded that Congress had the authority, under its counting power, to settle disputes regarding the validity of electors. In 1800, the Senate debated what provisions ought to be made for the possibility of a dispute over the legality of electoral votes.²⁷³

Senators noted that, among other things, "questions may arise whether an elector has been appointed in a mode authorized by the Legislature of his State or not."²⁷⁴ Although some senators believed Congress should not play a role in resolving such disputes, those senators believed it was for the states themselves, not the federal courts, to resolve any disputes.²⁷⁵ In any event, a majority of senators believed it was for Congress to decide such questions, and therefore the Senate passed a bill that would assign the resolution of those disputes to a committee comprised of members of Congress.²⁷⁶ The Senate referred the bill to the House, a majority of which agreed that Congress had this power.²⁷⁷ The House recommended that federal and state courts be used for the examination of witnesses.²⁷⁸ Notably, however, neither the federal nor the state judges were to decide the question whether the votes complied with the law. Rather, the state and federal judges who presided over the examination of witnesses were merely to transmit the testimony to the President of the Senate.²⁷⁹ Congress could consider the testimony elicited as part of Congress's resolution of whether an electoral vote complied with the state legislature's directive.²⁸⁰ Because the Senate and House could not agree on whether the concurrence of both houses would be necessary to accept or reject a vote, the bill never made it into law.²⁸¹ The debate is illuminating, however, for it shows the early Congress's view that an objection that an elector was chosen contrary to the manner directed by the state legislature was a matter for the political branches, not the courts, to resolve.

273. See Counting Electoral Votes: Proceedings and Debates of Congress Related to Counting the Electoral Votes for President and Vice-President of the United States, H.R. Misc. Doc. No. 44-13, at 16-29 (1877).

274. *Id.* at 18-19.

275. See, e.g., *id.* at 20 (statement of Sen. Pinckney) ("If the bill is not passed, we are to depend, as we have hitherto done, on the attachment of the States and the good sense and integrity of their executives.").

276. *Id.* at 19, 21.

277. *Id.* at 27. Although the Senate's version of the bill provided that the Chief Justice or other Justice of the Supreme Court would sit as the chairman of the committee, the Justice's involvement would not have constituted participation by the Court as such.

278. *Id.* at 23.

279. *Id.* at 25.

280. *Id.*

281. *Id.* at 29.

This congressional view did not change. In the aftermath of the Civil War, Congress was faced with objections to the electoral votes submitted by some of the southern states. For example, in the 1868 presidential election, a question arose in Congress as to whether Georgia's nine electoral votes should be included in the count.²⁸² Objections had been raised that, among other things, the election had not been free and fair.²⁸³ The House voted that the Georgia votes should not be counted, and the Senate concluded that, because the electors did not matter to the outcome of the election, both totals would be read.²⁸⁴ Although the branches could not agree on the solution, they were in agreement that it was for Congress to resolve the issue. Similarly, Congress refused to count electoral votes in the 1872 election because of objections.²⁸⁵

In 1875 and the beginning of 1876, the Senate considered legislation to regulate the counting of votes. The debate focused on whether it was appropriate for Congress to look behind the signed and certified certificates and on how to resolve a case of multiple returns.²⁸⁶ No one suggested that the validity of a return rested with the Supreme Court to decide. When legislation was proposed that would permit such a contest to be submitted to a federal circuit court, with an appeal to the Supreme Court, objections were raised that this method would be inappropriate because the Constitution "requires the count . . . to be concluded without delay."²⁸⁷ One congressman objected that "[t]he whole frame-work of the Constitution is repugnant to the idea of its being settled in the judiciary."²⁸⁸

Congress had not yet passed legislation to address contested electoral returns when a dispute arose in the aftermath of the 1876 presidential election. The contest between Samuel Tilden, the Democratic candidate, and Rutherford B. Hayes, the Republican candidate, came down to one electoral vote, and Republicans and Democrats disputed the outcomes in South Carolina, Louisiana, and Florida.²⁸⁹ There were allegations—and evidence—of voter fraud and canvassing board misconduct in those

282. Charles Fairman, *History of the Supreme Court of the United States: Five Justices and the Electoral Commission of 1877*, at 7 (1988).

283. *Id.*

284. *Id.* at 6–9.

285. *Id.* at 20–21.

286. See *id.* at 9–39. Some believed that Congress's role was largely ministerial and that "[t]he whole matter was within the jurisdiction of the States." *Id.* at 20. Others believed that Congress should determine if a return was "true and valid." *Id.* at 23.

287. *Id.* at 29.

288. *Id.* at 18 (quoting Frederick Frelinghuysen).

289. See Keith Ian Polakoff, *The Politics of Inertia: The Election of 1876 and the End of Reconstruction* 203 (1973). There was also a dispute over an elector in Oregon, because he held a federal office, which would make him ineligible under the Constitution. He resigned his office after being elected, but Democrats argued that he should be considered ineligible because he was ineligible on election day itself. *Id.* at 226–28, 288.

states, as well as violations of state law.²⁹⁰ In some instances, the Democrats turned to the state courts for relief.²⁹¹ It became clear, however, that "[t]he electoral votes of Louisiana, Florida, and South Carolina were certainly going to be cast for Hayes, regardless of any Democratic claims to those states."²⁹² The Democrats believed their only source of redress was "to force Congress to deal with their grievance . . . by having their own electors meet and forward contesting votes to Washington."²⁹³ Thus, there were 184 votes for Tilden (one short of the number needed to capture the presidency), 165 for Hayes, and 20 claimed for both candidates.²⁹⁴

Everyone assumed that the authority to choose among the competing sets of electors resided with Congress under the counting power of Article II. But there were other unanswered legal questions. Could Congress inquire into whether any of the "official" state returns, signed by the governor, were fraudulent, or must it accept them at face value?²⁹⁵ Did the President of the Senate have the power to count the electoral votes, with the two houses present as witnesses, or did the two houses themselves have the power to count and therefore resolve any underlying controversies?²⁹⁶ No one argued that the power to decide these questions resided with the Supreme Court.

On the contrary, one Republican senator, George F. Edmunds of Vermont, believed that a constitutional amendment was necessary to give the Supreme Court such power.²⁹⁷ Edmunds proposed a constitutional

290. See *id.* at 210–15 (describing the allegations and evidence of misconduct in Louisiana and Florida, including the fact that the returning board in Louisiana violated state law because it lacked a Democratic member, and the fact that illiterate black voters in Florida were tricked by misleading ballots).

291. For example, Democrats asked the Florida courts to have the canvassing board start counting the ballots. *Id.* at 217–18. This suit was averted when the canvassing board reversed itself and agreed to start counting. In South Carolina, Democratic leaders asked the state supreme court for a writ of prohibition barring anything other than a ministerial count. *Id.* at 219–20. "The justices, all Republican, responded by ordering the board to confine itself to the mere aggregation of the officially reported county totals when treating the contests for electors . . ." *Id.* at 220.

292. *Id.* at 223.

293. *Id.*

294. *Id.* at 231.

295. C. Vann Woodward, *Reunion and Reaction: The Compromise of 1877 and the End of Reconstruction* 21–22 (2d rev. ed. 1956).

296. Throughout the early years of the country's history, the President of the Senate had handled the count, but at that time, the count was purely ministerial. Polakoff, *supra* note 289, at 224–25. During the Civil War, when significant questions arose regarding the rights of the seceded states to participate in a national election, both houses assumed they had the power to resolve these controversies. The Republicans and Democrats disagreed over the proper procedure during the Hayes-Tilden contest. The Republicans' position was that the President of the Senate (then a partisan Republican) should count, whereas the Democrats argued that "the authors of the Constitution never intended to give to one man, who might himself be an aspirant for the presidency, the power to act in cases involving conflicting certificates." *Id.* at 225.

297. *Id.* at 265–68.

amendment that would give the Supreme Court the power "to receive, open, and count all of the electoral certificates."²⁹⁸ It became clear that such an amendment would not be ratified,²⁹⁹ however, so the members of Congress considered other avenues to resolve the controversy before them.

Initially, some Republicans considered Edmunds's alternative suggestion to have Congress agree voluntarily to give the matter to the Supreme Court, in an effort to win over public opinion. One Republican noted that "[w]e can afford to abide by their judgement, far better than to insist on having our own way by force."³⁰⁰ Senator Carl Schurz of Missouri told Hayes that "[i]f the Supreme Court counts the electoral votes and declares the result, that result will be accepted as legal, just and legitimate by every American citizen."³⁰¹ A movement began among Republicans to form "a tribunal to whom may be referred at once, *without debate* or excitement, all disputed points."³⁰² Since the Democrats needed only one of the disputed twenty electoral votes to win, they did not object, reasoning that they would be awarded at least one by such a tribunal.³⁰³

Ultimately, it was agreed to have the matter decided by an Electoral Commission, which would consist of fifteen men, ten from the legislative branch (equally divided among Republicans and Democrats), and five from the judiciary.³⁰⁴ The plan was to designate Justices Nathan Clifford and Stephen J. Field, Democrats, and Justices Samuel F. Miller and William Strong, Republicans, and have them select the fifth Justice, whom everyone assumed would be Justice David Davis, an independent.³⁰⁵ "Reliance upon the independence of Judge Davis was probably the decisive factor in Democratic opinion" to support the tribunal.³⁰⁶ But Justice Da-

298. *Id.* at 265.

299. *Id.* at 265–66. Edmunds subsequently argued that, after the votes were counted, a matter could be brought to the Supreme Court of the District of Columbia, and then an appeal taken to the U.S. Supreme Court. *Id.* If Edmunds truly believed the Supreme Court had this authority all along, however, it is unclear why he would have proposed a constitutional amendment.

300. *Id.* at 266 (quoting John Murray Forbes).

301. *Id.* at 267.

302. *Id.* at 269 (quoting William P. Craighill).

303. Woodward, *supra* note 295, at 164. As C. Vann Woodward put it, "[a]ny fair-minded judge would vote to go back of the corrupt election returns in one or more states, and any such investigation would overturn Hayes' claims." *Id.*

304. See Polakoff, *supra* note 289, at 270. Some have argued that Congress lacked the power to delegate its counting power to a committee. Beverly J. Ross & William Josephson, *The Electoral College and the Popular Vote*, 12 J.L. & Pol. 665, 715–16 (1996).

305. Polakoff, *supra* note 289, at 274.

306. Woodward, *supra* note 295, at 164.

vis declared himself unable to serve on the Commission,³⁰⁷ leaving the fifteenth seat to Justice Joseph P. Bradley, a Republican.³⁰⁸

The deliberations of the Commission proceeded in a judicial manner, with arguments presented on both sides by counsel.³⁰⁹ The tribunal first heard argument on the disputed returns in Florida. The parallels with the Bush-Gore dispute are striking. The Democrats' attorneys argued that Tilden had received a majority of the votes cast and "that the legitimate result of the election had been reversed by a partisan returning board which had exceeded its authority."³¹⁰ The Republican lawyers maintained that the electors with a certificate signed by the governor must be accepted and argued that the Commission would have to look behind *all* returns of a state, including county returns, if it was going to look behind any returns.³¹¹ Because that could not be completed in a timely manner, "the commission had no alternative to counting the certificate that, on its face, met all the legal requirements."³¹² The Commission decided in favor of the Republicans, voting strictly along party lines, eight to seven.³¹³ And so went all of its subsequent votes.³¹⁴ The Commission therefore determined the ultimate outcome of the election along partisan lines.³¹⁵

Hayes-Tilden differed from Bush-Gore in that, in Hayes-Tilden, Congress remained accountable for its role and the Supreme Court as a Court never became involved. Although five Justices ultimately took part in deciding the controversy, they did so only with Congress's consent. Moreover, Congress itself remained involved, sending representatives from each party to sit on the Commission.

The Hayes-Tilden controversy teaches us that no one disputed Congress's authority to decide ultimately how to resolve the question, and also that, even with the participation of five Supreme Court Justices, everyone expected the Commission to vote along partisan lines—and everyone believed that it did. Indeed, as Alexander Bickel noted, even if Justice Bradley voted on principle, no one would believe it: "Given the fact that on both sides fraud could not be disentangled from fraud, the real

307. The same day that the bill for the Electoral Commission passed the Senate—and after the Democratic Party irrevocably committed to passing it in the House—the Illinois legislature elected Davis to the United States Senate. *Id.* at 165.

308. All of the remaining Justices were Republican. The Democrats were moderately satisfied with Bradley from among the remainder. *Id.* at 166. Republicans also accepted him, believing "all would go right" with him. *Id.* (quoting Henry Van Ness Boynton).

309. Polakoff, *supra* note 289, at 285.

310. *Id.* at 286.

311. *Id.*

312. *Id.*

313. Woodward, *supra* note 295, at 167.

314. *Id.*

315. The concurrence of the House and Senate was necessary to overturn the decision of the Commission, and they were deadlocked. See Ross & Josephson, *supra* note 304, at 717 n.275.

great question was not fit 'for the wrangling of lawyers.'³¹⁶ Justice Breyer in his dissent in *Bush v. Gore* took from this event the lesson that members of the Supreme Court becoming involved in such partisan conflicts "undermin[es] respect for the judicial process."³¹⁷

Indeed, because of the partisan nature of the Hayes-Tilden election proceedings and the calls of illegitimacy that surrounded them, Congress decided to establish ground rules for resolving any similar future controversy by enacting the Electoral Count Act in 1887.³¹⁸ The majority of the House committee that reported the bill reiterated their view that the authority to determine the legality of votes and select from among competing electors "rests with the two Houses, and *there is no other constitutional tribunal*."³¹⁹ A plan to have the Supreme Court decide such controversies was expressly rejected because involving the Court in such a "political question in which the people of the country were aroused" could threaten the Court's legitimacy in other cases affecting life and property.³²⁰

The solution Congress adopted in Title 3 therefore reflected the consistent and prevailing view in Congress that it is within the power of the political branches, not the Supreme Court, to resolve such disputes. Section 15 of Title 3 establishes the rules by which Congress will decide among competing electors.³²¹ In addition, under § 5 of Title 3, Congress provides a safe harbor, which states are free to ignore, under which Congress will accept the state's resolution of any contest regarding the choice of electors, as long as that contest was resolved in accordance with a law passed before the electors are chosen and the decision was made at least six days before the meeting of the electors.³²² Under this safe harbor, the decisions of state judicial proceedings are "binding upon Congress."³²³

316. Bickel, *The Least Dangerous Branch*, supra note 112, at 185 (quoting Justice Bradley).

317. 531 U.S. 98, 157 (2000) (Breyer, J., dissenting); see also Charles Fairman, *Mr. Justice Miller and the Supreme Court* 280 (1939) (noting that "the public image of judicial impartiality was affected in a way from which the Court did not at once recover" after the Justices on the Electoral Commission voted along seemingly partisan lines).

318. Electoral Count Act of 1887, ch. 90, 24 Stat. 373 (codified as amended at 3 U.S.C. § 15 (1994)).

319. 18 Cong. Rec. 30 (1887) (emphasis added).

320. 17 Cong. Rec. 817-18 (1886) (statement of Sen. Sherman).

321. 3 U.S.C. § 15 (1994).

322. *Id.* § 5; see also John W. Burgess, *The Law of the Electoral Count*, 3 Pol. Sci. Q. 633, 635 (1888) (arguing that the safe harbor reflects an "excessively states-rights view" regarding elector choice by not requiring but "simply hold[ing] out an inducement" for states to provide for determination of election controversies).

323. 15 Cong. Rec. 5461 (1884) (statement of Rep. Hiscock); see also 17 Cong. Rec. 1020 (1886) (statement of Sen. Hoar) ("The bill provides that where the State has created a tribunal for the determination of these questions the proceedings of that tribunal shall be conclusive."); *id.* at 816 (statement of Sen. Sherman) (recognizing that election disputes might "be decided according to the laws of each State by judicial interpretation"); 15 Cong. Rec. 5078 (1884) (statement of Rep. Browne) (arguing that if the state legislature

"Nowhere" does this statute "provide[] for involvement by the United States Supreme Court."³²⁴

If states fail to take advantage of the safe harbor, the consequence is that Congress will decide from among competing electors submitted to it.³²⁵ The legislative history makes clear that, in the absence of state identification of legally appointed electors, the two houses of Congress will determine the legally appointed electors when they meet to count the electoral vote.³²⁶ The legislative measure was not designed to interfere with states' ability to "appoint their electors in such manner as they might determine," but was rather a "notice to the states as to what evidence Congress would accept from a state as *conclusive* in case a contest should arise in that body concerning the counting of the electoral vote of a state."³²⁷ Thus, the entire point of the provisions in Title 3 was to establish the rules of decision for *Congress* to follow in the case of an electoral dispute. It is Congress's duty:

to ascertain whether a State has voted or not, and ascertain whether the vote that has been deposited under the forms of law, with the proper officer, is in fact the lawful vote of a State. It is, as has been already said, a question of identity, and these two assembled bodies, the Senate and the House of Representatives, have the right, and have the duty imposed upon them, to see to it that the votes counted are in fact the votes of the States.³²⁸

This congressional understanding indicates that Congress, not the Supreme Court, would provide the forum for resolving a conflict among competing electors. The Supreme Court did not disturb Congress's understanding of its role, even when it subsequently concluded that it had jurisdiction in a case arising under Article II, Section 1, Clause 2. In 1892, the Court decided *McPherson v. Blacker*, which confirmed that the state legislatures retained flexibility in setting the manner of choosing electors.³²⁹ The Supreme Court relied heavily on *McPherson* in concluding that the Florida Supreme Court's decision should be vacated in *Bush*

has "submitted the controversy to its judicial tribunals, and they have determined it, that is the act of the State, and it ought to bind the Congress").

324. *Bush v. Gore* (*Bush II*), 531 U.S. 98, 153 (2000) (Breyer, J., dissenting).

325. See 17 Cong. Rec. 867 (1886) (statement of Sen. Morgan) (noting that the legislation applies only "[i]f the States will not dutifully exercise their own powers"); see also *id.* at 1023 (statement of Sen. Hoar) ("The bills says, therefore, that in case the State declines to appoint any other tribunal and chooses to leave it on the governor's certificate, we will leave it where the State has left it.").

326. 18 Cong. Rec. 75 (1886) (statement of Rep. Eden).

327. Burgess, *supra* note 322, at 637.

328. 18 Cong. Rec. 48 (1886); see also *Bush II*, 531 U.S. at 127 (Stevens, J., dissenting) (noting congressional power to recognize electors); *id.* at 130 (Souter, J., dissenting) (same); *id.* at 153-57 (Breyer, J., dissenting) (same).

329. 146 U.S. 1, 21-22 (1892).

v. Palm Beach County Canvassing Board,³³⁰ so it is important to analyze the opinion to determine what role the Court claimed for itself in *McPherson*.

In *McPherson*, the Court held that the state legislature could, under Article II, Section 1, Clause 2, direct that electors be selected by districts.³³¹ Notably, the Court rejected the argument that *all* questions arising under that provision presented political questions.³³² The Court concluded that it had jurisdiction over the question of whether the state legislature could properly delegate to districts its authority in a state statute.³³³ The Court did not hold—or even hint in the slightest manner—that it had the power to determine whether or how much the state legislature did delegate, or whether the proceedings in the districts were exercised in accordance with the legislature's wishes.³³⁴ Nor did the Court in *McPherson* reinterpret state law for itself. Indeed, nothing in *McPherson* can be read to permit the *Supreme Court* to police the manner in which electors are selected to determine if it comports with the state legislature's wishes.³³⁵ The opinion merely establishes that state legislatures have broad power under the Constitution.³³⁶

The difference between *McPherson* and the *Bush* cases therefore shares similarities with the distinction the Court drew between *Dillon v. Gloss*³³⁷ and *Coleman v. Miller*.³³⁸ In *Dillon*, the Supreme Court held that Congress had the power to place a seven year ratification limit on the Eighteenth Amendment.³³⁹ In *Coleman*, the Court explained that it would not determine what constitutes a reasonable time when Congress had not fixed one, because there were no constitutional criteria for the Court to make such a determination.³⁴⁰ Similarly, although the Court in

330. 531 U.S. 70, 76 (2000).

331. *McPherson*, 146 U.S. at 42.

332. *Id.* at 23.

333. *Id.* at 23–24.

334. *See id.* at 41.

335. The state legislature could not, of course, violate other constitutional provisions. *Williams v. Rhodes*, 393 U.S. 23, 28–29 (1968) (stating that the states' power to appoint electors, like other constitutional grants of legislative power, "may not be exercised in a way that violates other specific provisions of the Constitution").

336. The Court held that "[t]he legislative power is the supreme authority except as limited by the constitution of the State." *McPherson*, 146 U.S. at 25; see also *Bush v. Gore* (*Bush II*), 531 U.S. 98, 148 (2000) (Breyer, J., dissenting) (arguing that state legislatures' power to select the manner of appointing electors is not "unlimited [and] devoid of any state constitutional limitations"). The Court in *McPherson* concluded that it was "not authorized to revise the conclusions of the state court" on the questions of state constitutional law that were presented. *McPherson*, 146 U.S. at 23. This type of decision is therefore similar to the decision that the Court makes in all political question cases—i.e., how much authority the Constitution delegates to other actors.

337. 256 U.S. 368 (1921).

338. 307 U.S. 433 (1939).

339. *Dillon*, 256 U.S. at 374–76.

340. *Coleman*, 307 U.S. at 452–54. A comparison of *Dillon* and *Coleman* also establishes that while some questions under a constitutional provision might present issues that should be decided by the Court, that does not mean that all questions arising under that

McPherson concluded that the state legislature had the power to provide for the selection of electors by districts, it does not necessarily follow that the Court has the power to interpret the state legislative scheme for itself or that the Court has the authority to resolve any conflicts in provisions of the state statutory scheme. There are no federal standards for the Court to use in making those decisions, and therefore there is no basis for the Court to displace the state court interpretation. If there is an objection to a slate of electors on the grounds that they were selected in a manner contrary to that established by the state legislature or if the state submits multiple sets of electors, Congress can resolve those issues in determining which ballots to count.

Thus, as the Supreme Court itself conceded in *Bush I*, the *Bush* cases did not present an analogous question to that in *McPherson*.³⁴¹ Whether the Supreme Court had the power to reinterpret Florida law to determine if the Florida Supreme Court had overstepped the authority granted by the state legislature or otherwise had usurped the legislature's role³⁴² was a question of first impression for the Supreme Court in the *Bush* cases. Consequently, whether it was a political question was also an issue of first impression.³⁴³ Moreover, the Court's determination in *McPherson*, unlike its involvement in the *Bush* proceedings, did not take place in the context of an ongoing election.³⁴⁴ The prudential concerns

provision are for the Court. Other questions arising under that same provision might present political questions.

341. *Bush v. Palm Beach County Canvassing Bd. (Bush I)*, 531 U.S. 70, 76 (2000) (noting that *McPherson* "did not address the same question petitioner raises here"). An analogous question would instead be whether the Florida legislature could delegate to the Florida Supreme Court the task of interpreting its election laws.

342. None of the Court's opinions in the *Bush* cases establishes the Court's superior competency to determine the intent of the Florida legislature vis-à-vis the state supreme court. It is simply implicit that the Court believes it would do a better job—a somewhat odd presumption given the state court's familiarity with the state election regime and the Court's relative ignorance of that same regime. Indeed, it is for this reason that the Court generally defers to a state court's interpretation of state law. See *id.*

343. In any event, the Court has considered whether a case presents a political question, even though it has previously decided a similar case on the merits, if the facts are distinguishable. Compare *Dillon*, 256 U.S. at 375–76 (deciding on the merits that seven years was a reasonable time limit on state ratification of a constitutional amendment), with *Coleman*, 307 U.S. at 452–56 (holding that while Congress had the power to prescribe time limits on amendment ratification, the judiciary could not do so because of the lack of judicially manageable standards). For discussions of these cases, see Dellinger, *supra* note 97, at 405 (pointing out that the Supreme Court concluded that a political question was presented in *Coleman* even after rejecting similar arguments in earlier cases); Millet, *supra* note 88, at 748–59 (describing the Court's increasing trend toward deferral of Article V questions to Congress, culminating in *Coleman* in 1939).

344. See Tribe, *Freeing Bush v. Gore*, *supra* note 14, at 284 (arguing that "pre-election constitutional challenges to state systems for conducting presidential elections need not be political rather than justiciable in character . . . while challenges to a state's actions in the course of a particular presidential election . . . should be regarded as political rather than justiciable").

raised by the *Bush* cases, which are discussed below,³⁴⁵ were therefore not present in *McPherson*.³⁴⁶

McPherson provides no support for the argument that it is the Supreme Court that determines whether electors have been selected in the manner chosen by the state legislature. *McPherson* did nothing to undermine Congress's role in settling disputes about the selection of electors or competing claims by electors. Indeed, long after *McPherson*, when the Supreme Court was cutting back on the political question doctrine in *Baker v. Carr*³⁴⁷ and *Powell v. McCormack*,³⁴⁸ members of Congress repeated their long-held and uncontroverted (until the *Bush* cases) view that Congress, and not the courts, possesses the power to resolve elector disputes.³⁴⁹

B. *Application of the Prudential Political Question Doctrine to the Election Cases*

It is clear, then, that even under the more restrictive classical theory of the political question doctrine, there is a strong argument that the Supreme Court should have stayed its hand. If prudential factors are considered as well, the argument is even more compelling. The Court was well aware that its decision essentially would determine the outcome of the 2000 presidential election. Never before in our nation's history has the Court held that it had the power to issue such a ruling. As Alexander Bickel put it, abstention is appropriate when "the sheer momentousness" of a decision "unbalances judgment and prevents one from subsuming the normal calculations of probabilities."³⁵⁰ Stephen Calabresi has simi-

345. See *infra* Part II.B.

346. If anything, the prudential considerations pointed in the opposite direction in *McPherson*, because the Court's involvement established that the states could delegate authority, thereby making clear that Presidents had been properly selected. In contrast, "a refusal by the Court to handle the question would have carried with it the implication that Presidents of the United States had been improperly elected." Philippa Strum, *The Supreme Court and "Political Questions": A Study in Judicial Evasion* 113 (1974). Deciding the case and upholding the statute would not be dangerous because "Michigan was certainly willing to uphold the decision, as the President must have been, for he had of course been elected by Electors chosen under this system." *Id.*

347. For a discussion of *Baker*, see *supra* Part I.C.1.

348. For a discussion of *Powell*, see *supra* Part I.C.2.

349. See 115 Cong. Rec. 203-04 (1969) (statement of Sen. Muskie) (stating that although the issue had not yet been "settled in the courts," the validity of an elector's vote could be a political question); see also Ross & Josephson, *supra* note 304, at 716 ("It is possible the Supreme Court would decline to review any challenge to Congress's counting of the elector votes on the basis of either the separation of powers or the political question doctrine.").

350. Bickel, 1960 Term Foreword, *supra* note 24, at 75; see also Bickel, *The Least Dangerous Branch*, *supra* note 112, at 184 (explaining the factors that can contribute to a Court's sense that an issue is too "momentous" to be reviewed by the courts); Edwin B. Firmage, *The War Powers and the Political Question Doctrine*, 49 U. Colo. L. Rev. 65, 74 (1977) (noting that courts will decline to decide a question when "an issue . . . is simply so awesome in its consequences that ultimate resolution, to be legitimate, must necessarily

larly summarized the Supreme Court's political question cases as involving questions that are "too important, too fundamental, and too anterior to the setting up of a legal system for courts to decide them."³⁵¹

It would be difficult to think of many questions as fundamental and important as the Article II question of how to select the President.³⁵² Indeed, in the closely related circumstance of whether the judiciary could review a question of succession to the presidency, Calabresi argues that such litigation "would be far more damaging to the country than *any* of the other likely outcomes."³⁵³ "Like setting dynastic succession in the English monarchy, or specifying who would act as Regent," the selection of a President "involves a political power that must be exercised by the Crown or by the Parliament but surely not by the Courts of Law."³⁵⁴

Nor was the Court applying "judicially discoverable and manageable standards" in determining whether the state court overstepped its bounds.³⁵⁵ Rather, the Article II question required the Court to address fundamental questions of state allocation of authority with no constitutional benchmarks or precedent to guide it. The Article II question presented the same type of anterior question of governance found to be so problematic in the Guarantee Clause cases and described by the *Baker* Court as involving a "policy determination of a kind clearly for nonjudicial discretion."³⁵⁶

Taking the decision away from the political process left little room for deliberation or protest. The Court itself obviously recognized the importance of the case and the need for the public to have some access to

rest with a political branch"). Nat Stern has found, however, that some state courts get involved precisely when the "sheer momentousness" of a decision demands it. Stern, *supra* note 182, at 421. "That is, a court may become involved in a normally sensitive area because the court views itself as the only avenue for immediate resolution of an important public issue." *Id.* In the *Bush* cases, however, there was no evidence that the political branches could not resolve the Article II issue or that the Supreme Court presented the only avenue for relief.

351. Calabresi, *Presidential Succession*, *supra* note 58, at 170 (noting that the Court has denied judicial review in cases involving impeachment, whether a state government should be recognized as valid, the constitutional amendment process, certain foreign relations questions, and the status of Indian tribes).

352. See *Bush v. Gore* (*Bush II*), 531 U.S. 98, 156-57 (2000) (Breyer, J., dissenting) (citing the factors noted by Bickel justifying abstention and arguing that "[t]hose characteristics mark this case").

353. Calabresi, *Presidential Succession*, *supra* note 58, at 169.

354. *Id.* at 170. In addition, as Melville Watson noted:

[W]hen judges as individuals or as a body of individuals come to decide which king or which constitution they will support and assert to represent, it may often be good judgment for them to follow the lead of the men who as a practical matter are likely to be looked to by the people as more representative of themselves and conversely are likely to be more directly in touch with popular sentiment.

Watson, *supra* note 24, at 309.

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

356. *Id.*

the proceedings. The Court permitted an unprecedented same day audio rebroadcast of the oral argument,³⁵⁷ an acknowledgement that there was a special need for transparency. The Court was injecting itself into the democratic process in a way that it had not done before, and therefore special public access seemed necessary. But the public never heard the Court's deliberations as it would have if Congress had resolved the controversy.³⁵⁸ The people were left with nothing more than rushed opinions—and no formal outlet to express their disagreement or to demand answers. Because the Supreme Court Justices hold their terms for life,³⁵⁹ the people cannot express their discontent or satisfaction at the ballot box. At most, and unfortunately, the only political outlet is the next Supreme Court confirmation hearing.

The partisan appearance of the final outcome, the secrecy of the Court's deliberations, and the lack of redress for the discontented among the citizenry cannot help but cast doubt on the Court's own legitimacy—which, as noted above, is a driving force behind the prudential political question doctrine.³⁶⁰ As Justice Breyer eloquently put it, "we do risk a self-inflicted wound—a wound that may harm not just the Court, but the Nation."³⁶¹ Even if the Justices were following settled principles of black-letter law, which they assuredly were not because the case presented issues of first impression, their role in the 2000 election left a large segment of society feeling as if the election came down to a vote of five to four, on partisan grounds.³⁶² Although a decision by Congress would undoubtedly fall on similar partisan lines, that is to be expected from our political branches, whose members would be held accountable for their votes in the next election.

357. Barbara Cochran, Opening the Doors to America's Courtrooms, RTNDA Communicator, Feb. 2001, at 16, 16 (noting that "[n]ormally, the audiotapes [of proceedings] are not released until that year's term has ended").

358. Cf. Akhil Reed Amar, In Praise of Impeachment, *Am. Law.*, Sept. 1998, at 92, 93 (arguing that impeachment is preferable to a criminal prosecution because it is public and political, and therefore connected to the people).

359. U.S. Const. art. III, § 1.

360. See *supra* text accompanying notes 112–120; see also *Bush v. Gore (Bush II)*, 531 U.S. 98, 128–29 (2000) (Stevens, J., dissenting) ("Although we may never know with complete certainty the identity of the winner of this year's Presidential election, the identity of the loser is perfectly clear. It is the Nation's confidence in the judge as an impartial guardian of the rule of law."); Scott E. Gant, *Judicial Supremacy and Nonjudicial Interpretation of the Constitution*, 24 *Hastings Const. L.Q.* 359, 414 (1997) (arguing that "[t]he kinds of issues now described as 'political questions' are precisely those which would most embroil the courts in endeavors which can only corrode the legitimacy which the army-less, purse-less Court so desperately needs"). But see Chemerinsky, *Cases Under the Guarantee Clause*, *supra* note 191, at 859 (arguing that "[h]istory demonstrates that judicial credibility and legitimacy are not fragile").

361. *Bush II*, 531 U.S. at 158 (Breyer, J., dissenting).

362. See *Mixed Feelings in Aftermath*, CBS News (Dec. 17, 2000), at <http://www.cbsnews.com/now/story/0,1597,257905-412,00.shtml> (on file with the *Columbia Law Review*) (citing poll data that thirty-seven percent of the public believes the Court's decision was based on partisan politics).

Even if the cloud cast over the Court is not as dark as some suspect,³⁶³ the question remains whether the Court's involvement was necessary as a prudential matter. Why did the Court put its own legitimacy at risk? One theory, espoused by Judge Posner, is that the Court wanted to avoid embroiling the country in a chaotic controversy and thought that it was better for the citizenry to have a definite answer.³⁶⁴

To be sure, having a politically determined outcome might have taken far longer and involved more openly partisan debate. There is no evidence, however, that the political process would have been unable to resolve the controversy.³⁶⁵ The Florida legislature seemed poised to remedy any problem on its own. It was making plans to select its own electors.³⁶⁶ Indeed, the Florida legislature—the body the Supreme Court was allegedly protecting—was the one party that told the Court that the case presented a political question. It argued that it was “entirely appropriate” for the controversy to be resolved “by the branches of government that are most responsive to the will of the people.”³⁶⁷ Nor was there any reason to doubt that Congress could resolve any resulting disputes under its power to count the ballots.

The Supreme Court, however, never bothered to question whether these democratic organs could resolve any disputes or take care of whatever countermajoritarian problems were presented by the Florida Supreme Court's role in the case.³⁶⁸ The Court certainly never claimed that its involvement in the case rested on its view that the political

363. To be sure, some opinion polls suggest that the public's approval ratings for the Court have barely changed after the *Bush* cases. See Yoo, In Defense, *supra* note 14, at 225–27. But that could reflect the public's satisfaction with having the election over and settled. In 1877, the public was also satisfied with the end of the election crisis, even though it was settled by partisan means. Woodward, *supra* note 295, at 214.

It is noteworthy that almost seven hundred law professors have signed a statement asserting that the Court “has tarnished its own legitimacy” by its involvement in the election cases. See Law Professors' Statement, at <http://www.the-rule-of-law.com/statement.html> (last visited Oct. 10, 2001) (on file with the *Columbia Law Review*).

364. Richard A. Posner, Breaking the Deadlock: The 2000 Election, the Constitution, and the Courts 4 (2001).

365. Cf. Garrett, *supra* note 14, at 38–40, 50 (arguing that there was “no sign” that leaving the matter to the political branches would have caused “a political crisis that would have done damage to our institutions of governance”).

366. Florida Legislature Plans To Pick Electors, STLtoday.com, News Services (Dec. 7, 2000), at <http://www.stltoday.com/stltoday/news/special/election2000.nsf/other/40BC199E8753B31C862569AE006D3EA4?OpenDocument> (on file with the *Columbia Law Review*). Whether the Florida legislature could lawfully intervene in this manner is beyond the scope of this Article. This Article does, however, present the argument for concluding that it would be for Congress to determine whether to count the votes of electors selected by the Florida state legislature.

367. Brief of the Florida Senate and House of Representatives, *supra* note 209, at 8.

368. Although some states have created their own version of the “political question doctrine” in interpreting and applying state constitutions, the political question doctrine discussed in this Article does not apply to state court determinations. See Stern, *supra* note 182, at 406–07; *supra* text accompanying notes 138–140. It is strictly a doctrine allocating interpretive power among the federal branches.

branches would be unable to resolve the question.³⁶⁹ Instead, the Supreme Court added an additional, “countermajoritarian” layer to the mix by injecting itself into the process. The Supreme Court seemed unconcerned about the limitations on its ability to resolve the issues in the cases, especially given the time pressure it was under.³⁷⁰

The Supreme Court never seemed to consider that the matter could be decided by a body other than a court.³⁷¹ That is, if it believed the Florida Supreme Court was out of line—because it was taking the election away from the people and disobeying the legislature—should not a political organ make that determination? How does one unelected, antidemocratic body correct the failings of another antidemocratic body? Do two countermajoritarian wrongs somehow make a right? The Court’s willingness to vacate the Florida Supreme Court’s decision in *Bush I* suggests that the Court thought so. And in the per curiam opinion in *Bush II*, a majority of the Court stated, without qualification, that “[w]hen contending parties invoke the process of the courts . . . it becomes our unsought responsibility to resolve the federal and constitutional issues the judicial system has been forced to confront.”³⁷² The Court did not limit

It is worth noting, however, that in a study of the “political question doctrine” in state courts, Nat Stern found that “[s]tate courts have usually resisted requests to intervene in the election process and to interpret election results.” Stern, *supra* note 182, at 408, 411. As one state court put it, “[e]lections are a function of the political branch of the government, are a matter of political regulation, and are not per se the subject of judicial cognizance.” *State ex rel. Ford v. Bd. of Elections*, 150 N.E.2d 43, 45 (Ohio 1958) (per curiam). Many state courts generally intervene in elections only when fraud or similar abuses are present, or when individual rights are at stake. Stern, *supra* note 182, at 416, 419–21.

369. Chief Justice Rehnquist suggested, after the case was decided, that he held this view. See *infra* note 373.

370. Cf. *O’Brien v. Brown*, 409 U.S. 1, 3–4 (1972) (concluding that the Court could not “in this limited time give to these issues the consideration warranted for final decision on the merits” because “these cases involve claims of the power of the federal judiciary to review actions heretofore thought to lie in the control of political parties”). It is especially surprising that the Court’s originalists would decide such a fundamentally important question on a rushed basis, unless absolutely necessary, given the fact that, “[p]roperly done, [plumbing the original understanding of an ancient text] requires the consideration of an enormous mass of material—in the case of the Constitution and its Amendments, for example, to mention only one element, the records of the ratifying debates in all the states.” Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. Cin. L. Rev. 849, 856 (1989). As discussed above, this rushed judgment was not necessary, and it appears to have led the Court to reach an incorrect interpretation of Article II. As Justice Scalia has observed, “most errors in judicial historiography [will] be made in the direction of projecting upon the age of 1789 current, modern values.” *Id.* at 864. In this case, those errors included a view of the Court’s power that is far greater than originally intended. See *infra* Part III.

371. At oral argument in *Bush I*, Justice Kennedy seemed stunned by the possibility that “the Supreme Court of Florida is it, so far as a *judicial* interpretation of the consequences of 3 U.S.C. § 5.” Transcript of Oral Argument at 48, *Bush I*, available at <http://www.cnn.com/LAW/library/documents/election.florida.html> (last visited Oct. 8, 2001) (on file with the *Columbia Law Review*) (emphasis added).

372. *Bush v. Gore* (*Bush II*), 531 U.S. 98, 111 (2000). Similarly, the concurrence in *Bush II* stated that “[a] significant departure from the legislative scheme for appointing

its proclamation to the equal protection claims. Rather, its statement suggests that the Court believes it is its province and its *duty* to say what the law is whenever “parties invoke the process of the courts” and the case raises a significant constitutional question.³⁷³

The whole point of the political question doctrine, however, is that some issues are for the political branches, not the federal judiciary, to confront and resolve. And the Article II question in the *Bush* cases presented a strong candidate for application of the political question doctrine. The text and structure of Article II, the original understanding, Congress’s subsequent understanding when a similar issue arose, and prudential factors all make a strong case for congressional resolution. Yet the Court did not even consider that possibility.

III. THE DECLINE OF THE POLITICAL QUESTION DOCTRINE AND THE TREND TOWARD JUDICIAL SUPREMACY

The Supreme Court’s failure even to consider the political question doctrine reflects a broader trend in which the Court overestimates its own powers and prowess vis-à-vis the political branches. The political question doctrine itself cannot coexist with the current Court’s views of how interpretive power is allocated under the Constitution.

Section A of this Part explores how the Court’s inflated opinion of its own interpretive powers has influenced its treatment of Congress’s constitutional judgments in cases in which the Court plainly has jurisdiction. Section A then explains how this same view has bled into the Court’s evaluation of its own jurisdictional limits, and demonstrates that the Court’s view of its interpretive superiority over Congress is in theoretical tension with the entire premise of the political question doctrine. Section B then addresses the political question doctrine’s demise as a normative matter.

A. *Judicial Immodesty and the Decline of Deference*

One reading of *Marbury v. Madison* is that it endorses the judiciary as the final, independent arbiter of the meaning of all constitutional lan-

Presidential electors presents a federal constitutional question,” and then assumed without any analysis that the issue was therefore a question for the Court. *Id.* at 113 (Rehnquist, C.J., concurring).

373. Later claims by some of the Justices buttress this broad reading. Chief Justice Rehnquist gave a speech subsequent to the election cases, suggesting that he believed the Court’s involvement was necessary to avoid a national crisis. See Charles Lane, Rehnquist: Court Can Prevent a Crisis, *Wash. Post*, Jan. 19, 2001, at A24; see also Irvin Molotsky, In Year-End Report, Rehnquist Renews His Call To Raise the Salaries of Federal Judges, *N.Y. Times*, Jan. 1, 2001, at A10 (“The Florida state courts, the lower federal courts and the Supreme Court of the United States became involved in a way that one hopes will seldom, if ever, be necessary in the future.” (quoting the Chief Justice’s year end report)). Justices Kennedy and Thomas also testified before Congress that the Court had a “responsibility” to decide the case on the merits. See *infra* text accompanying notes 583–584.

guage. But, as Henry Monaghan has pointed out, "the judicial duty 'to say what the law is' does not demand an independent judgment rule; it is in fact quite consistent with a clear-mistake standard."³⁷⁴ That is, the Constitution itself can be read to vest interpretive authority with the other branches of government—and the Court's obligation to say what the law is might require recognition that some interpretive power has been allocated elsewhere.

The Constitution's vesting of interpretive power with the other branches on some constitutional questions reflects the institutional differences among the branches. In particular, the judiciary's independence and isolation from popular pressures and sentiment make it a poor policymaker. Indeed, it is because of the judiciary's institutional limitations that a prominent theory of judicial review at the time *Marbury* was decided, even when a case was properly within the Court's jurisdiction, was one of great deference to the political branches. Courts consistently stated that Congress's constitutional judgments would be overturned only if plainly in error.³⁷⁵ It is that same recognition of the Court's limitations and the strengths of the legislative branch that underlies the rational basis test used in constitutional law today.³⁷⁶

In the past few decades, however, the Supreme Court has become increasingly blind to its limitations as an institution—and, concomitantly, to the strengths of the political branches—and has focused on *Marbury*'s grand proclamation of its power without taking that statement in context. The modern Supreme Court—beginning with the Warren Court,³⁷⁷ continuing through the Burger Court,³⁷⁸ and exponentially gaining strength

374. Monaghan, *Marbury* and the Administrative State, *supra* note 2, at 9.

375. See *supra* text accompanying notes 46–51.

376. See, e.g., *United States R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 175–76 (1980) (noting that rational basis review reflects the belief that it is not for federal courts to decide what is wise economic or social policy).

377. The exact source of this modern view might be traceable to the Court's famous statement in *Cooper v. Aaron* that "the federal judiciary is supreme in the exposition of the law of the Constitution." 358 U.S. 1, 18 (1958); see also John C. Yoo, *Choosing Justices: A Political Appointments Process and the Wages of Judicial Supremacy*, 98 Mich. L. Rev. 1436, 1458 (2000) [hereinafter Yoo, *Choosing Justices*] ("It was not until *Cooper v. Aaron* in 1958 that the Court first clearly declared that its interpretations of the Constitution bound all other government officials."). Of course, the circumstances there were extreme: Governor Orval Faubus of Arkansas was defying a federal court order to desegregate the Little Rock schools. *Cooper*, 358 U.S. at 4–12. As Paul Brest points out, "[t]he supremacy clause of article VI and the structure of federalism provide strong reasons for asserting the supremacy of federal over state interpretations of the Constitution." Paul Brest, *Congress as Constitutional Decisionmaker and Its Power To Counter Judicial Doctrine*, 21 Ga. L. Rev. 57, 66 (1986). *Cooper* did not address the far more nuanced constitutional issues inherent in the distribution of constitutional interpretation among the three federal branches of government.

378. See Robert F. Nagel, *Political Law, Legalistic Politics: A Recent History of the Political Question Doctrine*, 56 U. Chi. L. Rev. 643, 661 (1989) (arguing that "[u]nder the Burger Court, the core objective of judicial review became judicial review"). John Yoo has argued that, "[w]here *Cooper* established judicial supremacy over the states, [United States

with the Rehnquist Court³⁷⁹—acknowledges few limits on its power to say what the law is. While the Warren and Burger Courts used the supremacy rhetoric of *Marbury* to advance the Court's position vis-à-vis the states,³⁸⁰ the Rehnquist Court has used that language to assert a superior place in the constitutional order vis-à-vis the other federal branches.

The current Court increasingly displaces Congress's view with its own without much more than a passing nod to Congress's factual findings or policy judgments. Admittedly, rational basis review still exists in the equal protection context,³⁸¹ suggesting that there is still a spectrum of deference. But the unmistakable trend is toward a view that all constitutional questions are matters for independent judicial interpretation and that Congress has no special institutional advantage in answering aspects of particular questions. The Court rarely engages in a threshold determination of whether the constitutional provision at issue contemplates that the political branches receive some deference in their interpretation. The Court has therefore become increasingly inmodest when it comes to deciding how constitutional interpretive power should be allocated.

This Section explores this trend in three areas in which the Court has jurisdiction. First, it considers the Court's treatment of Congress's power under Section 5 of the Fourteenth Amendment. Because the Constitution expressly carves out enforcement responsibility for Congress in this context, this is an area where one would expect the Court to be especially sensitive to Congress's factual findings and policy decisions. In fact, however, the Court has become increasingly skeptical of congressional involvement under Section 5, giving only lip service to any notion of deference. Second, this Section analyzes the Court's increased scrutiny of Congress's factual findings under the Commerce Clause. Although the case for deference is not, perhaps, as strong as in the Section 5 context,

v. Nixon, 418 U.S. 683 (1974),] extended it to the Presidency." Yoo, *Choosing Justices*, supra note 377, at 1459.

379. See Schapiro, supra note 82, at 657 ("The concept that the Supreme Court is the ultimate, and in some cases exclusive, interpreter of the Constitution flourished in the 1990s."); Yoo, *In Defense*, supra note 14, at 237 ("Under the Rehnquist Court, [a] limited vision of judicial review has steadily been replaced by assertions of judicial supremacy—that the Supreme Court is not just *an* interpreter of the Constitution, but *the* interpreter of the Constitution."). This view of judicial authority falls under what has been called the catholic, as opposed to the protestant, style of constitutional interpretation. See Sanford Levinson, *Constitutional Faith* 9–53 (1988) (discussing Catholic and Protestant history and its relation to constitutional interpretation). That is, "Catholics centralize interpretive authority in the Pope (Supreme Court) while Protestants decentralize or deinstitutionalize that authority." Kathleen M. Sullivan, *The Nonsupreme Court*, 91 Mich. L. Rev. 1121, 1122 (1993); see also Sanford Levinson, *Could Meese Be Right this Time?*, 61 Tul. L. Rev. 1071, 1072 (1987) ("[A]s a constitutional protestant might put it, is interpretation the province of all those who profess what might be termed the constitutional faith?").

380. This federal versus state supremacy argument rests on a much firmer constitutional foundation. See Kramer, *We the Court*, supra note 46, at 100; Paulsen, *The Most Dangerous Branch*, supra note 5, at 237, 313–16.

381. See, e.g., *Nordlinger v. Hahn*, 505 U.S. 1, 10–11 (1992) (applying rational basis review to a state tax assessment that was challenged under the Equal Protection Clause).

one would nevertheless expect the Court to be cognizant of the policy and factual findings that inevitably underlie an exercise of Congress's commerce power. Indeed, that had been the Court's practice since the New Deal era. The recent shift toward more oversight is therefore yet another sign that the Court places greater faith in its own interpretive powers than in Congress's—even when the issue turns on factual findings. Third, this Section discusses the Court's attempt to impose its own policy views on Congress through substantive canons of statutory construction. These canons attempt to influence congressional decisionmaking by requiring Congress to consider factors the Court deems significant, even when those factors are not constitutionally mandated. The Court therefore shows great confidence in its own policymaking ability.

This Section concludes by analyzing how the Court's view of its own institutional capabilities undermines the premise of the political question doctrine. The Court's increasing confidence in its own constitutional abilities in cases in which it has jurisdiction has led it to conclude that its jurisdiction should not be limited.

1. *Section 5 of the Fourteenth Amendment.* — Section 5 of the Fourteenth Amendment gives Congress the “power to enforce, by appropriate legislation, the provisions of this article.”³⁸² This language appears to contemplate a unique interpretive role for Congress based on Congress's special position in the federal scheme.³⁸³ Indeed, the Court itself held as much in *Katzenbach v. Morgan*, stating that it would defer to congressional judgments about how to enforce this provision.³⁸⁴ The Court concluded that “[i]t was for Congress . . . to assess and weigh the various conflicting considerations It is not for us to review the congressional resolution of these factors. It is enough that we be able to perceive a basis upon which the Congress might resolve the conflict as it did.”³⁸⁵

In other words, the Court in *Katzenbach* took a *M'Culloch*-like view of deference to Congress's interpretations under Section 5, recognizing that “[i]mplicit in the Constitution's grant of power to Congress ‘to enforce’ the equal protection clause is congressional discretion to select appropriate enforcement means.”³⁸⁶ One need not accept *Katzenbach*'s suggestion

382. U.S. Const. amend. XIV, § 5. Congress has similar enforcement power under the Thirteenth and Fifteenth Amendments. See *id.* amend. XIII, § 2; *id.* amend. XV, § 2.

383. See Schapiro, *supra* note 82, at 670 (noting that the many individuals involved in drafting the Fourteenth Amendment “did not wish to give the courts sole responsibility for safeguarding the principles established therein”).

384. 384 U.S. 641, 653 (1966).

385. *Id.*

386. Bradford Russell Clark, Note, Judicial Review of Congressional Section Five Action: The Fallacy of Reverse Incorporation, 84 Colum. L. Rev. 1969, 1978 (1984); see also *id.* at 1986 (“Unless Congress has made a clear mistake in its choice of means, a judicial evaluation that there is insufficient congruence between means and ends is just as likely to be wrong as Congress' belief that its legislation sufficiently furthers its ends . . .”). Indeed, the risk of error is even greater in the case of judicial evaluation, because “courts lack Congress' vast factfinding capacity.” *Id.*

that Congress has the power to determine the scope of substantive rights under the Fourteenth Amendment to accept its less controversial conclusion that, once the Court has set the "substantive parameters" of what rights exist under the Fourteenth Amendment, "the preservation of Congress' enforcement power requires that Congress have the freedom to exercise discretion within those boundaries, and have remedial authority at least as broad as that of the judiciary."³⁸⁷

The Rehnquist Court, however, has all but abandoned this view. In a series of recent cases—*City of Boerne v. Flores*,³⁸⁸ *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*,³⁸⁹ *Kimel v. Florida Board of Regents*,³⁹⁰ and *Board of Trustees of the University of Alabama v. Garrett*³⁹¹—the Court has indicated that it will, in practice, accord essentially no deference to Congress's remedial judgment, even insofar as that interpretation rests on congressional findings and policy judgments.³⁹²

Boerne involved Congress's efforts to provide greater protection under the Free Exercise Clause of the First Amendment than the Court had recognized. Congress passed the Religious Freedom Restoration Act³⁹³ (RFRA) in 1994 essentially to overrule the Supreme Court's decision in *Employment Division v. Smith*³⁹⁴ and to reinstate the previous standard that had applied to Free Exercise Clause claims.³⁹⁵ The Court rebuffed Congress's attempts and stated unequivocally its view that it is supreme in its interpretation of the Constitution.³⁹⁶ Indeed, according to Michael McConnell, *Boerne* "adopted the most judge-centered view of constitutional law since *Cooper v. Aaron*."³⁹⁷

The Court emphasized that Congress's power under Section 5 was solely an enforcement power, "not the power to determine what constitutes a constitutional violation."³⁹⁸ Although the Court conceded that "the line between measures that remedy or prevent unconstitutional ac-

387. *Id.* at 1979.

388. 521 U.S. 507 (1997).

389. 527 U.S. 627 (1999).

390. 528 U.S. 62 (2000).

391. 121 S. Ct. 955 (2001).

392. Section 5 is, after all, "a threat to the Court's newfound supremacy, and, as such, the Court has tried to zap it." Neal Kumar Katyal, *Legislative Constitutional Interpretation*, 50 *Duke L.J.* 1335, 1376 (2001). "Just as defenders of judicial review fear the self-interested congresswoman who claims her legislation is constitutional to maximize her influence, so too should we fear the jurist who claims Congress must adhere to the Court's decisions." *Id.*

393. 42 U.S.C. §§ 2000bb to 2000bb-4 (1994).

394. 494 U.S. 872, 890 (1990) (holding that First Amendment protection of free exercise does not require exemptions from neutral, generally applicable laws that impinge on a religious practice).

395. *City of Boerne v. Flores*, 521 U.S. 507, 512-13 (1997).

396. *Id.* at 519, 529, 536.

397. Michael W. McConnell, *Comment, Institutions and Interpretation: A Critique of City of Boerne v. Flores*, 111 *Harv. L. Rev.* 153, 163 (1997).

398. *Boerne*, 521 U.S. at 519.

tions and measures that make a substantial change in the governing law is not easy to discern"³⁹⁹ and that "Congress must have wide latitude in determining where it lies,"⁴⁰⁰ its rejection of Congress's decision in *Boerne*, as well as in the three Section 5 cases that followed, makes clear that the Court alone will determine where the line is drawn and accord Congress no deference.⁴⁰¹ The Court's decision reflects its view that its capacity for enforcing the Fourteenth Amendment is greater than Congress's ability.

Although *Boerne*'s holding could have been prompted by the fact that Congress passed RFRA specifically to undercut *Smith*,⁴⁰² subsequent cases made clear that the Court's strict scrutiny of Congress's Section 5 legislation applies even in the absence of a Supreme Court decision on the matter. In *Florida Prepaid*, the Court reviewed legislation that subjected states to suit in federal court for patent infringement.⁴⁰³ Unlike in *Boerne*, no Supreme Court case had addressed the substantive issue. Although the Court did not disagree that a patent was property for purposes of the Fourteenth Amendment,⁴⁰⁴ the Court nevertheless struck down the statute on the grounds that Congress failed to show that there was a "pattern of patent infringement by the States."⁴⁰⁵ As Justice Stevens argued in dissent, it was "quite unfair" to demand a showing of a "pattern of patent infringement" when the Court had never articulated such a requirement.⁴⁰⁶ "[T]his Court has never mandated that Congress must find 'widespread and persisting deprivation of constitutional rights' . . . in order to employ its § 5 authority."⁴⁰⁷ Moreover, there was evidence in the congressional record that state remedies were inadequate for patent infringement,⁴⁰⁸ and that infringement was likely to increase.⁴⁰⁹ The Court, however, gave no deference to these findings. "Rather, the Court placed the onus for establishing the necessary factual predicate on Congress and found that Congress had not met its burden."⁴¹⁰

399. *Id.*

400. *Id.* at 520.

401. See McConnell, *supra* note 397, at 166 (observing that "[i]n effect, the *Boerne* Court replaced something akin to 'rational basis scrutiny' with a narrow tailoring requirement typical of intermediate scrutiny," and arguing that "serious means-end scrutiny necessarily transfers essentially political judgments from the legislature to the courts").

402. See, e.g., *Boerne*, 521 U.S. at 536 ("When the political branches of the Government act against the background of a judicial interpretation of the Constitution already issued, it must be understood that in later cases and controversies the Court will treat its precedents with the respect due them under settled principles . . .").

403. *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 630 (1999).

404. *Id.* at 637-39.

405. *Id.* at 640.

406. *Id.* at 654 (Stevens, J., dissenting).

407. *Id.* at 660 (Stevens, J., dissenting) (internal quotation marks omitted).

408. *Id.* at 655-56 (Stevens, J., dissenting).

409. *Id.* at 656-57 (Stevens, J., dissenting).

410. Schapiro, *supra* note 82, at 676.

In *Kimel*, the Court held that Congress lacked the authority under Section 5 to abrogate the states' sovereign immunity in the Age Discrimination in Employment Act of 1967 (ADEA).⁴¹¹ The Court in *Kimel* made clear that "[t]he ultimate interpretation and determination of the Fourteenth Amendment's substantive meaning remains the province of the Judicial Branch."⁴¹² By ultimate, the Supreme Court appeared to mean that its view was not merely final, but also that it would pay little attention to Congress's factual findings and policy judgments.⁴¹³

The Court's view that Congress possesses no special ability to analyze the weight of its findings is most striking in *Garrett*, in which the Court concluded that Congress lacked the authority under Section 5 to abrogate states' immunity under the Americans with Disabilities Act.⁴¹⁴ In so doing, the Court rejected a substantial congressional record of discrimination⁴¹⁵ as failing to show a "history and pattern" of discrimination.⁴¹⁶ Nevertheless, the Court seemed persuaded by the fact that these numbers paled in comparison to the overall number of individuals with disabilities. "It is telling, we think, that given these large numbers, Congress assembled only such minimal evidence of unconstitutional state discrimination"⁴¹⁷ Apparently, the Court has in mind some ratio, and Congress failed to satisfy it. The Court also rejected individual instances of discrimination as failing to show that the state's discrimination was irrational.⁴¹⁸ In other words, the Court replaced its constitutional opinion for that of Congress, without acknowledging or conceding that Congress might have a better vantage point insofar as the question involved factual findings and policy predictions.

Justice Breyer pointed out in dissent that, "[i]n reviewing § 5 legislation, we have never required the sort of extensive investigation of each piece of evidence that the Court appears to contemplate."⁴¹⁹ "Read with a reasonably favorable eye, the record indicates that state governments subjected those with disabilities to seriously adverse, disparate treatment."⁴²⁰ Thus, Justice Breyer observed that "[t]he Court's more recent [Section 5] cases have professed to follow the longstanding principle of deference to Congress," but "the Court's analysis and ultimate conclusion

411. *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 91 (2000).

412. *Id.* at 81.

413. *See id.* at 89.

414. *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 121 S. Ct. 955, 968 (2001).

415. *See id.* apps. A–C at 976 (Breyer, J., dissenting). Congress held thirteen hearings of its own and created a special task force that held hearings in every state, with attendance by more than 30,000 people. *Id.* at 969–70 (Breyer, J., dissenting).

416. *Id.* at 964.

417. *Id.* at 965–66.

418. *Id.* at 965.

419. *Id.* at 971 (Breyer, J., dissenting).

420. *Id.* at 973 (Breyer, J., dissenting).

deprive its declarations of practical significance.”⁴²¹ It is perhaps unsurprising that, in rejecting the most substantial congressional record of discrimination of the last four Section 5 cases, the Court also offered a bold proclamation of power, declaring the allegedly “long-settled principle”⁴²² “that it is the responsibility of this Court, not Congress, to define the substance of constitutional guarantees.”⁴²³

It seems clear that an animating force behind the Court’s Section 5 decisions is its view that Congress possesses no special institutional advantages in enforcing the Constitution. If anything, the Court believes the opposite: that it has the superior ability to make such decisions.⁴²⁴ And, in fact, the Court’s treatment of Congress’s power to enact prophylactic rules under Section 5 stands in sharp contrast to its view of its own authority to create prophylactic rules as part of its general power to interpret the Constitution. “The power with which the Court would endow itself under a ‘prophylactic’ justification,” Justice Scalia recently pointed out in *Dickerson v. United States*, “goes far beyond what it has permitted Congress to do under” the Fourteenth Amendment.⁴²⁵ The rule to which he was referring was the *Miranda v. Arizona* holding that an individual in custody must receive the now-infamous warnings, or else his or her statement cannot be used at trial.⁴²⁶ As the Court explained in later cases, this rule was not required by the Constitution, but was a “prophylactic” rule intended to protect the right against compulsory self-incrimination guaranteed by the Fifth Amendment.⁴²⁷ Shortly after *Miranda*, Congress passed 18 U.S.C. § 3501, which provided that a statement made by a defendant in custody “shall be admissible in evidence if it is voluntarily given.”⁴²⁸

421. *Id.* at 974–75 (Breyer, J., dissenting). Indeed, Justice Breyer makes a comparison to the lack of deference previously exhibited by the Court in the *Lochner* era. *Id.* at 975 (Breyer, J., dissenting) (citing *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936)). For an argument that the Court’s recent legislative record review “represents a novel mode of judicial review” that “threatens to impose procedural and substantive constraints on legislative action that have no support in precedent or in constitutional text or structure,” see William W. Buzbee & Robert A. Schapiro, *Legislative Record Review*, 54 *Stan. L. Rev.* 87, 90 (2001).

422. To support this “tradition,” the Court cited *Boerne*—which was decided in 1997. *Garrett*, 121 S. Ct. at 963 (citing *City of Boerne v. Flores*, 521 U.S. 507, 519–24 (1997)).

423. *Id.*

424. For a similar discussion of the Rehnquist Court’s Section 5 jurisprudence, see Kramer, *We the Court*, *supra* note 46, at 143–53.

425. 530 U.S. 428, 460 (2000) (Scalia, J., dissenting).

426. 384 U.S. 436, 444 (1966).

427. See, e.g., *Michigan v. Tucker*, 417 U.S. 433, 439, 446 (1974) (holding that the “police conduct at issue here did not abridge respondent’s constitutional privilege against compulsory self-incrimination, but departed only from the prophylactic standards later laid down by this Court” and admitting the fruits from a defendant’s un-*Mirandized* statement into evidence); see also Henry P. Monaghan, *The Supreme Court, 1974 Term—Foreword: Constitutional Common Law*, 89 *Harv. L. Rev.* 1, 20–23 (1975) (describing *Miranda* as an example of constitutional common law).

428. 18 U.S.C. § 3501(a) (1994).

In *Dickerson*, the Court held that Congress could not supersede *Miranda* because *Miranda* had announced a "constitutional rule."⁴²⁹ Thus, the majority's rejection of § 3501 means "that this Court has the power, not merely to apply the Constitution but to expand it, imposing what it regards as useful 'prophylactic' restrictions upon Congress and the States."⁴³⁰ In contrast, the Court has made clear that Congress lacks that same power—even though the Fourteenth Amendment explicitly gives Congress "some limited power to supplement its guarantees."⁴³¹ The *Dickerson* holding therefore goes far further than *Miranda* in establishing judicial supremacy.⁴³² And it reflects a Court increasingly confident in its abilities to answer any and all questions arising under—or merely related to—the Constitution, whatever the political branches may think.

2. *The Commerce Clause.* — Commerce Clause interpretation is perhaps the area in which the Court's displacement of Congress's constitutional judgment for its own is most evident.⁴³³ The Court's Commerce Clause decisions were once cited, along with the political question cases, as examples of the Supreme Court's deference to congressional constitutional judgments.⁴³⁴ Indeed, the Court's treatment of the Commerce Clause tracks the rise and fall of the political question doctrine.⁴³⁵ At the

429. *Dickerson*, 530 U.S. at 444.

430. *Id.* at 446 (Scalia, J., dissenting).

431. *Id.* at 460 (Scalia, J., dissenting); see also Archibald Cox, *The Role of Congress in Constitutional Determinations*, 40 U. Cin. L. Rev. 199, 252 (1971) (arguing that both Section 5 and judge-made rules of "quasi-constitutional stature" such as those announced in *Miranda* involve "a measure giving better effect to a constitutional guarantee").

432. As Justice Scalia vividly put it:

[*Dickerson*] converts *Miranda* from a milestone of judicial overreaching into the very Cheops' Pyramid (or perhaps the Sphinx would be a better analogue) of judicial arrogance. In imposing its Court-made code upon the States, the original opinion at least *asserted* that it was demanded by the Constitution. Today's decision does not pretend that it is—and yet *still* asserts the right to impose it against the will of the people's representatives in Congress. . . . This is not the system that was established by the Framers, or that would be established by any sane supporter of government by the people.

Dickerson, 530 U.S. at 465 (Scalia, J., dissenting).

433. Commentators have cited recent Commerce Clause cases as exemplifying the Court's theory of judicial supremacy. See, e.g., Schapiro, *supra* note 82, at 679 (citing *United States v. Lopez*, 514 U.S. 549 (1995), as an example of the Court's recent assertion of "a more robust role for judicial review in its Commerce Clause jurisprudence"); Yoo, *In Defense*, *supra* note 14, at 236 (discussing the Court's "lack of restraint," and mentioning *United States v. Morrison*, 529 U.S. 598 (2000), as one of many recent cases invalidating federal statutes).

434. See *Gant*, *supra* note 360, at 414–18 (1997) (arguing that the political question doctrine and the Court's Commerce Clause jurisprudence both reflect a voluntary allocation of constitutional interpretation by the Court to Congress).

435. Laurence Tribe has argued that "the political question doctrine is rarely if ever an all-or-nothing proposition: the concerns underlying the doctrine have at times been thought to warrant deference on some issues that nonetheless do not qualify as full-fledged political questions and thus do not require complete judicial abstention." Tribe, *A Constitution We Are Amending*, *supra* note 97, at 444 n.47.

same time that Chief Justice Marshall recognized the existence of political questions, he expressed his belief that Congress has broad—though not unlimited—power to regulate commerce.⁴³⁶ Similarly, just as the political question doctrine began to expand with the New Deal Court and the death of *Lochner*, so, too, did the Court's deference to Congress under the Commerce Clause.⁴³⁷ Now, just as the political question doctrine has fallen out of favor, the Commerce Clause seems to be fertile ground for reversing congressional interpretations.⁴³⁸

Section A.2 explores this trend in two areas. First, it considers the Court's growing distrust of the ability of the political process to protect state sovereign interests. Second, it analyzes the Court's failure to defer to congressional factfinding and policy judgments when applying its test for determining whether activity can be regulated under the Commerce Clause.

a. *The Political Process and the Commerce Clause.* — As late as 1985, in *Garcia v. San Antonio Metropolitan Transit Authority*, the Court declared that “[s]tate sovereign interests . . . are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power.”⁴³⁹ The Court, in other words, seemed to accept Herbert Wechsler's theory that federalism concerns are best policed by the political branches and not the judiciary.⁴⁴⁰

Just as the Court's acceptance of the political question doctrine has waned, however, the current Court is no longer content to leave Commerce Clause matters largely to the political process. Its anticommandeering cases—in which the Court has held that it will not permit

436. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 196–97 (1824) (providing a vision of Congress's commerce power that is arguably more expansive than the Framers originally intended).

437. See, e.g., *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937) (“Although activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control.”).

438. Steven G. Calabresi, *The Structural Constitution and the Countermajoritarian Difficulty*, 22 Harv. J.L. & Pub. Pol'y 3, 3 (1998) (“The last quarter century has seen an astonishing revival of judicial, and especially Supreme Court, enforcement of the structural constitution.”); see also Julian G. Ku, *The Delegation of Federal Power to International Organizations: New Problems with Old Solutions*, 85 Minn. L. Rev. 71, 138 (2000) (“Over the past three decades, the Court's interventions into structural constitutional review have established it as the undisputed ‘referee’ for constitutional disputes between the political branches and disputes between the federal government and the states.”).

439. 469 U.S. 528, 552 (1985).

440. See Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 Colum. L. Rev. 543, 543 (1954) [hereinafter Wechsler, *Political Safeguards of Federalism*]; see also Jesse H. Choper, *Judicial Review and the National Political Process: A Functional Reconsideration of the Role of the Supreme Court 175–93* (1980) (“Numerous structural aspects of the national political system serve to assure that states' rights will not be trampled, and the lesson of practice is that they have not been.”).

Congress to commandeer the states to enact or administer a federal regulatory program⁴⁴¹—make clear that the Court no longer adheres to the political theory of *Garcia*.⁴⁴² Although this movement could be explained by the Court's belief that Congress has simply gone too far and that the Framers' intent demands *some* scrutiny,⁴⁴³ the trend also reflects a greater distrust of congressional constitutional judgment and greater confidence in the Court's own abilities to police the process.

This shift became clear in *United States v. Lopez*, in which the Court held, for the first time in half a century, that an act exceeded Congress's Commerce Clause powers.⁴⁴⁴ Even more explicitly than in its anticommandeering cases, the Court explained that it no longer trusted Congress to police federalism concerns without oversight. As Justice Kennedy stated in his concurrence, which Justice O'Connor joined, "the federal balance is too essential a part of our constitutional structure and plays too vital a role in securing freedom for us to admit inability to intervene."⁴⁴⁵ Justice Kennedy conceded that one reading of the *Federalist Papers* "is that the balance between national and state power is entrusted in its entirety to the political process."⁴⁴⁶ He ultimately rejected that view because "the absence of structural mechanisms to require . . . officials to undertake this principled task [of maintaining the federal balance], and the momentary political convenience often attendant upon their failure to do so, argue against a complete renunciation of the judicial role."⁴⁴⁷ In other words, he did not trust Congress to be left alone.

Although the dissenters did not argue that the issue presented a question solely for the political process, they did emphasize the deference

441. See, e.g., *New York v. United States*, 505 U.S. 144, 188 (1992) (holding that "[t]he federal government may not compel the States to enact or administer a federal regulatory program"). Nor can Congress "circumvent that prohibition by conscripting the States' officers directly." *Printz v. United States*, 521 U.S. 898, 935 (1997).

442. Indeed, Justice Stevens's dissent in *Printz* attempted to rely on that theory, but could not garner five votes. *Printz*, 521 U.S. at 957–59 (Stevens, J., dissenting) (arguing that "[r]ecent developments demonstrate that the political safeguards protecting Our Federalism are effective" and that "unelected judges are better off leaving the protection of federalism to the political process in all but the most extraordinary circumstances").

443. See *id.* at 905–23. But see *id.* at 970–72 (Souter, J., dissenting) (making a strong argument in favor of the legislation in *Printz* based on *The Federalist* No. 27); Evan H. Caminker, *State Sovereignty and Subordinacy: May Congress Commandeer State Officers To Implement Federal Law?*, 95 *Colum. L. Rev.* 1001, 1007 (1995) (arguing that the anticommandeering principle in *New York* "ultimately seems driven less by careful analysis than by the attitudes of individual justices about the federal government's overexercise of lawmaking power relative to the states"); H. Jefferson Powell, *The Oldest Question of Constitutional Law*, 79 *Va. L. Rev.* 633, 635 (1993) (arguing that the anticommandeering principle of *New York* does not have "a firm basis in founding-era discussion or the subsequent history of constitutional debate").

444. 514 U.S. 549, 567–68 (1995) (striking down the Gun-Free School Zones Act of 1990, 18 U.S.C. § 922(q) (1994)).

445. *Id.* at 578 (Kennedy, J., concurring).

446. *Id.* at 577 (Kennedy, J., concurring).

447. *Id.* at 578 (Kennedy, J., concurring).

accorded the political process in this area. As Justice Souter stated, this deference “reflects our respect for the institutional competence of the Congress on a subject expressly assigned to it by the Constitution and our appreciation of the legitimacy that comes from Congress’s political accountability in dealing with matters open to a wide range of possible choices.”⁴⁴⁸ That view of deference, however, could not command a majority of the current Court in *Lopez*.

b. *The Substantial Effects Test and Congressional Factfinding and Policymaking*. — The Court’s theory of institutional competency is even more evident in the Court’s scrutiny of Congress’s judgment as to whether something will have a substantial effect on interstate commerce.⁴⁴⁹ Determining what has an *effect* on interstate commerce involves the same type of factfinding expertise at issue in the social and economic legislation that the Court reviews under the Due Process and Equal Protection Clauses.⁴⁵⁰ Indeed, the *Lochner* era saw the Court strike down various acts as outside Congress’s commerce power. In *A.L.A. Schechter Poultry Corp. v. United States*, for example, the Court struck down regulations fixing wages and hours in intrastate businesses, and emphasized that the line between direct and indirect effects of intrastate transactions on commerce was fundamental.⁴⁵¹ Later, after it became apparent that “no court was capable of drawing such a line in terms appropriate for continuing judicial administration,”⁴⁵² the Court rejected the distinction between “indirect” and “direct,” and held that Congress’s Commerce Clause power extends to activities having a “substantial relation” to interstate commerce.⁴⁵³ This test is similar to the Necessary and Proper Clause standard, under which the Court gives wide latitude to Congress.⁴⁵⁴ It is therefore not

448. *Id.* at 604 (Souter, J., dissenting).

449. See *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937). If Congress’s power under the Commerce Clause were viewed as an original matter of interpretation, without the Supreme Court’s subsequent gloss, it could be argued that “commerce” has a circumscribed meaning that is readily policed by the courts without deference. Randy Barnett has recently culled persuasive evidence that the original meaning of “commerce” was “the trade or exchange of goods.” Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. Chi. L. Rev. 101, 146 (2001). The Supreme Court historically has given the Commerce Clause a different interpretive gloss, however, concluding that Congress can regulate areas that will have a *substantial effect* on interstate commerce. See *Wickard v. Filburn*, 317 U.S. 111, 125 (1942). The current Court—in word, if not in deed—has not backed away from that position. See *Lopez*, 514 U.S. at 559 (“We conclude, consistent with the great weight of our case law, that the proper test requires an analysis of whether the regulated activity ‘substantially affects’ interstate commerce.”).

450. Cox, *supra* note 431, at 226.

451. 295 U.S. 495, 548–50 (1935).

452. Cox, *supra* note 431, at 225.

453. *Jones & Laughlin*, 301 U.S. at 37.

454. See, e.g., *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819) (“Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.”).

surprising that from 1937 to 1995, the Court deferred to Congress in all of its Commerce Clause cases.⁴⁵⁵

Although that deference seemed to come to a halt in *Lopez*,⁴⁵⁶ the case could be explained by the fact that Congress failed to amass *any* evidence to support its conclusion that the behavior it was regulating has a substantial effect on interstate commerce.⁴⁵⁷ The government conceded in *Lopez* that “[n]either the statute nor its legislative history contain[s] express congressional findings regarding the effects upon interstate commerce of gun possession in a school zone.”⁴⁵⁸ The Court noted that it “would have to pile inference upon inference” to defer to Congress.⁴⁵⁹ Some thought that the result would be different if Congress provided a more explicit record of reasoning—because then the Court would clearly be substituting its judgment for that of Congress.⁴⁶⁰ Thus, although Justice Breyer’s dissent compiled a great deal of information to support Congress’s judgment as rational,⁴⁶¹ the Court may have been persuaded by the fact that Congress had not undertaken such an effort itself, so its expertise in factfinding was not a factor in the decision.

This limited view of *Lopez* could no longer be maintained after the Court held in *United States v. Morrison* that Congress lacked the authority under the Commerce Clause to pass the Violence Against Women Act.⁴⁶² Congress held four years of hearings, received reports from task forces on gender bias in twenty-one states, and issued eight reports with specific factual findings.⁴⁶³ Congress relied on evidence that violence against women resulted in annual costs of between \$5 and \$10 billion in 1993 and that gender based violence prevents women from participating fully in the national economy.⁴⁶⁴ The record, in fact, was “far more voluminous than the record compiled by Congress and found sufficient in two prior cases upholding Title II of the Civil Rights Act of 1964 against Commerce

455. J. Peter Mulhern, In Defense of the Political Question Doctrine, 137 U. Pa. L. Rev. 97, 151 & n.193 (1988) (noting consistent deference marked by a single anomalous backslide in *National League of Cities v. Usery*, 426 U.S. 833 (1976)).

456. *United States v. Lopez*, 514 U.S. 549, 567–68 (1995).

457. See McConnell, *supra* note 397, at 186–87 (citing *Lopez* as an example of a case in which “[i]t may be true that the presumption of constitutionality should not attach when Congress has given no attention to the constitutional question”).

458. *Lopez*, 514 U.S. at 562 (citing Brief for the United States) (internal quotation marks omitted).

459. *Id.* at 567.

460. The court of appeals in *Lopez* suggested as much. *United States v. Lopez*, 2 F.3d 1342, 1363–67 (5th Cir. 1993).

461. *Lopez*, 514 U.S. at 615 app. (Breyer, J., dissenting).

462. 529 U.S. 598, 617–19 (2000). The Violence Against Women Act is codified at 42 U.S.C. §§ 13931–14040 (1994).

463. *Morrison*, 529 U.S. at 629–31 (2000) (Souter, J., dissenting); Joseph R. Biden, Jr., The Civil Rights Remedy of the Violence Against Women Act: A Defense, 37 Harv. J. on Legis. 1, 20–25 (2000).

464. S. Rep. No. 103-138, at 41, 54–55 (1993).

Clause challenges.”⁴⁶⁵ Indeed, the Court conceded that, “[i]n contrast with the lack of congressional findings that we faced in *Lopez*, § 13981 is supported by numerous findings regarding the serious impact that gender-motivated violence has on victims and their families.”⁴⁶⁶

The Court nevertheless held that these findings were insufficient.⁴⁶⁷ The Court stated that it would scrutinize congressional findings to determine whether the regulated activity itself was of an economic nature, regardless of the cumulative effect of the activity on commerce.⁴⁶⁸ The Court therefore reformulated the substantial effects test to limit the facts Congress may consider to those that are economic in nature, regardless of whether Congress believes the aggregation of those facts has an effect on commerce. The Court’s rationale was that, without such a restriction, Congress would be able to regulate any crime or activity, no matter how local, as long as its aggregated impact has substantial effects on employment, production, transit, or consumption.⁴⁶⁹ This result would make the “enumerated” commerce power meaningless.⁴⁷⁰

The Court’s opinion reveals that animating its decision was a potent reading of *Marbury*’s judicial supremacy rhetoric, without regard for *Marbury*’s recognition of the judiciary’s limits. The Court quoted the familiar supremacy rhetoric from *Cooper v. Aaron* that “the federal judiciary is supreme in the exposition of the law of the Constitution” and noted that “ever since *Marbury* this Court has remained the ultimate expositor of the constitutional text.”⁴⁷¹ The Court then stated that “the Constitution’s separation of federal power and the creation of the Judicial Branch indi-

465. *Morrison*, 529 U.S. at 635 (Souter, J., dissenting).

466. *Id.* at 614.

467. *Id.*

468. *Id.* at 610–11, 613.

469. *Id.* at 615–16.

470. *Id.* at 610. The Court’s conclusion, of course, is in marked tension with the “substantial effects” test. That test, after all, is about *effects*. It says nothing about the cause of those effects and whether they must be economic in nature. Rather, the test leaves it to Congress’s expert judgment to determine whether a cause will affect commerce. The limitation on Congress’s power is ends based—the activity must have an effect on commerce, not the nation’s mental health or its political well being. Thus, Congress must show that the cumulative effect of gender based violence is deleterious to the nation’s economy, say, because it limits the productivity of a substantial share of the nation’s workforce, not because it harms the mental well being of millions of women. That is precisely the case Congress made. Nevertheless, instead of overruling the substantial effects test—which would have been intellectually honest—the Court established a limit of its own devise, the “economic” cause, to ensure that Congress would not overwhelm the states. “Nothing in the Constitution’s language, or that of earlier cases prior to *Lopez*, explains why the Court should ignore one highly relevant characteristic of an interstate-commerce-affecting cause (how ‘local’ it is), while placing critical constitutional weight upon a different, less obviously relevant, feature (how ‘economic’ it is).” *Id.* at 658 (Breyer, J., dissenting).

471. *Id.* at 617 n.7 (quoting *Cooper v. Aaron*, 358 U.S. 1, 18 (1958)).

cate that disputes regarding the extent of congressional power are largely subject to judicial review."⁴⁷²

But this raw claim to "ultimate" power says nothing about whether the Supreme Court should defer to Congress's judgment because of its superior competence at making the types of judgments necessary under the Court's "substantial effects" test.⁴⁷³ In a more deferential mood, the Court itself has noted that it "is institutionally unsuited to gather the facts upon which economic predictions can be made, and professionally untrained to make them."⁴⁷⁴ But whether the Court will leave to itself or Congress the authority to determine whether a cause is "economic" remains to be seen;⁴⁷⁵ given the piercing judicial supremacy rhetoric in *Morrison*, it seems likely that Congress will receive little deference.

3. *Substantive Canons of Statutory Interpretation.* — While the cases involving Section 5 of the Fourteenth Amendment and the Commerce Clause might represent obvious instances of the Court's increasing tendency to replace its views for those of Congress, they are not the Court's only means of doing so. A more subtle method involves its establishment of certain substantive canons of statutory interpretation. Some substantive canons, such as the canon that requires the Court to avoid an interpretation that would render a statute unconstitutional,⁴⁷⁶ show respect for Congress. But not all substantive canons are so benign. Some place a burden on Congress to provide a "super-strong clear statement" of its intent to regulate in an area, even when Congress has the authority to do so.⁴⁷⁷ These canons essentially ask Congress to take a second look at its decision because the Court does not believe it is a good idea. Although these canons do not stop Congress from acting, they do make it more difficult for Congress to achieve its legislative objectives—even when those objectives are consistent with the Constitution and, in the absence of the canon, the Court could discern congressional intent.

472. *Id.* at 618 n.8.

473. See Eisgruber, *supra* note 5, at 350 (pointing out that *Marbury* does not answer the question of what level of deference is appropriate).

474. *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 308 (1997).

475. As Justice Breyer questions in his dissent, would Congress be permitted to regulate the local street corner mugger or pickpocket? *Morrison*, 529 U.S. at 656 (Breyer, J., dissenting). More to the point of the Commerce Clause, "[t]he local pickpocket is no less a traditional subject of state regulation than is the local gender-motivated assault." *Id.* at 658 (Breyer, J., dissenting).

476. See, e.g., *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 499–501 (1979) (explaining that prudential concerns require the Court to interpret a statute to avoid constitutional doubts, and citing for the principle *Murray v. The Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804) (Marshall, C.J.)).

477. William N. Eskridge, Jr., *Dynamic Statutory Interpretation* 275–306 (1994) (describing substantive canons); William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 *Vand. L. Rev.* 593, 611–12, 619–29 (1992) (describing the Court's development of "super-strong clear statement rules" which "establish very strong presumptions of statutory meaning that can be rebutted only through unambiguous statutory text targeted at the specific problem").

For example, in *Atascadero State Hospital v. Scanlon*, the Court insisted that Congress provide an “unmistakably clear” statement of its intent to abrogate state sovereign immunity.⁴⁷⁸ Instead of applying its usual rules of construction to determine Congress’s intent, the Court held that it would not assume that Congress intended to abrogate a state’s sovereign immunity unless that intent was unequivocally clear. This type of substantive canon imposes the Court’s views on Congress, as it requires Congress to pay extra attention to the issue of sovereign immunity when drafting a statute, presumably because the Court believes that state interests are not sufficiently protected in the political process without this extra check. As a result, in some cases in which an ordinary reading of the statute indicates that Congress intends to abrogate state sovereign immunity, and such an abrogation would be constitutional, the Court will nevertheless conclude that the abrogation is not “clear” enough.⁴⁷⁹ The Court therefore ignores Congress’s intent, requires Congress to pass an extra hurdle before it can put its policies into effect, and systematically favors the states.⁴⁸⁰ Thus, the Court can achieve indirectly what it cannot do directly: It can temporarily prevent Congress from abrogating state sovereign immunity, even when Congress has the authority to do so. The Court can, therefore, further its own policy preferences.

The Court followed a similar course in *Gregory v. Ashcroft*, in which it considered whether a federal antidiscrimination law—the ADEA—applied to state judges.⁴⁸¹ A group of state judges in Missouri argued that a state law mandating retirement for judges at age seventy violated the ADEA.⁴⁸² Although Congress had the power to enact the statute,⁴⁸³ and had amended the statute to include state and local governments,⁴⁸⁴ the Court demanded a clear statement of its intent to include state judges specifically.⁴⁸⁵ The Court noted that Missouri’s law regulating judges represents “a decision of the most fundamental sort for a sovereign entity” and congressional interference with such a core state concern would have to be stated with the utmost clarity.⁴⁸⁶ Ironically, the Court cited *Garcia v. San Antonio Metropolitan Transit Authority* for the proposition that it is “constrained in [its] ability to consider the limits that the state-federal

478. 473 U.S. 234, 242 (1985).

479. In *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, Justice Stevens’s dissent includes a footnote that shows the level of detail and prediction this requires on the part of Congress. 527 U.S. 627, 654 n.6 (1999) (Stevens, J., dissenting).

480. After *Atascadero*, Congress enacted several “clear statements.” See *id.* at 665 & n.18 (Stevens, J., dissenting).

481. 501 U.S. 452, 464–70 (1991).

482. *Id.* at 455–56.

483. *EEOC v. Wyoming*, 460 U.S. 226, 243 (1983).

484. Viet D. Dinh, *Reassessing the Law of Preemption*, 88 Geo. L.J. 2085, 2093 (2000) [hereinafter Dinh, *Reassessing the Law of Preemption*].

485. *Gregory*, 501 U.S. at 467.

486. *Id.* at 460.

balance places on Congress' powers under the Commerce Clause."⁴⁸⁷ Therefore, the Court continued, "[i]nasmuch as this Court in *Garcia* has left primarily to the political process the protection of the States against intrusive exercises of Congress' Commerce Clause powers, we must be absolutely certain that Congress intended such an exercise."⁴⁸⁸ The Court therefore created a plain statement rule to achieve indirectly what it refused to achieve directly in *Garcia*. Although the Court claimed this canon would avoid a potential constitutional problem,⁴⁸⁹ *Garcia*'s rationale suggested that there would be no constitutional bar to applying the ADEA to state judges.⁴⁹⁰ *Gregory* therefore shows how the Court uses a covert mechanism of statutory interpretation to tip the scales in favor of its own policy judgments.

Although *Gregory* and *Atascadero* could arguably claim support in the Tenth and Eleventh Amendments, respectively,⁴⁹¹ some of the Court's substantive canons are directly contrary to the constitutional design. For instance, the Supreme Court interprets federal statutes with a presumption against federal preemption of state law—that is, Congress must provide a "clear statement" of preemption.⁴⁹² But, as Viet Dinh has recently explained, this substantive canon has no basis in the Constitution's text or history, nor in substantive principles of federalism.⁴⁹³ Rather, the questions of constitutional policy in preemption have already been answered with reference to "the specific enumerations and limitations of federal legislative power in Article I and the inclusion of the Supremacy Clause in the Constitution."⁴⁹⁴ The Court's putting its thumb on the scale in favor of the states in its preemption analysis is, therefore, entirely unsupported. "[T]he logic of and the principles animating the Supremacy Clause would seem to suggest, if anything, a bias in favor of preemption, not against."⁴⁹⁵ By systematically disfavoring preemption, the Court upsets the constitutional balance of power between federal and state governments.⁴⁹⁶

487. Id. at 464 (citing *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985)).

488. Id.

489. Id. at 469.

490. See Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 Tex. L. Rev. 1321, 1426 (2001) [hereinafter Clark, *Separation of Powers as a Safeguard*] ("If one accepts *Garcia*'s premise that under the Commerce Clause Congress may regulate state and private activities to the same extent, then *Gregory* presented no potential constitutional problem to avoid.").

491. See Dinh, *Reassessing the Law of Preemption*, supra note 484, at 2093.

492. See, e.g., *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (explaining the Court's presumption against federal preemption of state laws).

493. Dinh, *Reassessing the Law of Preemption*, supra note 484, at 2087–97.

494. Id. at 2092.

495. Id. at 2094. But see Clark, *Separation of Powers as a Safeguard*, supra note 490, at 1429–30 (disagreeing with Dinh and arguing that the presumption against preemption is supported by the constitutional structure).

496. Dinh, *Reassessing the Law of Preemption*, supra note 484, at 2092.

This subtle mechanism of statutory interpretation thereby enables the Court to substitute its judgment for that of Congress—a substitution that is driven by its view that its interpretation of the Constitution is superior, even if that interpretation depends on factual findings and policy judgments the Court is unsuited to make.

4. *The Political Question Doctrine and the New Judicial Supremacy.* — The demise of the political question doctrine is part and parcel of this larger trend of refusing to accord interpretive deference to the political branches.⁴⁹⁷ The political question doctrine cannot coexist with the current Court's view of the judiciary's place in the constitutional structure.⁴⁹⁸ The doctrine requires the Court to acknowledge that the other branches "may make constitutional law—i.e., make judgments about the scope and meaning of its constitutionally authorized . . . functions—subject to change only if [the branch] later changes its mind or by a constitutional amendment."⁴⁹⁹ Indeed, as J. Peter Mulhern explained in his article defending the political question doctrine, it is for this reason that proponents of the judicial monopoly theory have condemned the doctrine.⁵⁰⁰ These commentators do not trust the political branches to make these determinations—and neither does the Rehnquist Court.⁵⁰¹ That is why the Court no longer seems interested in analyzing as a threshold matter whether the Constitution gives an interpretive role to another branch.

If "[a] strong view of judicial supremacy implies an absence of judicial deference,"⁵⁰² a fortiori it demands the demise of the political question doctrine.⁵⁰³ If the Court does not trust the political branches enough to give their decisions deference in cases over which the Court has jurisdiction, it would be anomalous for the Court to conclude that the political branches possess institutional advantages that justify giving them complete control over some constitutional questions. Or, to state the

497. See Schapiro, *supra* note 82, at 685 (observing that the decline of the political question doctrine "conforms to the current Court's renewed concern with imposing judicial restraints on the scope of federal power").

498. See Bederman, *supra* note 158, at 1489 (arguing that the political question doctrine is "subversive of ordered liberty" because it "psychologically licenses deference" to the political branches).

499. Gerhardt, *supra* note 20, at 233.

500. Mulhern, *supra* note 455, at 112–18 (1988) (describing the arguments of Redish, Henkin, and McCormack as rooted in a theory of judicial monopoly that holds that "any provision of the Constitution that the judiciary will not enforce is meaningless").

501. For an argument that the Supreme Court has also shown less trust of the lower courts, see generally Ashutosh Bhagwat, *Separate But Equal?: The Supreme Court, the Lower Federal Courts, and the Nature of the "Judicial Power,"* 80 B.U. L. Rev. 967 (2000).

502. Schapiro, *supra* note 82, at 665.

503. Cf. Bederman, *supra* note 158, at 1465–70 (pointing out the converse phenomenon, that extreme deference can "mask[] an almost abdicationist stance").

matter conversely, the existence of the political question doctrine is a powerful weapon for those who advocate coordinate review.⁵⁰⁴

It is no coincidence that judges and scholars have relied on the existence of the political question doctrine to support their theories that other branches are charged with the responsibility of interpreting the Constitution. Justice Scalia has cited the political question doctrine to support the argument that not all constitutional violations must be remediable in the courts.⁵⁰⁵ Paul Brest, arguing against a theory of judicial exclusivity in interpretation, notes that such a theory "takes no account of so-called 'political questions.'"⁵⁰⁶ Lawrence Sager has observed that "[t]he very existence of the political question doctrine in our constitutional jurisprudence thus reflects a partial recognition" of his thesis of judicially underenforced constitutional norms.⁵⁰⁷ Erwin Chemerinsky has similarly relied on the political question doctrine to support his claim "that for each part of the Constitution one branch of government is assigned the role of final arbiter of disputes."⁵⁰⁸ Archibald Cox has asserted that "[t]he underlying considerations . . . are hardly different" between the deference accorded "political determinations under the commerce, due process or equal protection clauses," and the determination "whether a question is political."⁵⁰⁹ Michael McConnell has used political question doctrine cases to support his view that Congress has the power to interpret the Fourteenth Amendment to enforce Section 5 of that amendment.⁵¹⁰

The most expedient way to remove the intellectual tension between the Court's theory of judicial superiority and the political question doctrine is to eliminate one or the other. And so the Court has ushered out

504. See *Gant*, *supra* note 360, at 371 (observing that scholars criticizing judicial supremacy frequently cite the political question doctrine to support their view); see also *Hand*, *The Bill of Rights*, *supra* note 112, at 15–18 (relying on the political question doctrine to support the argument that, because the Court is free to accept political determinations on some constitutional questions, judicial review generally "need not be exercised whenever a court sees, or thinks that it sees, an invasion of the Constitution"); cf. *Finkelstein*, *supra* note 24, at 361–64 (implicitly recognizing the link between deference to the political branches and the political question doctrine by arguing that "a great deal of the so-called unconstitutional social and industrial legislation might have fared better at the hands of the court had it been treated from the point of view of a political question").

505. *Webster v. Doe*, 486 U.S. 592, 612–13 (1988) (Scalia, J., dissenting). Ironically, in light of the *Bush* cases, Justice Scalia also used as an example "the rather grave constitutional claim that a [] [congressional] election has been stolen," and noted that it cannot be addressed by the courts under Article 1, Sections 5 and 6. *Id.* at 612.

506. *Brest*, *supra* note 377, at 63. Interestingly, *Brest* also notes, in support of his argument, that some aspects of legislation are unreviewable (or at least not reviewed in practice), including whether a law is supported by facts to sustain its constitutionality. *Id.* at 64–65. As the discussion above makes clear, the Supreme Court now scrutinizes legislative factual findings as well. See *supra* text accompanying notes 403–423, 462–475.

507. *Sager*, *supra* note 20, at 1225.

508. *Chemerinsky*, *Interpreting the Constitution*, *supra* note 19, at 84.

509. *Cox*, *supra* note 431, at 206.

510. *McConnell*, *supra* note 397, at 171 & n.123.

the doctrine—allowing its supremacy theory to flower and its confidence in its own constitutional abilities to grow.

B. *A Call for Judicial Modesty: Resuscitating the Classical Political Question Doctrine*

The preceding Sections of this Article traced the jurisprudential treatment of the political question doctrine from the founding through the recent *Bush* cases and demonstrated the link between the doctrine and the prevailing general theory of judicial review. I have argued that the Court's increasing confidence in its own ability as a constitutional decisionmaker, regardless of the constitutional provision at issue or the policy judgments necessary for such a decision, has destroyed the theoretical foundation for the political question doctrine and eroded the principle of according deference to congressional judgments. It has allowed the Court to bypass the threshold determination of how much interpretive power a provision of the Constitution gives political actors. This Section evaluates the decline of the doctrine—and, concomitantly, the rise of the Court's theory of judicial supremacy—from a normative standpoint. That is, it seeks to answer the question whether the political question doctrine's end is a positive, negative, or neutral development.

Section B.1 discusses the structural basis for concluding that the Constitution contemplates a spectrum of deference to the interpretations of the political branches. Section B.2 evaluates the normative reasons for acknowledging this spectrum of deference. That is, I discuss the general institutional advantages of the political branches that might justify placing a constitutional question with those branches instead of with the judiciary. Section B.3 explains the political question doctrine's importance as part of this spectrum, and the negative consequences of abandoning the classical political question doctrine.

I. *The Spectrum of Deference.* — The political question doctrine is part of a spectrum of deference to the political branches' interpretation of the Constitution.⁵¹¹ This structural inference of deference finds support in the fact that *all* questions are originally resolved by the political branches when they choose to act or not; yet not every constitutional question

511. For an excellent discussion of the judicial supremacy theory's poor fit with our constitutional tradition, see Mulhern, *supra* note 455, at 119–27. Mulhern's claim in 1988 that a judicial supremacy theory did not conform to “modern constitutional practice,” serves to highlight the shift that has taken place under the Rehnquist Court. *Id.* at 127. One could hardly claim today that “modern constitutional practice” undercuts a theory of judicial supremacy. Indeed, one of Mulhern's chief examples—Commerce Clause doctrine—exemplifies the change. While Mulhern could then claim that Commerce Clause jurisprudence “is a serious embarrassment for anyone who would argue that deference is a peripheral enough part of [the] law to be compatible with the judicial monopoly assumption,” *id.* at 150, it is now a serious embarrassment for anyone claiming that the judicial monopoly assumption has not held sway with the Court.

reaches the federal courts (let alone the Supreme Court).⁵¹² The Constitution's structure and the limited powers of the judiciary require political actors to decide constitutional questions in many instances and, "[i]n such instances, they have the same authority to make this decision as the Supreme Court itself has in other instances."⁵¹³

512. See *Vander Jagt v. O'Neill*, 699 F.2d 1166, 1183 (D.C. Cir. 1983) (Bork, J., concurring) (observing that "it is of course precisely the function of the Article III limitations on jurisdiction, through such doctrines as standing and political question, to ensure that nonfrivolous claims of unconstitutional action will go unreviewed by a court"); Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 *Suffolk U. L. Rev.* 881, 892 (1983) [hereinafter *Scalia, The Doctrine of Standing*] (noting that some issues will never reach the courts because no one will have standing to bring the action); Herbert Wechsler, *The Courts and the Constitution*, 65 *Colum. L. Rev.* 1001, 1006 (1965) [hereinafter *Wechsler, Courts and Constitution*] (noting that the Supreme Court and other federal courts do not decide constitutional questions because they are vested with a "special function . . . to enforce the Constitution or police the other agencies of government" but because they "must decide a litigated issue that is otherwise within their jurisdiction and in doing so must give effect to the supreme law of the land"). In addition, it should be remembered that the Supreme Court's appellate jurisdiction is subject to congressional oversight. U.S. Const. art. III, § 2, cl. 2 ("[T]he supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make."); see also Paul M. Bator, *Congressional Power over the Jurisdiction of the Federal Courts*, 27 *Vill. L. Rev.* 1030, 1040-41 (1982) (observing that Congress has made such exceptions to the Supreme Court's jurisdiction and that Congress has "the raw power" to make such exceptions, but arguing that it would violate the "spirit" of the Constitution to do so); Martin H. Redish, *Congressional Power To Regulate Supreme Court Appellate Jurisdiction Under the Exceptions Clause: An Internal and External Examination*, 27 *Vill. L. Rev.* 900, 927 (1982) (arguing that Congress's power under the Exceptions Clause is broad—"no significant internal limitation on Congress' authority can be found, and the reach of any external constitutional restraint is, at best, uncertain"—but that, as a policy matter, Congress should exercise restraint); Wechsler, *Courts and Constitution*, *supra*, at 1005, 1007 (arguing that the constitutional plan gave Congress the power to determine "how far judicial jurisdiction should be left to the state courts, bound as they are by the Constitution" and the exercise of this power can serve as a "forum of great dignity" for protesting the Court's actions). Indeed, "[f]or most of our history, the Supreme Court lacked the authority to review state court judgments upholding federal claims and defenses," and "[f]or many decades, it lacked the authority to review not only the judgments of lower federal courts in civil cases involving little money, but also the judgments of lower federal courts in any criminal case." Edward A. Hartnett, *A Matter of Judgment, Not a Matter of Opinion*, 74 *N.Y.U. L. Rev.* 123, 147 (1999).

513. 4 *Elliot's Debates*, *supra* note 49, at 521 (statement of Sen. Edward Livingston); see also Letter from James Madison, to Spencer Roane (May 6, 1821), in 9 *Writings of James Madison* 55, 59 (1910) (criticizing the Supreme Court's interpretation of the Framers' views on nationalization and arguing that Congress should exercise its own interpretation). At a debate in one of the first sessions of Congress on the organization of the judiciary, one member gave his view that:

[T]hose . . . who make the laws, are presumed to have an equal attachment to, and interest in, the Constitution, are equally bound by oath to support it, and have an equal right to give a construction to it; that the construction of one department, of the powers particularly vested in that department, is of as high authority, at least, as the construction given to it by any other department; that it is, in fact, more competent to that department, to which powers are exclusively

It was "anticipated and clearly foreseen" that many constitutional questions would never reach the courts.⁵¹⁴ For example, the First Bank of the United States was chartered in 1791 and lasted for twenty years, and the Second Bank of the United States was re-chartered in 1816, yet it was not until 1819 that the constitutionality of the bank was decided by the Supreme Court.⁵¹⁵ Between *Marbury* in 1803 and *Dred Scott* in 1856, the Supreme Court did not invalidate a single federal act.⁵¹⁶ As James Thayer explained more than a century ago, "[t]he judiciary may well reflect that if they had been regarded by the people as the chief protection against legislative violation of the constitution, they would not have been allowed merely this incidental and postponed control."⁵¹⁷ Rather, the judiciary would have been given the power to revise laws before they went into operation. Instead, however, the Framers viewed the judicial power as but one safeguard⁵¹⁸ and expected the political branches to regulate their own behavior in accordance with the Constitution.⁵¹⁹ Indeed, Thayer's description of the "clear error" standard of review that existed at the framing is based not on the idea that only clearly erroneous laws violate the Constitution, but on the view that the judiciary's enforcement ended there. As Lawrence Sager has argued, limiting the Constitution's meaning to the Supreme Court's pronouncements would therefore stunt constitutional norms and lead to underenforcement,⁵²⁰ because the very

confided, to decide upon the proper exercise of those powers, than any other department, to which such powers are not intrusted, and who are not consequently under such high and responsible obligations for their constitutional exercise; and that, therefore, the legislature would have an equal right to annul the decisions of the courts, founded on their construction of the Constitution, as the courts would have to annul the acts of the legislature founded on their construction.

4 Elliot's Debates, *supra* note 49, at 444 (statement of Mr. Breckenridge) (quoting Senate debate on Jan. 13, 1802); see also Yoo, *Choosing Justices*, *supra* note 377, at 1455 ("*Marbury's* grounding of judicial review in the Court's case-deciding function left ample room for the other branches to engage in constitutional interpretation while performing their own constitutional duties.").

514. Thayer, *supra* note 50, at 136.

515. See *id.*

516. Frank H. Easterbrook, *Presidential Review*, 40 Case W. Res. L. Rev. 905, 916 (1989-1990).

517. Thayer, *supra* note 50, at 136.

518. *Id.* at 138; see also Felix Frankfurter, *A Note on Advisory Opinions*, 37 Harv. L. Rev. 1002, 1007-08 (1924) (quoting with approval Thayer's thesis that congressional interpretations of the Constitution should be accorded great deference).

519. See Sager, *supra* note 20, at 1224 (relying on Thayer's rule of clear mistake and noting that "the distinction between the scope of the norms of the Constitution and the scope of their judicial enforcement is inherent in the doctrine of judicial restraint and played a central role in the early formulation and defense of that doctrine").

520. *Id.* at 1263-64. The link between judicial review and constitutional interpretation has become so ingrained that one commentator has argued that "if a court is not willing to enforce a provision or principle, then that provision or principle is not law." McCormack, *supra* note 20, at 822.

design of the Constitution contemplates that some questions will not reach the courts.

It naturally follows from this structure that the Constitution vests some interpretive authority with the political branches. The Court's decision in *M'Culloch v. Maryland*, for example, recognizes that the scope of the Necessary and Proper Clause is essentially within Congress's power to interpret.⁵²¹ The Court's decision in *Katzenbach v. Morgan* recognized a similar power for Congress under Section 5 of the Fourteenth Amendment.⁵²² And the Court's political question cases involving the interpretation of the Guarantee Clause,⁵²³ Article V,⁵²⁴ and the Senate's power to try impeachments under Article I⁵²⁵ all acknowledge a constitutional grant of interpretive power in Congress. These cases are all part of a spectrum of deference that recognizes that the Constitution delegates authority to the political branches to different degrees, and that some of those delegations permit the political branches to give substantive meaning to the constitutional provisions in the exercise of their discretion.

This model is not a foreign one to students of administrative law. This same spectrum of deference finds an analog in judicial review of administrative agencies. In some instances, courts engage in de novo review. In others, courts give agency decisions *Chevron* deference.⁵²⁶ And, in a small category of cases, a matter is deemed within the absolute discretion of an agency.⁵²⁷ All of these determinations are made by an initial judicial interpretation of the statute itself, based on an evaluation of what the legislature intended.⁵²⁸ This same threshold inquiry is appropriate in

521. 17 U.S. (4 Wheat.) 316, 324-25 (1819).

522. 384 U.S. 641, 653 (1966).

523. See, e.g., *Luther v. Borden*, 48 U.S. (7 How.) 1, 42 (1849) (holding that the right to decide what government is the established one in a state and whether that government is republican is placed in Congress and not in the courts); see also *supra* Part I.B.1.

524. See, e.g., *Coleman v. Miller*, 307 U.S. 433, 450 (1939) (holding that the decision as to the efficacy of ratifications of constitutional amendments by state legislatures is a political question and the "ultimate authority" on the issue lies in Congress); see also *supra* text accompanying notes 83-98.

525. See, e.g., *Nixon v. United States*, 506 U.S. 224, 226 (1993) (holding that the language and structure of Article I constitute a textual commitment to the Senate to determine how to try impeachments); see also *supra* text accompanying notes 184-193.

526. *Chevron U.S.A. Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 844 (1984) (holding that "a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency" if the statutory provision does not unambiguously express the intent of Congress).

527. 5 U.S.C. § 701(a)(2) (1994). For a discussion of this provision, see generally Ronald M. Levin, *Understanding Unreviewability in Administrative Law*, 74 Minn. L. Rev. 689 (1990).

528. *Chevron*, 467 U.S. at 842; *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971). Interestingly, a similar pattern of Supreme Court interpretive supremacy might also be emerging in this area as well, as the Court has increasingly concluded that questions of critical importance fall outside the familiar zone of deference to agency decisions. See, e.g., *Williams v. Am. Trucking Assocs.*, 121 S. Ct. 903, 910 (2001) (stating its view that Congress "does not alter the fundamental details of a regulatory scheme in vague

constitutional cases to determine how much interpretive deference should be accorded the political branches based on the language and structure of the Constitution.

Thus, although the notion that some constitutional questions belong outside the judiciary might seem passing strange in light of the current view of judicial supremacy that the Court espouses, it is hardly a revolutionary concept.⁵²⁹ On the contrary, it is the new theory of complete judicial interpretive power that finds little historical support.⁵³⁰

2. *Subjecting Political Questions to Political Pressures and Political Judgment.* — Structure and history are not the only bases on which interpretive deference to the political branches can be defended. Just as it makes sense for Congress to vest in administrative agencies power to decide various questions because of the institutional advantages agencies possess, so,

terms or ancillary provisions”); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159–60 (2000) (holding that, in determining whether Congress has “directly spoken” to the question at issue, the Court will look to the nature and importance of the question and will not always presume that ambiguity constitutes an implicit delegation to the agency to fill in gaps); *MCI Telecomm. Corp. v. AT&T Co.*, 512 U.S. 218, 231 (1994) (holding that the Federal Trade Commission’s statutory power to modify any requirement of a given statute did not enable the FTC to effect a “fundamental revision” of a provision of the statute, given the provision’s “enormous importance to the statutory scheme”).

529. Larry Kramer has convincingly demonstrated that “[t]o deny that there are spaces outside the Court where constitutional decisions are made, decisions to which judges are subservient, is a radical and unprecedented idea.” Kramer, *We the Court*, *supra* note 46, at 163. Other scholars have criticized the Court’s theory of judicial supremacy and have argued for more interpretive power to be placed in the hands of the political branches. The view that the Constitution allocates interpretive issues among the branches has been deemed “departmentalism.” See Susan R. Burgess, *Contest for Constitutional Authority: The Abortion and War Powers Debates 12–19*, 126 (1992) (discussing scholars advocating departmentalism and concluding that “departmentalism is superior to judicial and executive supremacy in terms of fostering constitutional consciousness and broadening constitutional authority”); Mark Tushnet, *Taking the Constitution Away from the Courts 11–53* (1999) [hereinafter Tushnet, *Taking the Constitution*] (arguing that some parts of the Constitution, in particular its “fundamental guarantees of equality, freedom of expression, and liberty,” should be controlled by the people); Gant, *supra* note 360, at 383–89, 404 (describing the development of the theory of departmentalism and listing some of its adherents); Hartnett, *supra* note 512, at 146–47 (asserting that the Supreme Court issues judgments, not opinions, and that the political branches need only obey judgments, not opinions); Katyal, *supra* note 392, at 1340–41 (proposing that the Senate use Supreme Court confirmation hearings to set forth the members’ views on key constitutional questions and that the Court accord a presumption of correctness to those views, as long as the Senate’s interpretation “increases individual constitutional rights”). Defenses of judicial supremacy are getting harder and harder to find. But see Alexander & Schauer, *supra* note 5, at 1377–81 (arguing in support of *Cooper v. Aaron*’s judicial supremacy).

530. See Devins & Fisher, *supra* note 5, at 86–90 (arguing that “[j]udicial exclusivity . . . finds no support in Congressional and White House practices, in the debates surrounding the drafting and ratification of the Constitution, or in the Constitution itself”); Lawson & Moore, *supra* note 5, at 1292 (“We are aware of no one who has even attempted to put forth a plausible originalist case for a generalized judicial supremacy in constitutional interpretation.”).

too, does it make sense for the Constitution to delegate interpretive authority to the political branches in some instances.

As Justice Stone argued in a dissent to one of the last *Lochner* era cases, "[c]ourts are not the only agency of government that must be assumed to have the capacity to govern."⁵³¹ Courts must reject the "assumption that the responsibility for the preservation of our institutions is the exclusive concern of any one of the three branches of government, or that it alone can save them from destruction."⁵³² Laurence Tribe has similarly observed that "at least so long as the manner in which our nation's fundamental document is to be interpreted remains open to question, the 'meaning' of the Constitution is subject to legitimate dispute, and the Court is not alone in its responsibility to address that meaning."⁵³³

There are, however, still those who distrust the political branches to answer constitutional questions. Most importantly, the Supreme Court itself seems to fall into that category. But is there any reason to place greater trust in the judiciary on all constitutional questions?⁵³⁴ It is not sufficient simply to expect the worst out of the political branches. For even with judicial review, a "society so riven that the spirit of moderation is gone, no court *can* save; that a society where that spirit flourishes, no court *need* save; that in a society which evades its responsibility by thrusting upon courts the nurture of that spirit, that spirit in the end will perish."⁵³⁵ After all, even when the judiciary acts as the final interpreter of a constitutional question, it must rely on the other branches to comply. Moreover, "[t]he exercise of *any* final power is by definition open to monstrous hypothetical abuse."⁵³⁶ "[J]udges exercise such power daily, unreviewably imposing procedural and substantive boundaries on almost every decision of the political branches."⁵³⁷ The political branches, at least, are accountable to the electorate if they behave "monstrous[ly]."

In addition, like the members of the judiciary, members of Congress and the President take an oath to support the Constitution.⁵³⁸ Some of

531. *United States v. Butler*, 297 U.S. 1, 87 (1936) (Stone, J., dissenting).

532. *Id.* at 87-88 (Stone, J., dissenting).

533. Laurence H. Tribe, *American Constitutional Law* § 3-4, at 34-35 (2d ed. 1988). "Although the Constitution in a sense stands beyond ordinary politics . . . democracy is surely less threatened by a system of constitutional interpretation in which many may share significant and respected roles than by a system with but one authoritative voice." *Id.* at 39; see also Steven G. Calabresi, *Thayer's Clear Mistake*, 88 Nw. U. L. Rev. 269, 275-76 (1993) (arguing that departmentalist interpretation is superior to both Thayer's clear mistake rule and the new theory of judicial supremacy).

534. As Judge Easterbrook has commented, "[t]he same power of judicial review that gave us *Brown v. Board of Education* also gave us *Dred Scott*, *Plessy v. Ferguson*, and *Lochner v. New York*." Easterbrook, *supra* note 516, at 925.

535. Learned Hand, *The Contribution of an Independent Judiciary to Civilization, in The Supreme Judicial Court of Massachusetts 1692-1942*, at 59, 66 (Mass. Bar Ass'n ed., 1942).

536. *Nixon v. United States*, 938 F.2d 239, 246 (D.C. Cir. 1991).

537. *Id.*

538. U.S. Const. art. II, § 1, cl. 8; *id.* art. VI, cl. 3.

the Framers considered this a "great check[]" on abuse of authority.⁵³⁹ There is no reason to suspect that members of Congress and the President take their oaths any less seriously than the judiciary does.⁵⁴⁰ And the fact that political actors take such an oath reflects the Framers' understanding and expectation that they would have an independent obligation to uphold the Constitution.⁵⁴¹

To be sure, the structure of our government creates different incentives for the three branches to comply with their oaths. And that structure dictates that some questions properly belong with the judiciary.⁵⁴² Most fundamentally, the judiciary, because of its independence, is best suited to protect individual liberties from oppression by the majority.⁵⁴³ But not all questions arising under the Constitution go to the core of individual rights. As some scholars aptly point out, at some level, all constitutional questions involve individual rights because even structural questions of federalism and separation of powers involve a check on tyranny, and because the Constitution is "counter-majoritarian in *all* of its provisions."⁵⁴⁴ But, there is certainly a difference—in degree, if not in

539. See 2 Elliot's Debates, supra note 49, at 85–86 (statement of James Bowdoin, Delegate, Massachusetts) (listing among the "great checks" on Congress and the President the fact that members of Congress and the President take oaths to support and preserve the Constitution); *id.* at 93–94 (statement of Theophilus Parsons, Delegate, Massachusetts) ("The oath the several legislative, executive, and judicial officers of the several states take to support the federal Constitution, is as effectual a security against the usurpation of the general government as it is against the encroachment of the state governments."); see also Eugene W. Hickok, Jr., *The Framers' Understanding of Constitutional Deliberation in Congress*, 21 Ga. L. Rev. 217, 262 (1986) ("The oath that [members of the First Congress] had taken to 'support and defend the Constitution' carried an obligation that most members took quite seriously."). At the North Carolina debates on the ratification of the Constitution, one delegate stated that this is a "very happy security." 4 Elliot's Debates, supra note 49, at 44. But see Letter from Gouverneur Morris, to Timothy Pickering (Dec. 22, 1814), reprinted in 1 *id.* at 507 (stating that legislators will comply with their oath to exercise their powers in accord with "their true intent and meaning . . . by swearing the true intent and meaning to be, according to their comprehension, that which suits their purpose"); 5 Elliot's Debates, supra note 49, at 352 (statement of James Wilson, Delegate, Pennsylvania) (stating that "he was never fond of oaths, considering them as a left-handed security only"). Of course, the same could be said about the oaths taken by judges.

540. See *Webster v. Doe*, 486 U.S. 592, 613 (1988) (Scalia, J., dissenting) ("Members of Congress and the supervising officers of the Executive Branch take the same oath to uphold the Constitution that we do, and sometimes they are left to perform that oath unreviewed, as we always are.").

541. See Schapiro, supra note 82, at 662–63.

542. See Brest, supra note 377, at 99–100 (comparing the structures of adjudicating and legislating and noting the superiority of the judiciary to decide constitutional questions).

543. See Scalia, *The Doctrine of Standing*, supra note 512, at 896 (arguing that the judiciary has been specifically designed to address individual rights against the majority but that that same structure is "terrible . . . to decide what is good for the people").

544. Martin H. Redish, *The Passive Virtues, the Counter-Majoritarian Principle, and the "Judicial-Political" Model of Constitutional Adjudication*, 22 Conn. L. Rev. 647, 660 (1990); see also *United States v. Munoz-Flores*, 495 U.S. 385, 394 (1990) ("This Court has

kind—between structural questions concerning the operation of government and those questions that directly implicate individual liberty.⁵⁴⁵

repeatedly emphasized that the Constitution diffuses power the better to secure liberty.” (internal quotation marks and citations omitted)); The Federalist No. 52, *supra* note 22, at 324 (James Madison) (arguing that the separation of powers prevents tyranny); Brown, *supra* note 18, at 137–38 (arguing that the Court must decide questions where individual rights are at stake and that even questions of separation of powers implicate individual rights).

545. See Choper, *supra* note 440, at 169 (arguing that the fundamental purpose of judicial review is to protect individual rights and asserting that the Court should abstain from federalism and separation of powers questions because the political branches of state and federal governments can take care of themselves); Chemerinsky, Cases Under the Guarantee Clause, *supra* note 191, at 864–65 (drawing distinctions among constitutional cases and arguing that “application of the political question doctrine is least appropriate in cases where individuals rights are at stake”); Dellinger & Powell, *supra* note 42, at 374 (noting that Justice Marshall distinguished between questions of individual rights and political questions involving the national interest); Kramer, We the Court, *supra* note 46, at 122–28 (describing the “New Deal settlement” in which the Court enforced constitutional prohibitions on the states and gave more exacting scrutiny to questions of individual rights, but largely deferred to Congress and the Executive on questions regarding the scope of their constitutional power); Antonin Scalia, The Two Faces of Federalism, 6 Harv. J.L. & Pub. Pol’y 19, 19–20 (1982) (arguing that the same notions of natural autonomy that apply in the relationship between the individual and the state do not apply to the situation of “one coercive governmental unit over another”); Suzanna Sherry, The Founders’ Unwritten Constitution, 54 U. Chi. L. Rev. 1127, 1133–34 (1987) (pointing out that early state constitutions differentiated between a “declaration of rights” and a “frame of government”); see also *Munoz-Florez*, 495 U.S. at 407 n.5 (Stevens, J., concurring) (“[S]ome constitutional provisions are designed to protect liberty in a more specific sense.”); Chemerinsky, Cases Under the Guarantee Clause, *supra* note 191, at 866 (noting that a distinction between structure of government and individual liberties is drawn in questions involving justiciability, including the standing doctrine of generalized grievances); Pushaw, *supra* note 21, at 508 (noting that the Court has “properly continued to find the *process* of making foreign and military policy to be nonjusticiable, although it has recognized that the *results* of such decisions may sometimes be scrutinized if they invade individual rights”); Scharpf, *supra* note 24, at 584 (noting that the political question doctrine will not be applied “where important individual rights are at stake”); cf. Michael B. Miller, The Justiciability of Legislative Rules and the “Political” Political Question Doctrine, 78 Cal. L. Rev. 1341, 1341, 1364–70 (1990) (arguing that courts should not grant relief where legislators bring claims based on legislative procedural rules but should review those same claims when brought by private third parties). This basic demarcation between individual rights and structural questions can be seen in the application of the political question doctrine throughout history. The political question doctrine has generally been reserved for those areas that pertain to the structure of government and not those directly impacting individual rights. See Chemerinsky, Cases Under the Guarantee Clause, *supra* note 191, at 866–67. Indeed, some scholars have thought that questions of federalism and separation of powers were “political questions” for precisely that reason. See Choper, *supra* note 440, at 61 (identifying three categories of constitutional provisions: separation of powers, federalism, and personal liberties); Wechsler, Political Safeguards of Federalism, *supra* note 440, at 558–60 (arguing that questions of federalism should be addressed by the political process).

Moreover, structural questions involving the separation of powers are not only about individual liberty. Cf. Brown, *supra* note 18, at 135 (arguing that the purpose of separation of powers is to “preserve individual liberty, avoid tyrannical concentration of power, and thus protect the rights of individuals from unwarranted interference by the government”).

And in cases in which individual liberty is not directly implicated, there may be sound reasons for the Constitution to vest some interpretive authority—including absolute interpretive authority—with the political branches.

In particular, are there not some constitutional questions that should be answered by the political branches precisely because these branches are accountable to the people? As Alexander Hamilton observed, if Congress or the President were to usurp too much authority and disrupt the constitutional balance, the people need not be driven to an appeal to arms to check them.⁵⁴⁶ The ability to vote a member or the President out of office “will prove a security to [the people’s] liberties, and a most important check to the power of the general government.”⁵⁴⁷ As one delegate to the ratification convention in North Carolina put it, “[i]f the Congress make laws inconsistent with the Constitution . . . [a] universal resistance will ensue.”⁵⁴⁸ “[I]n a country like this . . . where almost every man . . . has the right of election, the violations of a constitution will not be passively permitted.”⁵⁴⁹

Placing some interpretive power with the political branches also insures that those branches will, as a general matter, be more attentive to constitutional concerns. Under the type of judicial supremacy theory espoused by the current Court, the political branches lose their sense of responsibility to analyze independently the constitutionality of a particular course of action.⁵⁵⁰ They can rely on the courts to “correct” any unconstitutional behavior, because it is clear the courts will decide all constitutional questions.⁵⁵¹ Indeed, the political branches today are often only too willing to let the courts wrestle with the hard questions to avoid facing

The separation of powers also promotes a more efficient, effective government by allocating responsibilities to the branch most suited for the task. The political question doctrine is precisely designed to determine if resolution of a matter has been placed with another branch because of that branch’s relative superiority to decide the controversy.

546. 2 Elliot’s Debates, *supra* note 49, at 252 (quoting Alexander Hamilton at the New York debates on ratification, who noted that “the general sense of the people will regulate the conduct of their representatives”).

547. *Id.* at 168; see also *id.* at 175 (quoting John Hancock at the Massachusetts convention, noting that Congress’s and the Executive’s dependence on the people for elections is a critical check).

548. 4 *id.* at 71.

549. *Id.* at 72.

550. See Brest, *supra* note 377, at 59 (arguing that Congress has “failed to develop a tradition of trustworthy constitutional decisionmaking” because of “the widespread assumption that issues of constitutional law belong exclusively to the courts”); Devins & Fisher, *supra* note 5, at 98, 101 (arguing that under a regime of judicial supremacy, policymakers would treat the Constitution with indifference and that “[d]emocratic institutions will only take the Constitution seriously if they have some sense of stake in it”); Abner J. Mikva, How Well Does Congress Support and Defend the Constitution?, 61 N.C. L. Rev. 587, 588 (1983) [hereinafter Mikva, Support and Defend the Constitution] (observing that “the legislature has for the most part . . . left constitutional judgments to the judiciary”).

551. See Thayer, *supra* note 50, at 155–56.

the political consequences. When the courts make the decisions, the people cannot hold the political branches accountable.⁵⁵² If it were clear that the buck stops with the politically accountable branches, one would expect them to take more care.⁵⁵³

It is far more difficult to place a political check on the judiciary. The same independence that permits the judiciary to resist democratic impulses and to preserve and protect minority rights also immunizes the judiciary when it improperly impedes legitimate democratic goals. The Executive would have to expend enormous political capital to refuse to enforce one of its decisions,⁵⁵⁴ and so would Congress, if it stripped the Court of its budget. In contrast, the Court can keep Congress and the Executive from aggrandizing their power simply by deciding cases.⁵⁵⁵

The Court's view of judicial supremacy makes curbing its power even harder. Deferring to the political branches in some cases requires the Court to acknowledge the views of the political branches, which may cause the Court to question its own interpretation. A spectrum of deference therefore helps to promote a dialogue between the Court and the political branches. Without this mechanism for communication, the political branches must resort to other means to communicate their views of the Constitution. Indeed, as John Yoo has argued, one of the reasons for the increasing politicization of the Supreme Court appointment process is that the new theory of judicial supremacy has foreclosed other legitimate methods of resisting court decisions.⁵⁵⁶

552. Abner Mikva has argued that one reason Congress currently does a poor job of considering the constitutionality of statutes it adopts is that "by passing the hard questions to the courts, Congress is able to divert political pressure from itself." Mikva, *Support and Defend the Constitution*, *supra* note 550, at 588-89.

553. See Robin West, *Progressive Constitutionalism: Reconstructing the Fourteenth Amendment* 290-318 (1994); Mark Tushnet, *Policy Distortion and Democratic Debilitation: Comparative Illumination of the Countermajoritarian Difficulty*, 94 *Mich. L. Rev.* 245, 299-301 (1995). But see Schapiro, *supra* note 82, at 704 (noting that state legislatures have not been faced with aggressive judicial review, but there is no evidence that they "have grown especially sensitive to constitutional concerns"); *id.* at 705 (noting that the Court's move away from deference to Congress in some areas can be viewed as an attempt to protect the democratic process in the states).

554. See Paulsen, *The Most Dangerous Branch*, *supra* note 5, at 301-02.

555. See, e.g., *Clinton v. New York*, 524 U.S. 417, 448-49 (1998) (invalidating the Line Item Veto Act's cancellation procedures, which essentially allowed the President to rewrite laws already passed by Congress); *Bowsher v. Synar*, 478 U.S. 714, 736 (1986) (striking down section 251 of the Balanced Budget and Emergency Deficit Control Act of 1985, because it "violat[ed] the command of the Constitution that the Congress play no direct role in the execution of the laws"); *INS v. Chadha*, 462 U.S. 919, 958-59 (1983) (holding unconstitutional the congressional veto provision of the Immigration and Nationality Act, authorizing one congressional house to invalidate, by resolution, a decision of the Executive branch to allow a deportable alien to remain in the United States).

556. Yoo, *Choosing Justices*, *supra* note 377, at 1457-58 (arguing that under a concurrent theory of judicial review, there is less pressure to politicize the Supreme Court appointment process, and explaining that the Court's movement toward judicial supremacy "is an indispensable contributing factor" to the recent trend toward the

There are also some questions that may be better suited to the political branches because of institutional competence to gather and interpret the facts that are central to those questions. If it is true, as Felix Frankfurter once argued, that “the controversy between legislature and courts, in issues which matter most, is not at all a controversy about legal principles, but concerns the application of admitted principles to complicated and often elusive facts,”⁵⁵⁷ in some instances, we have reason to believe the political branches will do a superior job. For example, one reason the political question doctrine has remained more vibrant in the foreign relations context than in the domestic context is the Court’s admission that many underlying questions in those cases “are delicate, complex, and involve large elements of prophecy. . . . They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility.”⁵⁵⁸ Many questions outside of foreign relations also involve similarly delicate questions of policy, and the political branches can better tap the flow of ideas in the marketplace to reach their decisions.⁵⁵⁹ And they can perform an “educative function” by exposing constitutional deliberation to the public, instead of cloistering it behind the velvet curtains of the Supreme Court.⁵⁶⁰

Thus, the theory of deference to the political branches that has been with us throughout our nation’s history—a theory that, at its extreme, includes the political question doctrine—reflects not only the structure and text of the Constitution, but a very pragmatic determination that

politicization of the nomination and confirmation process); *id.* at 1462 (“By constitutionalizing more areas of life, and by pursuing the notion of judicial supremacy, the Court itself has shunted normal political activity from the world of policy into the world of Court appointments.”). Herbert Wechsler listed various Supreme Court appointments before 1965—such as President Eisenhower’s naming of Justices Harlan and Whitaker on the one hand, and Chief Justice Warren and Justice Brennan, on the other—and noted that the choices could only be explained by a “shared conviction that the Court is not a power organ, that it is a Court of law.” Wechsler, *Courts and Constitution*, *supra* note 512, at 1010. One could hardly make the same claim today. And, in the wake of *Bush v. Gore*, that process is likely to become even more political.

The desire to check the judiciary’s move toward supremacy may also explain the recent tendency to criticize particular judges and their decisions. For example, in the 1996 presidential election, Republican candidate Robert Dole and President Clinton both criticized a judicial decision by Judge Harold Baer, Jr., of the Southern District of New York, and Dole attacked Judge H. Lee Sarokin of the Third Circuit. See *Gant*, *supra* note 360, at 430–33. The criticism made an impact in both instances: Baer reversed himself, and Sarokin resigned. *Id.*

557. Frankfurter, *supra* note 518, at 1004.

558. *Chi. & S. Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948).

559. See Schapiro, *supra* note 82, at 699–700; see also *Gant*, *supra* note 360, at 393 (“[I]nviting agents outside the judiciary to consider seriously and speak out on constitutional matters can only enrich interpretive judgments, regardless of who may be charged with rendering the authoritative last word.”).

560. See *Gant*, *supra* note 360, at 393 (arguing that a diffusion of interpretive responsibility can expose more citizens to deliberation and analysis of constitutional questions).

some questions should be decided by the political branches because of their accountability and institutional competence. The level of deference varies, of course, depending on the issue involved. The Supreme Court, however, no longer seems interested in determining at the outset of a case whether any degree of deference is appropriate.

3. *The Importance of the Classical Political Question Doctrine.* — The same institutional and structural concerns that support giving some deference to Congress's interpretative decisions also justify giving absolute deference to the political branches in certain circumstances.⁵⁶¹ As Walter Dellinger and Jefferson Powell have noted, questions are left to the political branches "not only because of the judiciary's limitations, but also because of the political branches' virtues."⁵⁶² Thus, a recent trend in the academic literature is to identify issues that are better left to the political branches instead of the courts.⁵⁶³ For example, some constitutional questions lend themselves to a final decision by an organ of government that is democratically accountable.⁵⁶⁴ This Article has discussed one such

561. It is worth noting that vesting a final decision in a political branch does nothing to undermine the settlement value of the law that Frederick Schauer and Larry Alexander rely upon to defend judicial supremacy. See Alexander & Schauer, *supra* note 5, at 1371–72, 1377–79. The political branch makes the final, authoritative decision, so there is no risk of "interpretive anarchy." *Id.* at 1379.

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

563. See, e.g., Calabresi, *Presidential Succession*, *supra* note 58, at 175 (concluding, after a detailed structural and historical analysis, that "[t]he political question doctrine bars any judicial review whatsoever of the constitutionality of presidential succession statutes"); Chemerinsky, *Cases Under the Guarantee Clause*, *supra* note 191, at 859 (identifying some areas "where the judiciary is substantially less able than other branches to engage in constitutional interpretation," including "adopting amendments to overrule Supreme Court decisions or impeachment of judges" and "foreign policy decisions"); Viet D. Dinh, *Executive Privilege: The Dilemma of Secrecy and Democratic Accountability*, 13 *Const. Comment* 346, 352–55 (1996) (book review) (arguing that the judiciary cannot determine the point at which the legislative need for information outweighs a claim of executive privilege, and quoting then-Assistant Attorney General Antonin Scalia's view that this "is the very type of political question from which, even under *Baker v. Carr* the courts abstain" (citation omitted)); Rex D. Khan, *Why Refugee Status Should Be Beyond Judicial Review*, 35 *U.S.F. L. Rev.* 57, 74–77 (2000) (arguing that the determination of refugee status should be beyond judicial review); Pushaw, *supra* note 21, at 505–07 (arguing that "the President must have total discretion in deciding whether to veto a bill," that impeachments are "committed entirely to Congress," and that appointments, declarations of war, and the making of treaties present political questions); John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 *Cal. L. Rev.* 167, 288–90, 300 (1996) (concluding, after an extensive analysis of the Anglo-American understanding of war and separation of powers and the constitutional text and structure, that interbranch war powers disputes are nonjusticiable political questions and that the "Framers intended to establish a self-regulating system wherein the executive and legislative branches would monitor and control each other"); John C. Yoo, *Treaties and Public Lawmaking: A Textual and Structural Defense of Non-Self-Execution*, 99 *Colum. L. Rev.* 2218, 2248 (1999) (pointing out that the political branches are "structurally superior" to the judiciary in managing foreign affairs).

564. See Tushnet, *Taking the Constitution*, *supra* note 529, at 95–123 (arguing that taking the Constitution away from the courts and relying on self-enforcement—i.e., leaving

question, the resolution of a dispute under Article II about how to choose electors. As Justice Breyer stated in his dissent in *Bush v. Gore*, “[h]owever awkward or difficult it may be for Congress to resolve difficult electoral disputes, Congress, being a political body, expresses the people’s will far more accurately than does an unelected Court. And the people’s will is what elections are about.”⁵⁶⁵

But while there is great value in acknowledging that a question rests with the political branches, there is also a great danger that this power could be abused if there is no principled basis for determining when a decision should rest with another branch. It is for this reason that the classical political question doctrine must be distinguished from the prudential strand that has developed. The classical political question doctrine reflects the constitutional structure of deference, for it is rooted in the language, structure, and history of the Constitution itself. Just as the Court could conclude from the language and purpose of the Necessary and Proper Clause that Congress was entitled to great deference, the text and structure of the Constitution provides clues about whether Congress is entitled to absolute deference. The premise of the classical political question doctrine is that there must be some textual reason for concluding that the question lies within the interpretive powers of a political branch. As part of that textual analysis, of course, a court could look to the structural design of the Constitution and consider the consequences of judicial involvement and whether judicially manageable standards exist. Those factors would be used only to shed light on the interpretation of the Constitution itself, and would not be decisive on their own. Thus, they would be anchored to the Constitution and would therefore limit a judge’s ability to use her or his own policy preferences to avoid deciding a case or to lay claim to a case that properly rests with the political branches.

To be sure, tying the political question doctrine to constitutional interpretation will cure the problem of unprincipled application only insofar as the method of constitutional interpretation itself is principled. Thus, my endorsement of the classical political question doctrine must be tempered by this reality. Even without debating which method of constitutional interpretation is optimal—a debate that will undoubtedly rage indefinitely among legal scholars—one can assume that grounding a de-

it to the political process—could lead to superior results in some circumstances); see also Katyal, *supra* note 392, at 1341 (arguing that Congress might be better suited to interpret some constitutional provisions because it “frequently makes determinations as to shifts in popular opinion, beliefs, and ideals”); *id.* at 1363 (arguing that there are some decisions in which “society needs a democratic mandate rather than a judicial one,” noting that “political questions” fall within this category, and observing that “the political question doctrine is simply the flip side of strict scrutiny and representation-reinforcement theories”); Abner J. Mikva, Justice Brennan and the Political Process: Assessing the Legacy of *Baker v. Carr*, 1995 U. Ill. L. Rev. 683, 698 (arguing that decisions subsequent to *Baker v. Carr* have “overinvolved the courts, moving them too far into the political thicket”).

565. 531 U.S. 98, 155 (2000) (Breyer, J., dissenting).

cision in the Constitution itself will constrain a judge more than allowing him or her to use any prudential factors he or she deems important, regardless of what the Constitution has to say about the matter. At the very least, the classical political question doctrine makes it more difficult for judges to decide or not to decide cases when doing so is flatly at odds with the text, history, or structure of the Constitution. Perhaps even more importantly, it requires the Court—as a threshold matter—to focus on the language of the Constitution itself and whether that language suggests that some interpretive deference (or even complete deference) is appropriate.

This view of the political question doctrine finds endorsement in *Marbury v. Madison*, because the classical political question doctrine identifies those issues that the Constitution does not vest with the judicial branch.⁵⁶⁶ And it is on this basis that the classical doctrine diverges from the prudential doctrine. The difference between the classical and the prudential strains is the difference between a federal court “not tak[ing] jurisdiction if it should not” and improperly refusing to take jurisdiction when it should.⁵⁶⁷ “The one or the other would be treason to the constitution.”⁵⁶⁸

Unfortunately, because the two strands of the political question doctrine have been blurred over the years—and because *Baker v. Carr* seemed to weld them together in its six-part test⁵⁶⁹—most commentators have failed to bifurcate the doctrine. Indeed, some of the foremost legal scholars have come to believe that the prudential strain is the *only* aspect of the doctrine, forgetting its classical, constitutionally based roots.⁵⁷⁰

566. See Pushaw, *supra* note 21, at 502–03 & nn.542 & 546 (noting that arguments against the political question doctrine “cannot be reconciled with clear Federalist statements that certain constitutional questions were beyond the scope of judicial competence,” including *The Federalist* No. 78, in which Alexander Hamilton made clear that, in some instances, Congress and the President could be the final judges of their own powers).

567. *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821). Although Marshall was not discussing the political question doctrine specifically, his larger point about the Court’s jurisdiction applies in that context as well.

568. *Id.*; see also *Luther v. Borden*, 48 U.S. (7 How.) 1, 47 (1849) (“And while [the Court] should always be ready to meet any question confided to it by the Constitution, it is equally its duty not to pass beyond its appropriate sphere of action, and to take care not to involve itself in discussions which properly belong to other forums.”); Pushaw, *supra* note 21, at 469–70 (arguing that the doctrine of separation of powers requires judges to exercise their jurisdiction and is frustrated by justiciability doctrines that permit courts to abdicate their role of enforcing federal law); Wechsler, *Toward Neutral Principles*, *supra* note 24, at 5–6 (asserting that the Supremacy Clause commands judicial review); *id.* at 19 (“The courts have both the title and the duty when a case is properly before them to review the actions of the other branches in the light of constitutional provisions, even though the action involves value choices . . .”).

569. See 369 U.S. 186, 217 (1962); *supra* text accompanying notes 143–146.

570. See, e.g., Chemerinsky, *Cases Under the Guarantee Clause*, *supra* note 191, at 852–53 (describing the doctrine as applying “even though all of the jurisdictional and other justiciability requirements are met”); Michael J. Glennon, *Foreign Affairs and the*

And, because of the weaknesses of the prudential strand of the doctrine, many have advocated the abandonment of the doctrine in its entirety.

These calls for abandonment should apply only to the prudential strand of the doctrine. As these commentators rightly point out, there is no principled basis for distinguishing the cases that are avoided on prudential grounds from those that are decided.⁵⁷¹ It would be difficult to determine, *ex ante*, when the prudential factors listed in *Baker* would dictate abstention and when they would permit review. After all, many legal questions involve vague standards and require an "initial policy determination."⁵⁷² It is difficult to explain substantive due process or Eighth Amendment cases on any other basis. All cases reversing a political judgment of constitutionality express a similar "lack of the respect due coordinate branches of government."⁵⁷³ It would be hard to predict when there is an "unusual need for unquestioning adherence to a political decision already made" or when "the potentiality of embarrassment from multifarious pronouncements" demands abstention.⁵⁷⁴ Ironically, then, the *Baker* prudential factors themselves appear to be judicially unmanageable.

Moreover, the prudential strain aims to address problems that might be handled more directly by other doctrines, including standing⁵⁷⁵ and the courts' general powers of equitable discretion.⁵⁷⁶ What the pruden-

Political Question Doctrine, 83 Am. J. Int'l L. 814, 815-16 (1989) (arguing that the judiciary abdicates its responsibility under the Constitution when it relies on the political question doctrine and that the prudential reasons supporting it are "bare attacks upon the idea of judicial review"); Richard A. Posner, Path-Dependency, Pragmatism, and Critique of History in Adjudication and Legal Scholarship, 67 U. Chi. L. Rev. 573, 601 (2000) (asserting that the Supreme Court "invented" the political question doctrine and "occasionally applies [it] when necessary to avoid massive intrusions into the operations of other branches of government").

As discussed in Part I.A, *supra*, the classical political question doctrine holds that a jurisdictional requirement is not met—i.e., the Constitution has committed the question to another branch, and thus it is not a judicial "case" or "controversy."

571. See, e.g., Redish, Judicial Review and the "Political Question," *supra* note 19, at 1045-46 (arguing that the "undemocratic character of review" cannot support the doctrine, because that is characteristic of all instances of judicial review); Scharpf, *supra* note 24, at 552-53 (noting that the issues in cases finding political questions could not "possibly have been more hotly disputed than the constitutional questions concerning the federal bank, the Missouri compromise, the federal income tax, child labor legislation, the New Deal, Truman's seizure of the steel mills, or school segregation" (footnotes omitted)).

572. *Baker*, 369 U.S. at 217.

573. *Id.*

574. *Id.*

575. See Brown, *supra* note 18, at 143-48; Linda Sandstrom Simard, Standing Alone: Do We Still Need the Political Question Doctrine?, 100 Dick. L. Rev. 303, 306 (1996). Although the standing inquiry overlaps with the prudential political question doctrine, it does not address the classical doctrine, which recognizes that some issues fall outside the judiciary's purview completely.

576. See Henkin, *supra* note 20, at 617-22 (arguing that courts do not need the political question doctrine to avoid cases, where necessary, but can instead dismiss them for "want of equity"); see also *Colegrove v. Green*, 328 U.S. 549, 565-66 (1946) (Rutledge,

tial aspect of the doctrine adds, if anything, is an even more flexible escape hatch for a court that wishes to avoid deciding a tough case.⁵⁷⁷

Because the prudential doctrine allows the Court to avoid deciding a case without a textual analysis of the Constitution, it is this aspect of the political question doctrine that seems to be an unjustified dereliction of the Court's duty to "say what the law is."⁵⁷⁸ The prudential strand of the doctrine cannot be reconciled with the principle, announced by Chief Justice Marshall in *Cohens v. Virginia*, that "[t]he judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the constitution. [It] cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, [federal courts] must decide it, if it be brought before [them]."⁵⁷⁹

It would be unwise, however, to reject the entire political question doctrine because of the failings of the prudential doctrine. Indeed, the classical political question doctrine is critically important in the constitutional order, and its demise is cause for concern. In particular, the disappearance of the classical political question doctrine has a negative effect on two fronts.

First, it has a direct negative impact in that it prevents the political branches from exercising constitutional judgment in those cases in which a classical political question is presented. Admittedly, this is a small category of cases that are not likely to arise very often. Electoral count disputes, judicial impeachments, and constitutional amendment ratification questions do not occur with much frequency. These questions are of fundamental importance, however, and judicial interference in these circumstances could have a negative effect on our government that transcends

J., concurring) (arguing that a reapportionment claim should be dismissed for want of equity, not for presenting a political question, as Justice Frankfurter's opinion for the Court argued); *Ramirez de Arellano v. Weinberger*, 745 F.2d 1500, 1547 n.5 (D.C. Cir. 1984) (Tamm, J., dissenting) (noting that the same separation of powers concerns at issue in the political question doctrine apply in determining whether "the relief sought would intrude on the independence of the political branches"); *id.* at 1561-63 (Scalia, J., dissenting) (arguing that, even if a case does not present a political question, a court should consider whether granting the relief requested would be contrary to the separation of powers); cf. Richard H. Fallon, Jr., *Of Justiciability, Remedies, and Public Law Litigation: Notes on the Jurisprudence of Lyons*, 59 N.Y.U. L. Rev. 1, 43-45 (1984) (arguing that remedial concerns should not be addressed on a categorical basis as part of the threshold constitutional standing inquiry but should instead be addressed under the laws of equitable relief). The D.C. Circuit, for example, adheres to a "remedial discretion doctrine" instead of the political question doctrine in cases involving claims by individual members of Congress. See *Gregg v. Barrett*, 771 F.2d 539, 543-44 (D.C. Cir. 1985); *Riegle v. Fed. Open Market Comm.*, 656 F.2d 873, 881-82 (D.C. Cir. 1981).

577. See, e.g., *Scott Birkey, Gordon v. Texas* and the Prudential Approach to Political Questions, 87 Cal. L. Rev. 1265, 1278 (1999) (arguing that courts should use the prudential political question doctrine to avoid unmanageable issues).

578. *Henkin*, *supra* note 20, at 622.

579. 19 U.S. (6 Wheat.) 264, 404 (1821). And it is *how* the Court decides those questions, not whether it decides them, that will preserve its legitimacy. See *Wechsler, Toward Neutral Principles*, *supra* note 24, at 25-26.

the scope of the particular case. Nothing provides a more poignant illustration than the Article II issue in the 2000 election cases. The doctrine strikes at the heart of the separation of powers and the need for each branch to stay within its sphere to maintain the constitutional order.

Second, the end of the classical political question doctrine has a much broader secondary effect. The Supreme Court is effectively left alone to police the boundaries of its power.⁵⁸⁰ This is, perhaps, the most difficult of all the Court's tasks, for it requires the most extreme form of willpower. It also dramatically displays the tension that exists beneath the surface of all the Court's decisions. That is, when the Court is protecting individual rights against congressional action, deciding whether authority resides with the states or with Congress, or resolving controversies between the Executive and Congress, its own interest is not at the fore in the decision. Ostensibly, the Court is protecting one entity from another. When the Court decides whether the political question doctrine applies, however, what is merely implicit in those other decisions becomes explicit: the Court's institutional interests and strengths vis-à-vis the other branches.⁵⁸¹

Thus, when the Court conducts the threshold inquiry of whether a matter rests exclusively with another branch, it must inevitably weigh the advantages and disadvantages of judicial review versus pure political analysis. This process therefore highlights for the Court its own strengths and weaknesses, as well as the upsides and downsides of giving the question to Congress or the Executive.⁵⁸² This is a healthy analysis for the Court to undertake, for it highlights the functional concerns behind the separation of powers and forces the Court to take a more modest view of its own powers and abilities. Eliminating this jurisdictional question from the Court's tasks therefore helps to pave the way for a much broader vision of judicial supremacy and a much more limited view of deference to the political branches. The end of the doctrine thus threatens to disrupt our constitutional order and turn the Framers' vision of a constitutional conversation among three coordinate branches into a monologue by the Supreme Court.

580. Michael Stokes Paulsen has argued that the branches were intended by the Founders to be coordinate, and that none can determine the boundaries of the others. Paulsen, *The Most Dangerous Branch*, *supra* note 5, at 228–34.

581. See Easterbrook, *supra* note 516, at 925 (arguing that “[i]f judges may (and do) look after the interests of the judicial branch, there is no principled objection to the like power—and the like potential for misuse—in the President”); Katyal, *supra* note 392, at 1373 (“The standard argument against congressional determinations of constitutional questions—that Congress will self-interestedly preserve the constitutionality of its own legislation—similarly impugns the Supreme Court’s ability to reconsider its previous interpretation of constitutional criminal procedure.”).

582. See Eisgruber, *supra* note 5, at 371 (advocating “‘full-contact constitutional interpretation’: a system within which competing institutions with differing competencies and perspectives confront one another constructively and sometimes aggressively about how best to interpret constitutional principles”).

CONCLUSION

On its own, the political question doctrine might seem to be relatively insignificant—after all, it applies to a small subset of constitutional questions. Those questions, however, can have enormous significance. Perhaps even more importantly, the doctrine is part of a larger vision of the constitutional structure in which the institutional strengths and weaknesses of each branch are taken into account in resolving particular issues. The Court's utter disregard of the doctrine thus reflects a broader and more dangerous trend. The current Court appears to believe that it alone provides the final answer to almost all constitutional questions, while the interpretations of the other branches are to be accepted at the Court's discretion. This view fails to tap the resources that the political branches have to offer, namely their proximity and accountability to the people. The proximity gives Congress and the Executive greater access to information and the accountability makes them better barometers of popular sentiment than the Court. To be sure, the Court's central role is to buck popular sentiment to uphold the Constitution's protection of individual rights. But not all questions bear on individual rights to the same degree, and it is critical that the Court recognize that in some cases, its greatest strength—its independence and social isolation—can also be its greatest weakness.

Unfortunately, the current Court seems to believe that it is superior to the other branches on virtually all constitutional questions. That judicial immodesty inexorably led to the Court's entanglement in the Article II question presented by the 2000 presidential election. Far from recognizing their limitations to decide the controversy, the Justices were of the view that it was nothing less than their *duty* to lend their expertise to the questions. Justices Kennedy and Thomas, for example, recently testified before Congress that they had the "responsibility" to take the case.⁵⁸³ Justice Thomas stated that he would have "avoided getting involved in that difficult decision" if only "there was a way."⁵⁸⁴

Whatever one thinks of the *Bush* cases on their merits, the Court's belief that it had a constitutional duty to decide the cases before the state and federal political branches even had a chance to weigh in on the questions—let alone conclusively resolve them—is disconcerting. It belies a level of judicial immodesty that threatens to undermine the delicate constitutional balance of power. Thus, while the Supreme Court has made much of its role in preserving and protecting the separation of powers, it is blind to its own aggrandizement at the expense of the other branches. The political question doctrine has been one of the unfortunate casualties of that trend. But it does not appear to be the last.

583. Charles Lane, 2 Justices Defend Court's Intervention in Fla. Dispute, *Wash. Post*, Mar. 30, 2001, at A13.

584. *Id.*