

## ARTICLE III AND THE POLITICAL QUESTION DOCTRINE

*Scott Dodson*

**ABSTRACT**—Courts and commentators have often sourced the political question doctrine in Article III, a repository of other separation-of-powers doctrines applicable to the federal courts. *Rucho v. Common Cause*, a blockbuster political question case decided in 2019, explicitly tied the doctrine to Article III. But the historical development of the doctrine undermines the depth of that connection. Further, sourcing the doctrine in Article III leads to some very odd effects, including leaving state courts free to answer federal political questions. This Article argues that the source of the political question doctrine is in substantive law, not in Article III. Such an orientation helps explain a number of puzzling attributes of the doctrine, including why federal courts retain jurisdiction over political question cases, why state courts must follow the federal political question doctrine, and why some political questions can be delegated back to the courts. Refocusing the political question doctrine on substantive law, rather than on Article III, helps better allocate power among federal courts, state courts, and political branches.

**AUTHOR**—James Edgar Hervey Chair in Litigation, Geoffrey C. Hazard Jr. Distinguished Professor of Law, and Director of the Center for Litigation and Courts, UC Hastings Law. I thank those who shared reactions on early drafts, especially Tara Grove, Craig Konnoth, Mike Parsons, Zach Price, Adam Steinman, Alexander Tsesis, and Rivka Weill. This paper was selected for presentation at the 2021 ACS Constitutional Law Scholars Forum, the 2020 Loyola Constitutional Law Conference, and the Federal Courts Workshop at the 2020 SEALS Conference, and I am grateful for reactions I received at those events. It was also presented at the UC Hastings Law 10-10 Workshop and a 2021 AALS Conference panel on federal courts, and I thank those who offered very helpful comments there.

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### INTRODUCTION

Federal courts must dismiss a case—or decline to resolve an issue—presenting a “nonjusticiable political question.”<sup>1</sup> Though the doctrine has historical roots,<sup>2</sup> the modern incarnation of the political question doctrine was cast by *Baker v. Carr*, which famously articulated a six-factor test for determining whether a case involves a political question.<sup>3</sup> The first two factors remain prominent: “a textually demonstrable constitutional commitment of the issue to a coordinate political department” and “a lack of judicially discoverable and manageable standards for resolving [the issue].”<sup>4</sup> In all post-*Baker* cases finding nonjusticiability, at least one of these two factors is present.<sup>5</sup>

*Baker* called the political question doctrine “primarily a function of the separation of powers”<sup>6</sup> but did not purport to source the doctrine in any particular provision of the Constitution. Article III, a repository of other separation-of-powers doctrines applicable to the federal judiciary, makes

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<sup>1</sup> *Rucho v. Common Cause*, 139 S. Ct. 2484, 2494 (2019).

<sup>2</sup> See *infra* notes 53–55 and accompanying text.

<sup>3</sup> 369 U.S. 186, 217 (1962) (“Prominent on the surface of any case held to involve a political question is found[:] [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; [2] or a lack of judicially discoverable and manageable standards for resolving it; [3] or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; [4] or the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government; [5] or an unusual need for unquestioning adherence to a political decision already made; [6] or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.”).

<sup>4</sup> *Id.*

<sup>5</sup> See *infra* Part II.

<sup>6</sup> *Baker*, 369 U.S. at 210.

some sense,<sup>7</sup> and since *Baker*, both courts and commentators have rooted the political question doctrine in Article III's delegation to the federal courts of limited "judicial" power over only "cases" and "controversies."<sup>8</sup>

But a close read of the cases developing the political question doctrine casts serious doubt on a firm Article III source. Some opinions do, indeed, refer to Article III. Yet others speak to an unmoored value of separation of powers. Still others cast the political question doctrine as a merits question rather than a jurisdictional question.<sup>9</sup>

In addition to lacking firm support in the caselaw, sourcing the doctrine in Article III has had some very strange consequences. For one, an Article III source cannot explain why the Court has retained at least some authority to decide political questions in extreme cases. If Article III prevents federal courts from resolving a political question, then Article III should prevent federal courts from resolving the question no matter the circumstances. Yet the Court has hinted that it retains some authority to answer such questions.<sup>10</sup>

Additionally, an Article III-based doctrine leaves an unsettling role for state courts. Because Article III's limitations do not apply to state courts,<sup>11</sup> a political question doctrine derived from Article III would allow state courts to adjudicate important constitutional issues that federal courts could not examine. How odd would it be to learn that while the political question doctrine prevents the U.S. Supreme Court from reviewing the propriety of an impeachment trial of the President of the United States, the doctrine does not bar a state judge—perhaps from a state whose population and government officials strongly support the President—from doing so? Yet justices have endorsed the theory driving that result.<sup>12</sup>

I argue that Article III is *not* the source of the political question doctrine. Although application of the doctrine might have Article III implications, the primary source of the federal political question doctrine resides in the substantive law governing the question. Thus, review of a federal impeachment, for example, is a political question not because of Article III but because of the Impeachments Clause itself. This reorientation of the

<sup>7</sup> See *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006) ("The doctrines of mootness, ripeness, and political question all originate in Article III's 'case' or 'controversy' language, no less than standing does.").

<sup>8</sup> See *infra* Part I.

<sup>9</sup> See *infra* Part II.

<sup>10</sup> See *infra* Section III.A.

<sup>11</sup> See *ASARCO Inc. v. Kadish*, 490 U.S. 605, 617 (1989) ("We have recognized often that the constraints of Article III do not apply to state courts . . .").

<sup>12</sup> See, e.g., *Goldwater v. Carter*, 444 U.S. 996, 1005 n.2 (1979) (Rehnquist, J., joined by Burger, C.J., Stewart & Stevens, JJ., concurring) ("This Court, of course, may not prohibit state courts from deciding political questions . . .").

political question doctrine has several important ramifications that resolve many of the tensions associated with sourcing the doctrine in Article III.<sup>13</sup>

First, because Article III is not the source of the political question doctrine, federal courts retain jurisdiction over cases presenting political questions. Indeed, if the political question can be avoided or has already been answered by the appropriate decision-maker, then a federal court can decide a case presenting a political question on the merits. If the answer to an unanswered political question is a necessary condition to maintaining a claim or defense, then the federal court should stay the case until receiving an answer, dismiss the claim for failure to state a claim upon which relief can be granted, or strike the defense.

Second, because substantive federal law binds state courts under the Supremacy Clause, a substantive-law delegation of adjudicatory authority to a nonjudicial decision-maker under *Baker* Factor 1 must be binding on state courts as well. For example, because the Impeachments Clause grants the Senate “sole” power to “try” federal impeachments,<sup>14</sup> state courts have no more authority to “try” a federal impeachment than federal courts. However, if the political question arises only because of Factor 2—because the substantive law requires application of standards inappropriate for a federal court—a state court potentially could decide a political question even though a federal court could not. Although such asymmetry between state and federal courts poses problems generally, those problems are decidedly less forceful in the context of partisan gerrymandering, the only pure Factor 2 political question presently recognized.

Third, because political questions do not deprive courts of jurisdiction, courts retain authority to decide matters peripheral to the political question even if they cannot answer the political question. Peripheral matters include determining *which* decision-maker has constitutional authority under the substantive law to answer a political question and issuing orders protecting that decision-maker’s authority when a different putative decision-maker attempts to usurp that authority. If, for example, the President attempted unilaterally to declare war, the political question doctrine would not stop the judiciary from holding the presidential declaration unlawful because the Declare War Clause gives that power solely to Congress.<sup>15</sup>

Fourth, even if one substantive law makes an issue a political question, other substantive laws could grant judicial authority over the same subject. For example, although the Impeachments Clause prevents a federal court

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<sup>13</sup> These ramifications are discussed in *infra* Sections IV.B.1–IV.B.6.

<sup>14</sup> U.S. CONST. art. I, § 3, cl. 6.

<sup>15</sup> *See id.* art. I, § 8, cl. 11.

from trying an impeachment,<sup>16</sup> the Due Process Clause<sup>17</sup> might permit a federal court (or a state court) to exercise interpretive and adjudicatory authority over whether the Senate's trial comported with the Fifth Amendment.<sup>18</sup> A substantive-law focus on political questions, rather than an Article III focus, thus gives federal courts a limited role in some political question cases and helps explain why a challenge to a particular redistricting plan can be nonjusticiable under the Guarantee Clause but justiciable under the Equal Protection Clause.

Fifth, if the substantive law allocates adjudicatory authority to a particular decision-maker under a *Baker* Factor 1 political question, that decision-maker could, if consistent with the nondelegation doctrine, delegate that adjudicatory authority to a different decision-maker, including, potentially, a federal court. Thus, the federal courts—and state courts—could exercise adjudicatory authority over a Factor 1 political question under a delegation from the original decision-maker. Orienting the doctrine around substantive law helps explain why the Court has suggested that federal courts can hear cases under legislation to enforce the Guarantee Clause.

Sixth, a substantive-law focus harmonizes the federal political question doctrine with state political question doctrines. A state constitution that commits interpretive or adjudicatory authority of a provision to, say, the state governor might give rise to a political question in state court under state law. If so, then federal courts hearing the same claim would be required to reach the same result under vertical choice-of-law principles rather than looking to Article III. In the end, reorienting the political question doctrine away from Article III and toward substantive law creates a more sensible and workable doctrine.

This Article begins, in Part I, by setting out the contours of the modern political question doctrine and establishing its purported moorings in Article III. Part II details the development of the federal political question doctrine and reveals that, in contrast to current understandings of the doctrine, the political question doctrine has only a tenuous connection to Article III. Part III exposes two oddities of sourcing the political question doctrine in Article III. First, the doctrine reserves some federal judicial authority to police the outer bounds of otherwise nonjusticiable constitutional violations, a result inconsistent with a lack of Article III power. Second, an Article III source would, troublingly, allow state courts to adjudicate some federal political questions that federal courts could not. Part IV reorients the political question

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<sup>16</sup> *Id.* art. I, § 3, cl. 6.

<sup>17</sup> *Id.* amend. XIV, § 1.

<sup>18</sup> *Id.* amend. V.

doctrine around substantive law rather than Article III and explains how this reorientation has important effects—some reassuring, some surprising, and others disruptive—on existing doctrine and on the authority of state courts. The final picture is of a recalibrated political question doctrine, largely outside of Article III, that allocates decision-making authority more sensibly among nonjudicial actors, federal courts, and state courts.

### I. THE MODERN POLITICAL QUESTION DOCTRINE AND ARTICLE III

This Part describes the theory and scope of the modern political question doctrine and shows its purported connection to Article III.

The political question doctrine holds that some issues cannot be appropriately resolved by the federal courts and instead must be delegated to the political branches of the government. This doctrine “is primarily a function of the separation of powers.”<sup>19</sup> As Justice Felix Frankfurter once put it, the political question doctrine helps courts avoid the “political thicket” by recognizing that the Constitution leaves “the performance of many duties in our governmental scheme to depend on the fidelity of the executive and legislative action.”<sup>20</sup> Or, as more recent commentary has put it, “[t]he political question doctrine reflects a constitutional design that does not require the judiciary to supply the substantive content of all the Constitution’s provisions” but instead directs that “some questions rest within the absolute discretion of the political branches.”<sup>21</sup>

The political question doctrine thus furthers the goal of “assign[ing] the most politically controversial matters to those who are charged with making these difficult policy decisions.”<sup>22</sup> That goal finds justification in the republican ideal that elected officials make certain policy judgments for the nation, in the practical reality that the federal courts are ill-equipped to do so, and in the preservation mindset that the legitimacy of the federal courts depends upon their role as neutral adjudicators rather than political policymakers.<sup>23</sup>

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<sup>19</sup> *Baker v. Carr*, 369 U.S. 186, 210 (1962).

<sup>20</sup> *Colegrove v. Green*, 328 U.S. 549, 556 (1946).

<sup>21</sup> Rachel E. Barkow, *More Supreme Than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237, 239 (2002); see also Tara Leigh Grove, *The Lost History of the Political Question Doctrine*, 90 N.Y.U. L. REV. 1908, 1909 (2015) (“[T]he political question doctrine instructs that the courts may not decide certain issues . . . because that constitutional question is ‘committed’ to another branch.”).

<sup>22</sup> Daniel B. Rodriguez, *The Political Question Doctrine in State Constitutional Law*, 43 RUTGERS L.J. 573, 574 (2013).

<sup>23</sup> See Barkow, *supra* note 21, at 240, 301 (articulating courts’ institutional limitations); Samuel Issacharoff, *Political Judgments*, 68 U. CHI. L. REV. 637, 638 (2001) (exploring the use of the political question doctrine in protecting the Court’s legitimacy).

This goal collides with the “virtually unflagging” obligation of the federal courts to adjudicate questions properly before them.<sup>24</sup> The tension between judicial power and judicial restraint, exacerbated by the Constitution’s lack of clear guidance for resolving that tension,<sup>25</sup> has led to great debates about the scope and propriety of the political question doctrine. At one extreme, the late Professor Alexander Bickel urged the Court to readily use the doctrine for expediency or to preserve institutional legitimacy,<sup>26</sup> while, at the other, Professor Martin Redish believes it unconstitutional for the Supreme Court to abdicate its duty of judicial review.<sup>27</sup> In the middle, the late Professor Herbert Wechsler thought the doctrine should apply only when the Constitution expressly committed an adjudicatory decision to a body other than the federal courts.<sup>28</sup> Meanwhile, Professor Rachel Barkow sees the doctrine as a broad “spectrum of deference” owed by the federal courts to the political branches’ interpretations of the Constitution.<sup>29</sup> And Professor Louis Henkin questioned whether there is such a thing as a single, coherent political question doctrine.<sup>30</sup> It is fair to say that the political question doctrine is ill-defined, unsettled, and contentious.

Part of the difficulty arises from the challenge of sourcing the political question doctrine. Such a broad and powerful doctrine demands constitutional grounding, and looking to Article III is consonant with other limits on judicial power: standing, mootness, ripeness, and the prohibition on advisory opinions.<sup>31</sup> Some Founding Era evidence supports an Article III connection—during the Convention, James Madison argued that Article III’s grant of judicial power was meant to be “limited to cases of a Judiciary

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<sup>24</sup> *Colo. River Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976).

<sup>25</sup> See Henry P. Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363, 1364 (1973) (calling the text of Article III’s description of judicial power “sparse and unhelpful”); Adrian Vermeule, *Judicial History*, 108 YALE L.J. 1311, 1335 (1999) (“[Article III] says nothing about the procedures by which courts vested with the judicial power must or may consider and decide cases.”); see also *Honig v. Doe*, 484 U.S. 305, 340 (1988) (Scalia, J., dissenting) (declaring the case-or-controversy requirement an “ultimate circularity”).

<sup>26</sup> Alexander Bickel, *The Passive Virtues*, 75 HARV. L. REV. 40, 46 (1961).

<sup>27</sup> Martin H. Redish, *Judicial Review and the “Political Question,”* 79 NW. U. L. REV. 1031, 1060 (1985).

<sup>28</sup> Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 7–9 (1959).

<sup>29</sup> Barkow, *supra* note 21, at 319–20.

<sup>30</sup> Louis Henkin, *Is There a “Political Question” Doctrine?*, 85 YALE L.J. 597, 622–23 (1976).

<sup>31</sup> For opinions tying the political question doctrine to Article III doctrines, see *infra* notes 35–42.

Nature.”<sup>32</sup> Although other contemporaneous evidence is sparse,<sup>33</sup> scholars have concluded that the Framers intended for the judicial power in Article III to encapsulate only matters “appropriate for judicial resolution,”<sup>34</sup> especially as contrasted with “political” questions.

It is no surprise, then, that courts and many commentators have rooted the political question doctrine in Article III. The Supreme Court itself has done so numerous times since the 1960s:

- “Justiciability is the term of art employed to give expression to th[e] dual limitation placed upon federal courts by the case-and-controversy doctrine. . . . Thus, no justiciable controversy is presented when the parties seek adjudication of only a political question.”<sup>35</sup>
- Resolution of political questions is “inconsistent with the judicial function under Art. III.”<sup>36</sup>
- “[T]he concept of justiciability, which expresses the jurisdictional limitations imposed upon federal courts by the ‘case or controversy’ requirement of Art. III, embodies both the standing and political question doctrines upon which petitioners in part rely. . . . [T]he presence of a political question suffices to prevent the power of the federal judiciary from being invoked by the complaining party.”<sup>37</sup>
- The political question doctrine is one “of the doctrines that cluster about Article III.”<sup>38</sup>
- “The doctrines of mootness, ripeness, and political question all originate in Article III’s ‘case’ or ‘controversy’ language, no less than standing does.”<sup>39</sup>

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<sup>32</sup> 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 430 (Max Farrand ed., 1911) (statement of James Madison). The Supreme Court has linked Madison’s characterization to Article III’s case-or-controversy requirement. See *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 (2006).

<sup>33</sup> See Susan Bandes, *The Idea of a Case*, 42 STAN. L. REV. 227, 231 (1990) (“The records of the Constitutional Convention contain virtually no discussion of the subject, with the sole exception of James Madison’s observation . . .”). Somewhat differently, Alexander Hamilton implied that the Constitution committed some interpretive questions to branches other than the federal courts. THE FEDERALIST NO. 78, at 467 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (“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.” (emphasis added)).

<sup>34</sup> Ann Woolhandler & Michael G. Collins, *State Standing*, 81 VA. L. REV. 387, 400 (1995); see also STEWART JAY, MOST HUMBLE SERVANTS: THE ADVISORY ROLE OF EARLY JUDGES 60–61 (1997) (arguing that the Framers expected that federal courts would “act in the usual fashion of courts”).

<sup>35</sup> *Flast v. Cohen*, 392 U.S. 83, 95 (1968).

<sup>36</sup> *Sierra Club v. Morton*, 405 U.S. 727, 732 n.3 (1972).

<sup>37</sup> *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 215 (1974).

<sup>38</sup> *Allen v. Wright*, 468 U.S. 737, 750 (1984) (citation and internal quotation marks omitted).

<sup>39</sup> *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006).



- “Article III of the Constitution limits federal-court jurisdiction to ‘Cases’ and ‘Controversies.’ Those two words confine the business of federal courts to questions presented . . . in a form historically viewed as capable of resolution through the judicial process. It is therefore familiar learning that no justiciable ‘controversy’ exists when parties seek adjudication of a political question.”<sup>40</sup>
- Article III’s limitation of the judicial power to cases and controversies “mean[s] that federal courts can address only questions historically viewed as capable of resolution through the judicial process,” and if a case presents questions that involve no “judicially enforceable rights,” then “the claim is said to present a political question and to be nonjusticiable—outside the courts’ competence and therefore beyond the courts’ jurisdiction.”<sup>41</sup>

Justices in nonmajority opinions of the Court have articulated similar sentiments.<sup>42</sup>

Several courts of appeals have followed the Supreme Court’s lead. According to the Fifth Circuit, “The justiciability doctrines of standing, mootness, political question, and ripeness all originate in Article III’s ‘case’ or ‘controversy’ language.”<sup>43</sup> In the Eleventh Circuit, a political question is “not a ‘case or controversy’ as defined by Article III.”<sup>44</sup> The D.C. Circuit said, “The political question doctrine concerns the jurisdictional ‘case or controversy requirement’ of Article III of the Constitution.”<sup>45</sup> Many other lower courts link the political question doctrine to Article III.<sup>46</sup>

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<sup>40</sup> *Massachusetts v. EPA*, 549 U.S. 497, 516 (2007) (citation and some internal quotation marks omitted).

<sup>41</sup> *Rucho v. Common Cause*, 139 S. Ct. 2484, 2493–94 (2019) (citations and internal quotation marks omitted).

<sup>42</sup> *See, e.g., Zivotofsky v. Clinton*, 566 U.S. 189, 202 (2012) (Sotomayor, J., concurring) (opining that the doctrine recognizes “the limits that Article III imposes upon courts”); *Vieth v. Jubelirer*, 541 U.S. 267, 302–03 (2004) (Scalia, J., plurality opinion) (characterizing political questions as “beyond our Article III authority to adjudicate”).

<sup>43</sup> *Choice Inc. of Tex. v. Greenstein*, 691 F.3d 710, 715 (5th Cir. 2012).

<sup>44</sup> *Carmichael v. Kellogg, Brown & Root Servs., Inc.*, 572 F.3d 1271, 1280 (11th Cir. 2009).

<sup>45</sup> *Jaber v. United States*, 861 F.3d 241, 245 (D.C. Cir. 2017).

<sup>46</sup> *See, e.g., Al-Tamimi v. Adelson*, 916 F.3d 1, 7–8 (D.C. Cir. 2019) (linking the doctrine to Article III jurisdiction); *Ctr. for Biological Diversity v. Mattis*, 868 F.3d 803, 815 (9th Cir. 2017) (stating that, like other Article III doctrines, “the presence of a political question likewise deprives this court of jurisdiction”); *Spectrum Stores, Inc. v. Citgo Petroleum Corp.*, 632 F.3d 938, 948–49 (5th Cir. 2011) (tying the political question doctrine to Article III jurisdiction); *cf. John Harrison, The Political Question Doctrines*, 67 AM. U. L. REV. 457, 512–13 (2017) (noting “a substantial number” of courts tying the political question doctrine to Article III).

Prominent commentators have also sourced the political question doctrine in Article III. As Professor Tara Grove has documented, many commentators and most of the leading casebooks and treatises covering the doctrine in the wake of *Baker* considered the doctrine to be grounded in Article III.<sup>47</sup> More recently, Professor Rachel Barkow, in her important exegesis of the doctrine, stated: “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.’”<sup>48</sup> A few voices—namely Professor John Harrison and the venerable *Wright & Miller* treatise—have taken the opposite view by arguing that the doctrine has no basis in Article III,<sup>49</sup> but they advanced that position prior to *Rucho v. Common Cause*, in which the Court expressly held the political question doctrine to be tethered to Article III.<sup>50</sup> As I aim to show below, everyone has it wrong: Article III plays a role, but not as the doctrine’s source.

## II. THE DOCTRINE’S DEVELOPMENT

I begin with a close look, informed by recent historical scholarship,<sup>51</sup> at how the cases developing the political question doctrine and culminating in

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<sup>47</sup> Grove, *supra* note 21, at 1948–54 (reporting on the scholarly treatment). Some debate focused on the Court’s “passive virtues” rather than interrogating the doctrine’s connection to Article III. *See* Bickel, *supra* note 26, at 46; Wechsler, *supra* note 28, at 7–9. Professor Louis Henkin, writing in 1976, thought the doctrine was “an unnecessary, descriptive packaging of several established doctrines” that largely fell outside of Article III, but he also was not focused on the doctrine’s constitutional source. *See* Henkin, *supra* note 30, at 622–23. Further, Henkin fought against the *Baker* taxonomy; he did not consider Factor 2 at all (an omission that would be unreasonable today in light of *Rucho v. Common Cause*, 139 S. Ct. 2484, 2502 (2019) (relying on Factor 2)), and he was skeptical of any true Factor 1 cases. Henkin, *supra* note 30, at 605 n.26 (arguing that the Court could review the Senate’s impeachment proceedings).

<sup>48</sup> Barkow, *supra* note 21, at 241; *see also* Note, *Political Questions, Public Rights, and Sovereign Immunity*, 130 HARV. L. REV. 732, 742 (2016) (“[T]he political question doctrine also bars Article III adjudication of the merits.”); CHARLES ALAN WRIGHT & MARY KAY KANE, LAW OF FEDERAL COURTS 78 (8th ed. 2017) (identifying the political question doctrine as a “case or controversy” doctrine).

<sup>49</sup> Harrison, *supra* note 46, at 486; 13C CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3534.3 (3d ed. 2019) (“Article III categories provide no meaningful independent support for reasoning about political questions.”); Ron Park, Note, *Is the Political Question Doctrine Jurisdictional or Prudential?*, 6 U.C. IRVINE L. REV. 255, 258–59 (2016) (“[T]he political question doctrine . . . springs from separation of powers principles and not Article III . . . .”); *cf.* Grove, *supra* note 21, at 1939 (arguing that the pre-*Baker* doctrine “neither arose from Article III, nor was a hard-and-fast jurisdictional rule”). One other pre-*Rucho* treatise states, without explanation, that “the political question doctrine is not derived from Article III’s limitation of judicial power to ‘cases’ and ‘controversies.’” ERWIN CHEREMINSKY, FEDERAL JURISDICTION § 2.6.2 (5th ed. 2007).

<sup>50</sup> 139 S. Ct. at 2493–94.

<sup>51</sup> *See* Grove, *supra* note 21, at 1911 (“I argue that the current political question doctrine does not have the historical pedigree that scholars attribute to it. In fact, the current doctrine was not created until

the 2019 decision *Rucho v. Common Cause* treat its connection to Article III. Although some cases, such as the ones enumerated above, tie the political question doctrine to Article III, others do not mention Article III at all, and still others treat the doctrine as a question of merits rather than jurisdiction. The cases thus undermine both the characterization of the political question doctrine as derived from Article III and the argument that the political question doctrine is completely unconnected to Article III. The cases instead suggest a more nuanced connection between the political question doctrine and Article III.

Some commentators identify dictum in *Marbury v. Madison* as the first caselaw support for the doctrine<sup>52</sup>: “The province of the court is, solely, to decide on the rights of individuals . . . . Questions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court.”<sup>53</sup> This disjunctive language suggests two different—though clearly related—categories: questions “submitted to the executive” and questions that are “in their nature political.”<sup>54</sup> *Marbury* did not mention Article III in this context, but it is fair to say that *Marbury*’s language—“province of the court” and “in their nature political”—harkens to and contrasts with values of “judicial” power embodied in Article III.<sup>55</sup>

The concept took deeper root in *Luther v. Borden*, an antebellum case arising out of competing claims to the government of Rhode Island.<sup>56</sup> When an insurrection attempted to establish a new state government, the established government declared martial law and defeated the insurgents. Afterward, an insurgent sued government officials for trespass in federal court.<sup>57</sup> When the officials declared their actions lawful under martial law, the plaintiff responded that the government and its martial law were illegitimate.<sup>58</sup> The lower federal court considered evidence on the lawfulness

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the mid-twentieth century, when it was employed by the Supreme Court to entrench, rather than to undermine, its emerging supremacy over constitutional law.”)

<sup>52</sup> See, e.g., Aziz Z. Huq, *Removal as a Political Question*, 65 STAN. L. REV. 1, 20 (2013) (calling the case the first to “[i]ntimate[]” the doctrine).

<sup>53</sup> *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803).

<sup>54</sup> *Id.* at 170. For historical context of *Marbury*’s language in light of the circumstances of the case, see Grove, *supra* note 21, at 1937–39.

<sup>55</sup> Cf. Hon. John Marshall, Speech in the House of Representatives of the United States (Mar. 7, 1800), in 18 U.S. (5 Wheat.) app. 3, 17 (1820) (“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.” (emphasis omitted)).

<sup>56</sup> 48 U.S. (7 How.) 1, 2 (1849).

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 34–35.

of the government, subsequently found it to be lawful, and so directed the jury, which then found for the defendant.<sup>59</sup>

On appeal, the Supreme Court considered the Guarantee Clause, which states: “The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened), against domestic Violence.”<sup>60</sup> Because the guarantee is “political in its nature,” the Court reasoned, it “rests with Congress to decide what government is the established one in a State.”<sup>61</sup> Congress can do so by choosing which Representatives and Senators to admit to Congress.<sup>62</sup> Congress also can delegate to the President the obligations to “guarantee” and “protect” by authorizing the President to call forth the militia to suppress insurrections.<sup>63</sup> According to the Court, the President’s decision to mobilize the militia to help put down the insurrection was an assertion by the United States that the old government was lawful and thus republican in form.<sup>64</sup>

Because state governmental changes are “a question to be settled by the political power”—a political question—the Court reasoned, “the courts are bound to take notice of its decision, and to follow it.”<sup>65</sup> Accordingly, the Court chastised the lower federal court for taking evidence and independently determining the government’s lawfulness rather than deferring to the determination made by the political branches, though the Court nevertheless affirmed the lower court for reaching the right result on the merits.<sup>66</sup>

*Luther* uses the same “political in nature” terminology as that in *Marbury*—terminology that has often referred to matters outside the “judicial” power of Article III.<sup>67</sup> But *Luther* also focuses on the Guarantee

<sup>59</sup> *Id.* at 38.

<sup>60</sup> U.S. CONST. art. IV, § 4. For comprehensive exegeses of the Guarantee Clause, see Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 2 (1988); WILLIAM M. WIECEK, *THE GUARANTEE CLAUSE OF THE U.S. CONSTITUTION 1–7* (1972); and Ryan C. Williams, *The “Guarantee” Clause*, 132 HARV. L. REV. 602, 604–611 (2018).

<sup>61</sup> *Luther*, 48 U.S. (7 How.) at 42.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 43.

<sup>64</sup> *Id.* at 44. Whether the government was lawful under state law was settled by the state courts. *Id.* at 39–40.

<sup>65</sup> *Id.* at 47. For the argument that the Guarantee Clause does not present a nonjusticiable political question, see Erwin Chemerinsky, *Cases Under the Guarantee Clause Should Be Justiciable*, 65 U. COLO. L. REV. 849, 851–52 (1994). For the argument that claims that the federal government violated the Guarantee Clause should be justiciable, see Merritt, *supra* note 60, at 70–78.

<sup>66</sup> *Luther*, 48 U.S. (7 How.) at 46–47.

<sup>67</sup> See *supra* text accompanying note 54.

Clause and interprets its reference to the “United States” to mean “Congress.”<sup>68</sup> In applying that language, the Court resolved the case not by ordering a dismissal for lack of Article III power but rather by affirming on the merits based on the conclusive actions of Congress and its delegate, the President.<sup>69</sup> *Luther* thus blends the political-in-nature justification with a construction of the Guarantee Clause that allocates decision-making authority to a nonjudicial branch.

*Luther* does not disclaim all judicial authority to construe the Guarantee Clause.<sup>70</sup> The Court stated, in dictum: “Unquestionably a military government . . . would not be a republican government, and it would be the duty of Congress to overthrow it.”<sup>71</sup> In subsequent decades, the Court adjudicated a series of republican-in-form cases on the merits.<sup>72</sup>

But in 1912, the Court reinterpreted *Luther* and categorically excluded the Guarantee Clause from the judicial power in *Pacific States Telephone & Telegraph Co. v. Oregon*.<sup>73</sup> There, Oregon voters passed, by ballot initiative, a state constitutional amendment levying a tax on certain businesses.<sup>74</sup> When one such business refused to pay, the state sued for the tax and penalties, and in its answer, the business defended its lack of payment on the ground that the tax was unlawful because it was adopted through an initiative process contrary to the Guarantee Clause of the Constitution.<sup>75</sup> The answer was demurred, and the state courts sustained the demurrer, holding that the defense was justiciable but meritless.<sup>76</sup>

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<sup>68</sup> 48 U.S. (7 How.) at 43. This interpretation is contestable. See Chemerinsky, *supra* note 65, at 871 (arguing that “United States” includes the federal courts).

<sup>69</sup> Grove, *supra* note 21, at 1927–28.

<sup>70</sup> 48 U.S. (7 How.) at 45; see also *New York v. United States*, 505 U.S. 144, 185 (1992) (“[P]erhaps not all claims under the Guarantee Clause present nonjusticiable political questions.”); *Baker v. Carr*, 369 U.S. 186, 222 n.48 (1962) (opining that “the judiciary might be able to decide the limits of the meaning of ‘republican form’”). Arguably, *Luther* is not about the justiciability of claims under the Guarantee Clause at all. The question at issue was which government was lawful, not which was “republican.” However, *Luther* has been cast as a political question case since at least 1912. See *infra* text accompanying notes 73–81. I therefore treat it as part of the political question canon.

<sup>71</sup> *Luther*, 48 U.S. (7 How.) at 45.

<sup>72</sup> See *In re Duncan*, 139 U.S. 449, 461–62 (1891) (rejecting, on the merits, a challenge to a state statute on the ground that it was adopted in a manner inconsistent with the Guarantee Clause); *Minor v. Happersett*, 88 U.S. (21 Wall.) 162, 176 (1875) (holding the denial of women’s suffrage to be consistent with a republican form of government). Other cases construing the Guarantee Clause include *Coyle v. Smith*, 221 U.S. 559, 567–68 (1911); *South Carolina v. United States*, 199 U.S. 437, 454 (1905); *Kies v. Lowrey*, 199 U.S. 233, 239 (1905); and *Forsyth v. Hammond*, 166 U.S. 506, 519 (1897).

<sup>73</sup> 223 U.S. 118, 151 (1912).

<sup>74</sup> *Id.* at 133–35.

<sup>75</sup> *Id.* at 136.

<sup>76</sup> *State v. Pac. States Tel. & Tel. Co.*, 99 P. 427, 428 (Or. 1909).

On writ of error, the Supreme Court framed the question as “call[ing] upon us to decide whether it is the duty of the courts or the province of Congress to determine when a state has ceased to be republican in form and to enforce the guaranty of the Constitution on that subject.”<sup>77</sup> The Court, citing *Luther*, wrote: “[T]hat question has long since been determined by this court . . . to be political in character, and therefore not cognizable by the judicial power, but solely committed by the Constitution to the judgment of Congress.”<sup>78</sup> Whether the initiative procedure rendered the state government nonrepublican was a question “within the scope of the powers conferred upon Congress, and not, therefore, within the reach of judicial power.”<sup>79</sup> Unlike *Luther*, which used Congress’s and the President’s actions to rule on the merits, *Pacific States* dismissed the writ for lack of jurisdiction, presumably under Article III.<sup>80</sup> This result allowed the state court decision—which held on the merits that Oregon’s initiative process was consistent with the Guarantee Clause—to stand.

Over the next fifty years, the Court used *Luther* and *Pacific States* to expand the political question doctrine into other areas, including Article V’s amendment process and foreign-relations decisions by the political branches.<sup>81</sup> Although the expansion was ad hoc and undertheorized, the Court continued to refer to the twin elements of the doctrine—the contrast between the political and the judicial and the commitment of authority to nonjudicial actors—without concretely localizing the doctrine in Article III.

In the 1962 case *Baker v. Carr*, considered to be the foundation of the modern political question doctrine,<sup>82</sup> the Court purported to synthesize the

<sup>77</sup> *Pac. States*, 223 U.S. at 133.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 150–51.

<sup>80</sup> *See id.* (“[I]t follows that the case presented is not within our jurisdiction, and the writ of error must therefore be, and it is, dismissed for want of jurisdiction.”).

<sup>81</sup> *See* *Coleman v. Miller*, 307 U.S. 433, 456 (1939) (plurality opinion) (concluding that the time for ratification was for Congress to determine and involved nonjudicial criteria); *id.* at 457–59 (Black, J., concurring) (reasoning that Congress has “sole and complete control over the amending process, subject to no judicial review” and that “[t]he process itself is ‘political’ in its entirety . . . and is not subject to judicial guidance, control or interference at any point”); *Oetjen v. Cent. Leather Co.*, 246 U.S. 297, 302 (1918) (“The conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative—‘the political’—Departments . . . , and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision.”); *Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948) (“[T]he very nature of executive decisions as to foreign policy is political, not judicial.”). In *Colegrove v. Green*, a plurality would have held challenges to state electoral districting to be nonjusticiable. 328 U.S. 549, 552, 554 (1946) (plurality opinion).

<sup>82</sup> *See, e.g.*, Nat Stern, *Don’t Answer That: Revisiting the Political Question Doctrine in State Courts*, 21 U. PA. J. CONST. L. 153, 158 (2018); WRIGHT ET AL., *supra* note 49, § 3534 (calling the case “classic”). Some commentators have argued that *Baker* dramatically changed the political question doctrine from

previous cases into a more formulaic test for the doctrine's application.<sup>83</sup> *Baker* involved a claim that the failure of Tennessee to update its apportionment statute since 1901, despite substantial redistribution of the state population, violated the Equal Protection Clause by giving some voters more voting power than others.<sup>84</sup> The lower court held that "no claim was stated upon which relief could be granted" because "the matter is considered unsuited to judicial inquiry or adjustment" and thus "fail[s] to state a justiciable cause of action."<sup>85</sup>

The Supreme Court reversed.<sup>86</sup> In discussing the political question doctrine, the Court did not cite to Article III or reference its language directly. Yet, in a separate section finding jurisdiction, the Court expressly stated that the claim fell within Article III.<sup>87</sup> Instead, the Court located the political question doctrine in a vague generalization of judicial capacity and separation of powers.<sup>88</sup> Justiciability, the Court explained, depends upon "whether the duty asserted can be judicially identified and its breach judicially determined, and whether protection for the right asserted can be judicially molded."<sup>89</sup> Summarizing precedent, the Court formulated a six-factor test for nonjusticiability:

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. Unless one of these formulations is

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one of deference to the political branches' factual determinations to one of judicial supremacy. *See* Grove, *supra* note 21, at 1911–13, 1962–64.

<sup>83</sup> *See* *Baker v. Carr*, 369 U.S. 186, 210–217 (1962).

<sup>84</sup> *Id.* at 188–95.

<sup>85</sup> *Id.* at 188, 196.

<sup>86</sup> *Id.* at 237.

<sup>87</sup> *Id.* at 199.

<sup>88</sup> *Id.* at 210 ("The nonjusticiability of a political question is primarily a function of the separation of powers.").

<sup>89</sup> *Id.* at 198.

inextricable from the case at bar, there should be no dismissal for non-justiciability on the ground of a political question's presence.<sup>90</sup>

Applying these factors, the Court found the plaintiffs' claim under the Equal Protection Clause justiciable. Under the first *Baker* factor, the Court could find "no question decided, or to be decided, by a political branch of government coequal with this Court."<sup>91</sup> Under Factor 2, "[j]udicial standards under the Equal Protection Clause are well developed and familiar" enough to make such a challenge judicially cognizable.<sup>92</sup> And no other factor favored nonjusticiability.

Since *Baker*, the Court has relied almost exclusively on the first two factors in applying the political question doctrine.<sup>93</sup> In applying those factors, the Court has found nonjusticiable political questions in three contexts—training the National Guard, Senate impeachment trials, and partisan gerrymandering<sup>94</sup>—while rejecting the political question doctrine in challenges to Congress's power to expel its members and to the constitutionality of a federal statute allowing Americans born in Jerusalem to choose to have "Israel" listed on their passport as their place of birth.<sup>95</sup> A brief explanation of each illuminates the modern doctrine's scope and ties to Article III.<sup>96</sup>

In *Powell v. McCormack*, in 1969, the House of Representatives refused to seat Representative Adam Clayton Powell, Jr. after finding that he had embezzled House funds.<sup>97</sup> Powell filed suit in federal district court seeking a declaratory judgment that his exclusion was unlawful because he met the constitutional qualifications.<sup>98</sup> Although the Constitution states that "[e]ach

<sup>90</sup> *Id.* at 217. Dissatisfaction with *Baker*'s factors abounds. *See, e.g.*, Robert J. Pushaw, Jr., *Judicial Review and the Political Question Doctrine: Reviving the Federalist "Rebuttable Presumption" Analysis*, 80 N.C. L. REV. 1165, 1175 (2002) ("*Baker*'s six factors cannot meaningfully distinguish 'political' questions from justiciable 'legal' ones.>").

<sup>91</sup> *Baker*, 369 U.S. at 226.

<sup>92</sup> *Id.*

<sup>93</sup> Williams, *supra* note 60, at 680–81.

<sup>94</sup> Gilligan v. Morgan, 413 U.S. 1, 11–12 (1973) (National Guard); Nixon v. United States, 506 U.S. 224, 237–38 (1993) (impeachment); Rucho v. Common Cause, 139 S. Ct. 2484, 2507–08 (2019) (partisan gerrymandering).

<sup>95</sup> Powell v. McCormack, 395 U.S. 486, 512–13 (1969) (House expulsion); Zivotofsky v. Clinton, 566 U.S. 189, 194 (2012) (Jerusalem case).

<sup>96</sup> In passing, the Court also rejected the political question doctrine in claims challenging Congress's plenary authority over American Indian tribes, the assertion of executive privilege in response to a congressional subpoena, and the President's authority to disregard a treaty. *See* County of Oneida v. Oneida Indian Nation, 470 U.S. 226, 248–50 (1985); United States v. Nixon, 418 U.S. 683, 692–97 (1974); Japan Whaling Ass'n v. Am. Cetacean Soc'y, 478 U.S. 221, 229–30 (1986). None of these cases sheds useful light on the thesis of this Article.

<sup>97</sup> 395 U.S. at 492–93.

<sup>98</sup> *Id.* at 489.



House shall be the Judge of the . . . Qualifications of its own Members,”<sup>99</sup> the Supreme Court held that provision to authorize the House to determine whether the constitutional qualifications are met but not whether other reasons for expulsion are constitutionally permissible.<sup>100</sup>

Like *Baker*, the Court distinguished the doctrine from subject matter jurisdiction<sup>101</sup> and, without citing Article III, reaffirmed that the political question doctrine depends upon the constitutional separation of powers.<sup>102</sup> Almost all of the Court’s analysis of the political question doctrine—some twenty-seven pages—focused on the meaning of the Qualifications Clauses in Article I.<sup>103</sup> After concluding that the Qualifications Clauses did not, under *Baker* Factor 1, allocate decision-making authority away from the federal courts on whether the House could unseat a member who satisfied all of the constitutional qualifications, the Court then summarily rejected application of the other five *Baker* factors.<sup>104</sup>

*Gilligan v. Morgan*, decided in 1973, involved a lawsuit for violations of the Due Process Clause based on the alleged negligent training of National Guard reservists.<sup>105</sup> The plaintiffs did not seek damages but rather asked the district court to “assume continuing regulatory jurisdiction over the activities of the Ohio National Guard” and to “establish standards for the training, kind of weapons and scope and kind of orders to control the actions of the National Guard.”<sup>106</sup>

The Supreme Court held such remedies inappropriate for federal courts. The Court relied primarily on *Baker* Factor 1.<sup>107</sup> The Militia Clause of Article I vests in Congress the power “[t]o provide for organizing, arming, and disciplining, the Militia, . . . reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia

<sup>99</sup> U.S. CONST. art. I, § 5, cl. 1.

<sup>100</sup> *Powell*, 395 U.S. at 522; *see also* *Nixon v. United States*, 506 U.S. 224, 237 (1993) (“The decision as to whether a Member satisfied these qualifications was placed with the House, but the decision as to what these qualifications consisted of was not.”).

<sup>101</sup> *See Baker v. Carr*, 369 U.S. 186, 198 (1961) (“The distinction between [lack of federal jurisdiction and nonjusticiability] is significant.”); *Powell*, 395 U.S. at 512 (“[T]here is a significant difference between determining whether a federal court has ‘jurisdiction of the subject matter’ and determining whether a cause over which a court has subject matter jurisdiction is ‘justiciable.’”).

<sup>102</sup> *Powell*, 395 U.S. at 518–19.

<sup>103</sup> *See id.* at 521–47; *cf. Nixon*, 506 U.S. at 237 (“Our conclusion in *Powell* was based on the fixed meaning of ‘[q]ualifications’ set forth in Art. I, § 2.”).

<sup>104</sup> *Powell*, 395 U.S. at 548–49. The Court noted that other provisions—including the Guarantee Clause and the Fourteenth Amendment—might impose qualifications outside of Article I. *Id.* at 520 n.41.

<sup>105</sup> 413 U.S. 1, 1 (1973).

<sup>106</sup> *Id.* at 5–6.

<sup>107</sup> *See Barkow*, *supra* note 21, at 268–70.

according to the discipline prescribed by Congress.”<sup>108</sup> As the Court reasoned:

[T]hat provision is explicit that the Congress shall have the responsibility for organizing, arming, and disciplining the Militia (now the National Guard), with certain responsibilities being reserved to the respective States. Congress has enacted appropriate legislation . . . and has also authorized the President—as the Commander in Chief of the Armed Forces—to prescribe regulations governing organization and discipline of the National Guard. . . . The relief sought by respondents, requiring initial judicial review and continuing surveillance by a federal court over the training, weaponry, and orders of the Guard, would therefore embrace critical areas of responsibility vested by the Constitution in the Legislative and Executive Branches of the Government.<sup>109</sup>

The Court continued:

It would be difficult to think of a clearer example of the type of governmental action that was intended by the Constitution to be left to the political branches directly responsible—as the Judicial Branch is not—to the electoral process. Moreover, it is difficult to conceive of an area of governmental activity in which the courts have less competence. . . . The ultimate responsibility for these decisions is appropriately vested in branches of the government which are periodically subject to electoral accountability.<sup>110</sup>

The Court did not rely on Article III or intimate that the political question doctrine removed the case from Article III “judicial power,” as *Pacific States* seemed to have done.<sup>111</sup> Instead, the Court ordered the case dismissed on the merits under Rule 12(b)(6) for failure to state a claim upon which relief could be granted,<sup>112</sup> as *Baker* suggested would be appropriate.<sup>113</sup>

In *Nixon v. United States*, decided in 1993, the Court considered whether the federal courts could review the constitutionality of a Senate impeachment conviction of a federal judge when the Senate used a committee to take evidence.<sup>114</sup> After his conviction, Walter Nixon sued in district court for a declaration that his conviction was void on the ground that the taking of evidence by a committee violated the constitutional direction that the Senate try impeachments.<sup>115</sup>

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<sup>108</sup> U.S. CONST. art. I, § 8, cl. 16.

<sup>109</sup> *Gilligan*, 413 U.S. at 6–7.

<sup>110</sup> *Id.* at 10.

<sup>111</sup> See *supra* notes 77–80 and accompanying text.

<sup>112</sup> *Gilligan*, 413 U.S. at 5.

<sup>113</sup> See *Baker v. Carr*, 369 U.S. 186, 196 (1962).

<sup>114</sup> 506 U.S. 224, 224 (1993).

<sup>115</sup> *Id.* at 227–28.

The Court concluded that, under Factor 1, the Constitution committed the interpretation of “try” to the Senate because the Senate has the “sole” power over impeachments.<sup>116</sup> The Court relied on *Baker* Factor 2 to bolster this conclusion: the vagaries of the word “try” helped convince the Court that the Constitution meant to leave the definition of that word to the Senate.<sup>117</sup> Together, those features made the question nonjusticiable under the Impeachments Clause.<sup>118</sup> Two concurrences suggested that extreme abuses of the Senate’s impeachment power—such as conviction by coin flip—might warrant judicial review.<sup>119</sup> No opinion cited to Article III, and the Court appears to have resolved the case on nonjurisdictional grounds.<sup>120</sup>

*Zivotofsky v. Clinton* presented the issue of whether a federal statute allowing Americans born in Jerusalem to choose to have “Israel” listed on their passport as their place of birth unconstitutionally interfered with the President’s authority over foreign affairs.<sup>121</sup> Zivotofsky was born in Jerusalem; his parents, American citizens, sued the State Department to have “Israel” listed on his passport. The lower courts dismissed for lack of jurisdiction based on the political question doctrine.<sup>122</sup>

The Supreme Court reversed. It characterized the political question doctrine as “a narrow exception” to the obligation of a federal court to decide a case before it.<sup>123</sup> In setting out the contours of the doctrine, the Court mentioned only *Baker* Factors 1 and 2.<sup>124</sup> Applying these factors, the Court contrasted the question of whether Jerusalem is part of Israel (perhaps a

<sup>116</sup> *Id.* at 229–33.

<sup>117</sup> *Id.* at 228–29 (“[T]he lack of judicially manageable standards may strengthen the conclusion that there is a textually demonstrable commitment to a coordinate branch.”); *id.* at 230 (concluding that the word “try” “lacks sufficient precision to afford any judicially manageable standard of review of the Senate’s actions”).

<sup>118</sup> *Id.* at 238. The Court also pointed to other factors, including the need for finality of presidential impeachments and the importance of preserving the Senate’s impeachment check on the judiciary. *Id.* at 234–36.

<sup>119</sup> *Id.* at 239 (White, J., concurring) (“Even taking a wholly practical approach, I would prefer not to announce an unreviewable discretion in the Senate to ignore completely the constitutional direction to ‘try’ impeachment cases.”); *id.* at 253–54 (Souter, J., concurring) (“One can . . . envision different and unusual circumstances that might justify a more searching review of impeachment proceedings. If the Senate were to act in a manner seriously threatening the integrity of its results, convicting, say, upon a coin toss . . .”).

<sup>120</sup> The district court held that it did have subject matter jurisdiction but nonetheless dismissed for lack of justiciability. *Nixon v. United States*, 744 F. Supp. 9, 11–12, 14 (D.D.C. 1990). The Supreme Court affirmed that result, and two justices who would have held the claim justiciable but meritless concurred in the judgment. *Nixon*, 506 U.S. at 239 (White, J., concurring). Those circumstances indicate that the Supreme Court agreed that the political question doctrine warrants a nonjurisdictional dismissal.

<sup>121</sup> 566 U.S. 189, 191–92 (2012).

<sup>122</sup> *Id.* at 191.

<sup>123</sup> *Id.* at 195.

<sup>124</sup> *Id.*

political question entrusted to the President by Article II) with the legal question of whether the congressional statute conflicts with the President's constitutional powers (an ordinary question for judicial resolution). The latter question, the Court held, was not a political question.<sup>125</sup>

The Court's opinion does not identify the source of the political question doctrine, but, in concurrence, Justice Sonya Sotomayor explained her view that the doctrine "recognizes the limits that Article III imposes upon courts and accords appropriate respect to the other branches' exercise of their own constitutional powers."<sup>126</sup> She then attempted to group the six *Baker* factors: Factor 1 is on its own, in that "the court lacks authority" because "the Constitution itself requires that another branch resolve the question presented";<sup>127</sup> Factors 2 and 3 "reflect circumstances in which a dispute calls for decision-making beyond courts' competence" and thus "beyond the judicial role envisioned by Article III";<sup>128</sup> and Factors 4 through 6 "address circumstances in which prudence may counsel against a court's resolution of an issue."<sup>129</sup>

*Rucho v. Common Cause*,<sup>130</sup> decided in 2019, considered whether partisan gerrymandering—drawing voting districts with imbalances among the major political parties—presented nonjusticiable political questions.<sup>131</sup> The Constitution provides that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators."<sup>132</sup> But state authority to set districts for elections, even absent congressional legislation, is not unfettered. States cannot, for example, set districts that violate the Equal Protection Clause.<sup>133</sup>

The Court has acknowledged that some (but not all) partisan gerrymandering could be unconstitutional<sup>134</sup> but, prior to *Rucho*, twice failed

<sup>125</sup> *Id.* at 196.

<sup>126</sup> *Id.* at 202 (Sotomayor, J., concurring).

<sup>127</sup> *Id.* at 203.

<sup>128</sup> *Id.* at 203–04.

<sup>129</sup> *Id.* at 204.

<sup>130</sup> 139 S. Ct. 2484 (2019).

<sup>131</sup> For an extensive treatment of partisan gerrymandering, see ERIK J. ENGSTROM, *PARTISAN GERRYMANDERING AND THE CONSTRUCTION OF AMERICAN DEMOCRACY* (2013).

<sup>132</sup> U.S. CONST. art. I, § 4.

<sup>133</sup> *Baker v. Carr*, 369 U.S. 186, 226 (1962).

<sup>134</sup> *See* *Ariz. State Legis. v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2658 (2015) (stating that partisan gerrymanders violate democratic principles); *Gaffney v. Cummings*, 412 U.S. 735, 752–54 (1973) ("It would be idle, we think, to contend that *any* political consideration taken into account in fashioning a reapportionment plan is sufficient to invalidate it." (emphasis added)).

to produce a majority opinion adopting a standard for determining unconstitutionality.<sup>135</sup> *Rucho* held that the task of setting standards was beyond the Court’s capacity, and thus, partisan-gerrymandering claims are nonjusticiable political questions.<sup>136</sup>

*Rucho* resolved two appeals. One involved a Republican redistricting plan in North Carolina; the other, a Democratic plan in Maryland.<sup>137</sup> The evidence overwhelmingly proved that each party in power had drawn district lines intentionally, and nearly exclusively, for the purpose of maximizing the elected number of its party’s candidates; the redistricting plans in each state passed on party-line votes in the state legislatures.<sup>138</sup> Federal district courts struck down both states’ redistricting plans on the basis of the First Amendment, and the court hearing the North Carolina case also found violations of the Equal Protection Clause and Article I.<sup>139</sup>

On appeal, the Supreme Court directly tied the political question doctrine to Article III. Article III, the Court said, has been understood “to mean that federal courts can address only questions historically viewed as capable of resolution through the judicial process.”<sup>140</sup> If a case presents questions that involve no “judicially enforceable rights” or “that lack judicially discoverable and manageable standards,” the Court explained, then “the claim is said to present a ‘political question’ and to be nonjusticiable—outside the courts’ competence and therefore beyond the courts’ jurisdiction.”<sup>141</sup> In contrast with other post-*Baker* cases, *Rucho* thus defines a political question as being outside the jurisdiction granted to federal courts by Article III.

Importantly, the Court disclaimed reliance on *Baker* Factor 1. After all, the Court previously had exercised authority to review the constitutionality of gerrymandered districts in vote-dilution and race-discrimination cases, so what made partisan gerrymanders political questions was not some textual commitment of congressional districting to a coordinate branch.<sup>142</sup> Instead, the Court held, partisan-gerrymandering claims, unlike racial-

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<sup>135</sup> See *Vieth v. Jubelirer*, 541 U.S. 267, 271 (2004) (plurality opinion); *Davis v. Bandemer*, 478 U.S. 109, 113 (1986).

<sup>136</sup> *Rucho v. Common Cause*, 139 S. Ct. 2484, 2506–07 (2019).

<sup>137</sup> *Id.* at 2491–93.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.* at 2492–93.

<sup>140</sup> *Id.* at 2493–94 (internal quotation marks omitted).

<sup>141</sup> *Id.* at 2494 (some internal quotation marks omitted).

<sup>142</sup> *Id.* at 2495–96 (rejecting the argument that “the Framers set aside electoral issues such as the one before us as questions that only Congress can resolve” by stating “[w]e do not agree” and by pointing to cases holding “that there is a role for the courts with respect to at least some issues that could arise from a State’s drawing of congressional districts”).

gerrymandering claims or one-person-one-vote claims, lack judicially manageable standards for resolution under *Baker* Factor 2 because distinguishing constitutional from unconstitutional partisan gerrymanders would require standards that are “political, not legal” and that therefore are “beyond the competence of the federal courts.”<sup>143</sup> The Court concluded:

Federal judges have no license to reallocate political power between the two major political parties, with no plausible grant of authority in the Constitution, and no legal standards to limit and direct their decisions. Judicial action must be governed by *standard*, by *rule*, and must be principled, rational, and based upon reasoned distinctions found in the Constitution or laws. Judicial review of partisan gerrymandering does not meet those basic requirements.<sup>144</sup>

The Court therefore vacated the district courts’ judgments and “remanded with instructions to dismiss for lack of jurisdiction.”<sup>145</sup>

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These cases reveal an unsettled relationship between the political question doctrine and Article III. The Court has alternatively grounded the doctrine in Article III (expressly in *Rucho* and effectively in *Pacific States*), distinguished the doctrine from Article III (*Powell, Baker*), and ignored Article III (*Nixon, Gilligan, Zivotofsky, Luther*). The cases thus suggest that uncovering the source of the political question doctrine demands deeper analysis.

### III. THE ODDITIES OF AN ARTICLE III SOURCE

In addition to its ambivalent historical pedigree, sourcing the political question doctrine in Article III causes two oddities. First, an Article III source is inconsistent both with the Court’s resolution of some political question cases as merits-based dismissals and with the Court’s reservation of authority to police the outer bounds of otherwise nonjusticiable constitutional violations. Second, an Article III source leaves anomalous space for state courts to adjudicate constitutional political questions that federal courts could not.

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<sup>143</sup> *Id.* at 2500.

<sup>144</sup> *Id.* at 2507 (internal quotation marks omitted) (quoting *Vieth v. Jubelirer*, 541 U.S. 267, 278 (2004) (plurality opinion)).

<sup>145</sup> *Id.* at 2508.

### A. Dismissals and Reservation of Authority

Lack of Article III authority typically results in a jurisdictional dismissal.<sup>146</sup> Without Article III jurisdiction, the Court has intoned, “the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.”<sup>147</sup> So important is Article III that a court cannot dismiss on the merits without first assuring itself of jurisdiction.<sup>148</sup>

If Article III is the source of the political question doctrine, then political question dismissals must be for lack of jurisdiction. The Court in two political question cases—*Rucho* and *Pacific States*—did indeed dismiss for lack of jurisdiction.<sup>149</sup> But the Court characterized political questions as nonjurisdictional in others. *Luther* held a question under the Guarantee Clause to be committed to Congress but then applied Congress’s answer to affirm the lower court’s judgment on the merits.<sup>150</sup> *Baker* specifically distinguished subject matter jurisdiction from nonjusticiability, which it characterized, using merits terminology, as a failure to state a claim upon which relief can be granted.<sup>151</sup> So did *Powell*.<sup>152</sup> *Gilligan*, after finding a political question under the Militia Clause, dismissed on the merits under Rule 12(b)(6).<sup>153</sup> *Nixon* appears to have deemed a dismissal for nonjusticiability to be a nonjurisdictional dismissal.<sup>154</sup> If the political question doctrine divests a federal court of Article III authority, then these political question cases ordered the wrong remedy.

Another feature of political question cases that undermines the doctrine’s connection to Article III is the Court’s insistence that federal courts do have power to decide some political questions in extreme cases. Without Article III judicial power to decide a question, a federal court should lack power to decide the question no matter how extreme the circumstances.<sup>155</sup> But that is not how the Court has approached the political question doctrine. To the contrary, the Court has often reserved authority to decide political questions under extreme circumstances.

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<sup>146</sup> See *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 88–89, 109–10 (1998).

<sup>147</sup> *Id.* at 94 (quoting *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1869)).

<sup>148</sup> See *Sinochem Int’l Co. v. Malay. Int’l Shipping Corp.*, 549 U.S. 422, 430–31 (2007).

<sup>149</sup> *Rucho*, 139 S. Ct. at 2508; *Pac. States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118, 151 (1912).

<sup>150</sup> *Luther v. Borden*, 48 U.S. (7 How.) 1, 46–47 (1849).

<sup>151</sup> *Baker v. Carr*, 369 U.S. 186, 200–01 (1962).

<sup>152</sup> *Powell v. McCormack*, 395 U.S. 486, 512 (1969).

<sup>153</sup> *Gilligan v. Morgan*, 413 U.S. 1, 5–6 (1973).

<sup>154</sup> See *supra* note 120.

<sup>155</sup> See *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 94–95 (1998) (denying the power to decide a cause of action without Article III jurisdiction).

For example, although the Court has often stated that Guarantee Clause claims present political questions, the Court has also decided some Guarantee Clause claims on their merits and has suggested that whether the Court will decide a Guarantee Clause claim depends upon the circumstances.<sup>156</sup> Similarly, in *Nixon*, although the Court held the question of whether the Senate could use a committee to take impeachment evidence to be nonjusticiable,<sup>157</sup> the two concurrences suggested that extreme abuses of the Senate’s impeachment power could warrant judicial review.<sup>158</sup> Retaining the authority to exercise judicial review in extreme cases otherwise outside of Article III is inconsistent with the way Article III generally works.<sup>159</sup> The Court’s insistence that it retains authority to decide some political questions, along with the Court’s dispositions of some political question cases on nonjurisdictional grounds, belie the idea that the political question doctrine is an expression of the limits of judicial power under Article III.

### B. Political Question Doctrine Asymmetry

An Article III-sourced political question doctrine leaves room for state courts to answer political questions that the federal courts cannot. This Section describes this asymmetry between state and federal courts and its discomforts.

#### I. State Court–Federal Court Asymmetry

Article III establishes a defined role for the federal courts in the federal system by restricting federal courts to exercising “judicial” power over specified “cases” and “controversies.”<sup>160</sup> These limits do not apply to state courts.<sup>161</sup> The Supreme Court has repeatedly confirmed that state courts are bound neither by Article III justiciability limits—even when they adjudicate

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<sup>156</sup> See *supra* notes 70–72 and accompanying text.

<sup>157</sup> *Nixon v. United States*, 506 U.S. 224, 229–31 (1993).

<sup>158</sup> *Id.* at 239 (White, J., concurring); *id.* at 253–54 (Souter, J., concurring).

<sup>159</sup> Cf. *Rucho v. Common Cause*, 139 S. Ct. 2484, 2507 (2019) (“[T]he dissent essentially embraces the argument that . . . ‘this Court *can* address the problem of partisan gerrymandering because it *must*.’ That is not the test of our authority under the Constitution; that document instead ‘confines the federal courts to a properly judicial role.’” (citation omitted)).

<sup>160</sup> U.S. CONST. art. III, § 2.

<sup>161</sup> See 16B WRIGHT ET AL., *supra* note 49, § 4015 (“As matters stand, state courts may determine federal constitutional questions even though Supreme Court review is blocked on such justiciability grounds as lack of standing, mootness, or political question doctrine.” (footnotes omitted)).



questions of federal law<sup>162</sup>—nor by federal notions of separation of powers.<sup>163</sup> The federal political question doctrine, if grounded in Article III, then also should not bind state courts.<sup>164</sup> An Article III source for the political question doctrine creates a potential asymmetry between the scope of federal judicial power and the scope of state judicial power to adjudicate questions of federal law.

Of course, states could adopt for their courts the same limits that Article III imposes on federal courts. But many do not.<sup>165</sup> State constitutions are, generally speaking, documents of default authorization; state courts, unlike federal courts, have all powers not prohibited to them by their constitutions.<sup>166</sup> To the extent a state constitution even has a section analogous to Article III,<sup>167</sup> the state constitutional language usually differs from that of Article III in ways that broaden the scope of state judicial power.<sup>168</sup>

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<sup>162</sup> See *ASARCO Inc. v. Kadish*, 490 U.S. 605, 617 (1989) (“[T]he constraints of Article III do not apply to state courts, and accordingly the state courts are not bound by the limitations of a case or controversy or other federal rules of justiciability even when they address issues of federal law . . . .”); *N.Y. State Club Ass’n v. City of New York*, 487 U.S. 1, 8 n.2 (1988) (“[T]he special limitations that Article III of the Constitution imposes on the jurisdiction of the federal courts are not binding on the state courts. The States are thus left free . . . to determine matters that would not satisfy the more stringent requirement in the federal courts that an actual ‘case’ or ‘controversy’ be presented for resolution.” (citation omitted)).

<sup>163</sup> See *Dreyer v. Illinois*, 187 U.S. 71, 84 (1902) (“Whether the legislative, executive, and judicial powers of a State shall be kept altogether distinct and separate, or whether persons or collections of persons belonging to one department may . . . exert powers which . . . pertain to another department of government, is for the determination of the State.”).

<sup>164</sup> See *Goldwater v. Carter*, 444 U.S. 996, 1005 n.2 (1979) (Rehnquist, J., concurring) (“This Court, of course, may not prohibit state courts from deciding political questions, any more than it may prohibit them from deciding questions that are moot . . . .”). State and territorial courts tend to agree that the federal political question doctrine does not bind them. See, e.g., *Freeman v. Grain Processing Corp.*, 848 N.W.2d 58, 91 (Iowa 2014) (“[T]he United States Supreme Court has made clear that the federal political question doctrine does not apply to state courts.”); *Bryan v. Fawkes*, 61 V.I. 201, 218 n.6 (2014) (similar); *State v. Campbell Cnty. Sch. Dist.*, 32 P.3d 325, 334 (Wyo. 2001) (similar). But see *Huddleston v. Sawyer*, 932 P.2d 1145, 1158–59 (Or. 1997) (holding that because the federal political question doctrine decisions are federal law, they are binding on state courts).

<sup>165</sup> See 1 STEVEN H. STEINGLASS, SECTION 1983 LITIGATION IN STATE COURTS § 6.2 n.3 (2018) (collecting cases). The states depart considerably from the Article III standing doctrine. See, e.g., *Provo City Corp. v. Willden*, 768 P.2d 455, 456 (Utah 1989) (“[T]he federal rules on standing, as such, are not binding on state courts, and the article III constitutional restrictions . . . are not necessarily relevant to the development of the standing rules that apply in Utah’s state courts.”).

<sup>166</sup> See Helen Hershkoff, *State Courts and the “Passive Virtues”*: Rethinking the Judicial Function, 114 HARV. L. REV. 1833, 1887–88 (2001).

<sup>167</sup> Some do not. E.g., *Keller v. Flaherty*, 600 N.E.2d 736, 738 (Ohio Ct. App. 1991) (“Ohio has no constitutional counterpart to Section 2, Article III . . . .”).

<sup>168</sup> See G. ALAN TARR & MARY CORNELIA ALDIS PORTER, STATE SUPREME COURTS IN STATE AND NATION 43 (1988).

Most state constitutions, for example, lack a case-or-controversy requirement.<sup>169</sup> While Article III's case-or-controversy requirement bars federal courts from issuing advisory opinions,<sup>170</sup> many states authorize or even require their state courts to issue advisory opinions.<sup>171</sup> Massachusetts courts have issued advisory opinions since at least 1781.<sup>172</sup> Other courts have issued advisory opinions even without express authority to do so.<sup>173</sup> And state court advisory opinions are not restricted to questions of state law; to the contrary, state courts have routinely issued advisory opinions on questions of federal law.<sup>174</sup>

Similarly, state courts usually employ more relaxed standing requirements than federal courts.<sup>175</sup> Some have virtually no standing

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<sup>169</sup> See Thomas B. Bennett, *The Paradox of Exclusive State-Court Jurisdiction over Federal Claims*, 105 MINN. L. REV. 1211, 1231 (2021) (“No state constitution imposes the ‘case or controversy’ requirement that the federal Constitution does.”); Hershkoff, *supra* note 166, at 1879–80 (making the same observation); see also *Life of the Land v. Land Use Comm’n*, 623 P.2d 431, 438 (Haw. 1981) (“[T]he courts of Hawaii are not subject to a ‘cases or controversies’ limitation like that imposed upon the federal judiciary by Article III . . .”).

<sup>170</sup> See *U.S. Nat’l Bank of Or. v. Indep. Ins. Agents of Am.*, 508 U.S. 439, 446 (1993); James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 153 (1893). The prohibition on advisory opinions stems from *Hayburn’s Case*, 2 U.S. (2 Dall.) 409, 410 n.\*(a) (1791), and refusal of the Court to answer questions posed by President George Washington’s Cabinet. See Letter from John Jay, C.J., U.S. Sup. Ct., and Associate Justices, U.S. Sup. Ct., to George Washington, President of the United States (July 20, 1793), in 3 THE CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY 487, 487–88 (H. Johnson ed., New York, G. P. Putnam’s Sons 1891); Letter from John Jay, C.J., U.S. Sup. Ct., and Associate Justices, U.S. Sup. Ct., to George Washington, President of the United States (Aug., 8, 1793), in THE CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY, *supra*, at 488, 488–89.

<sup>171</sup> See Hershkoff, *supra* note 166, at 1845–46; MEL A. TOPF, A DOUBTFUL AND PERILOUS EXPERIMENT 17–27, 187–89 (2011). A recent high-profile example is *Advisory Opinion to the Governor re: Implementation of Amendment 4, the Voting Restoration Amendment*, SC19-1341 (Fla. Jan. 16, 2020) (advising the Governor on the meaning of the state constitutional amendment extending voting rights to felons who complete “all terms of sentence” as applied to financial obligations like fines and restitution).

<sup>172</sup> See OPINIONS OF THE JUSTICES TO THE SENATE AND HOUSE OF REPRESENTATIVES, in 126 Mass. 547, 548 (Supp. 1880) (reporting advisory opinions from justices given on February 22, 1781).

<sup>173</sup> See *Scheibel v. Pavlak*, 282 N.W.2d 843, 851 (Minn. 1979) (issuing an advisory opinion to the Minnesota House of Representatives despite lacking jurisdiction).

<sup>174</sup> See William A. Fletcher, *The “Case or Controversy” Requirement in State Court Adjudication of Federal Questions*, 78 CALIF. L. REV. 263, 269 n.27 (1990) (citing cases); cf. *Doremus v. Bd. of Educ.*, 342 U.S. 429, 434 (1952) (“We do not undertake to say that a state court may not render an opinion on a federal constitutional question even under such circumstances that it can be regarded only as advisory.”).

<sup>175</sup> See generally Bennett, *supra* note 169, at 1232–33 & fig.1 (reporting a “kaleidoscope of state standing rules”); Hershkoff, *supra* note 166, at 1836–37 (reporting that state courts have issued advisory opinions, granted taxpayers standing, and decided moot cases); Wyatt Sassman, *A Survey of Constitutional Standing in State Courts*, 8 KY. J. EQUINE, AGRIC. & NAT. RES. L. 349, 349 (2016) (surveying the standing law of all fifty states).

requirements at all.<sup>176</sup> In Michigan, application of federal standing requirements might even *violate* the Michigan constitution.<sup>177</sup> These expansive exercises of judicial power—beyond the Article III confines applicable to federal court—authorize state court jurisdiction even when deciding questions of federal law.<sup>178</sup>

With regard to state political question doctrines specifically, some states have adopted the federal standard for themselves as a matter of state law.<sup>179</sup> Those adoptions likely stem from the gravitational force that federal law, especially as interpreted by the Supreme Court, exerts on the interpretation of state law, such that state doctrines often mirror their federal counterparts even in nonpreemptive areas such as Article III.<sup>180</sup>

Other states, however, have resisted that pull and developed distinctive political question doctrines.<sup>181</sup> Differentiation from the federal doctrine makes sense in light of the more active role state courts have traditionally

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<sup>176</sup> *E.g.*, *Lansing Sch. Ass'n v. Lansing Bd. of Educ.*, 792 N.W.2d 686, 692, 699 (Mich. 2010) (“[A] litigant has standing whenever there is a legal cause of action.”); *Ohio Acad. of Trial Laws v. Sheward*, 715 N.E.2d 1062, 1081–82 (Ohio 1999) (“State courts need not become enmeshed in the federal complexities and technicalities involving standing and are free to reject procedural frustrations in favor of just and expeditious determination on the ultimate merits.”).

<sup>177</sup> *Lansing Sch. Ass'n*, 792 N.W.2d at 693–94 & n.9.

<sup>178</sup> *See generally* Matthew I. Hall, *Asymmetrical Jurisdiction*, 58 UCLA L. REV. 1257, 1257 (2011) (discussing this problem in the context of standing and proposing the restoration of “the understanding of the Supreme Court’s appellate jurisdiction that was held by the founding generation: namely, that it extends to review of all state court determinations of federal law that are adverse to the claimed federal right”).

<sup>179</sup> *E.g.*, *Kan. Bldg. Indus. Workers Comp. Fund v. State*, 359 P.3d 33, 43 (Kan. 2015) (discussing the state court’s application of “the political question doctrine through *Baker*’s lens”). For catalogues of state political question doctrines, see Stern, *supra* note 82, at 180–88, and Nat Stern, *The Political Question Doctrine in State Courts*, 35 S.C. L. REV. 405, 408–12 (1984).

<sup>180</sup> *See generally* Scott Dodson, *The Gravitational Force of Federal Law*, 164 U. PA. L. REV. 703, 707–29 (2016) (exploring the widespread phenomenon—pervasive among constitutions, statutes, rules of court, and judicial decisions—of federal law’s pull on state courts and state lawmakers to emulate nonpreemptive federal law).

<sup>181</sup> *E.g.*, *Lobato v. State*, 218 P.3d 358, 368–72 (Colo. 2009) (en banc) (rejecting the *Baker* factors and instead adopting a more expansive scope of judicial review consistent with the role of Colorado courts in the Colorado system); *Backman v. Sec’y of the Commonwealth*, 441 N.E.2d 523, 527 (Mass. 1982) (rejecting the political question doctrine as inconsistent with the obligation of Massachusetts courts to adjudicate claims of unconstitutionality). Territorial courts have expressed similar sentiments. *See, e.g.*, *Bryan v. Fawkes*, 61 V.I. 201, 218 n.6 (2014) (“Hansen has provided this Court with no legal argument as to why this Court should incorporate [the political question doctrine] into Virgin Islands jurisprudence.”).

played in policy and politics.<sup>182</sup> Because state judges are often elected,<sup>183</sup> state court adjudication is “very much in the close shadow of political choice.”<sup>184</sup> State courts have a long history of common law lawmaking that includes creation, development, and implementation of legal policy in ways that operate in concert with the other branches of state government and blur the separation of powers.<sup>185</sup> Further, “because state constitutions often include positive rights and regulatory norms, their texts explicitly engage state courts in substantive areas that have historically been outside the Article III domain.”<sup>186</sup>

And structurally, state constitutions do not generally prescribe as rigid a separation of powers as the federal Constitution. For many state constitutions, as former Connecticut Supreme Court Justice Ellen Peters wrote, “the governing principle is not separation but networking.”<sup>187</sup> State courts are often working partners with the state political branches in setting and enforcing state regulatory policy.<sup>188</sup> In *Burford v. Sun Oil Co.*, for example, the Supreme Court adopted an abstention doctrine based in part on the close connection between state courts and state agencies:

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<sup>182</sup> Stern, *supra* note 82, at 180 (“Critics of the lockstep approach to state constitutional law can make a forceful case that state supreme courts should carve out their own distinctive conceptions of political questions.”).

<sup>183</sup> See Scott Dodson, *Accountability and Transparency in U.S. Courts*, in *ACCOUNTABILITY E TRANSPARÊNCIA DA JUSTIÇA CIVIL: UMA PERSPECTIVA COMPARADA [ACCOUNTABILITY AND TRANSPARENCY IN CIVIL JUSTICE: A COMPARATIVE PERSPECTIVE]* 273, 278–80 (Daniel Mitidiero ed., 2019).

<sup>184</sup> Rodriguez, *supra* note 22, at 576.

<sup>185</sup> See Hershkoff, *supra* note 166, at 1888; *Republican Party of Minn. v. White*, 536 U.S. 765, 784 (2002) (“Not only do state-court judges possess the power to ‘make’ common law, but they have the immense power to shape the States’ constitutions as well.”). For historical accounts, see Hendrik Hartog, *The Public Law of a County Court: Judicial Government in Eighteenth Century Massachusetts*, 20 AM. J. LEGAL HIST. 282, 284 (1976), and MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW: 1780–1860*, at xii (1977).

<sup>186</sup> Hershkoff, *supra* note 166, at 1889–90; see also Rodriguez, *supra* note 22, at 585 (“[S]tate constitutional rules are comparatively more detailed; we can therefore expect courts to find in the documents more discernible and manageable standards.”).

<sup>187</sup> Christine Durham, *The Judicial Branch in State Government: Parables of Law, Politics, and Power*, 76 N.Y.U. L. REV. 1601, 1608–09 (2001) (quoting Ellen A. Peters, *Getting Away from the Federal Paradigm: Separation of Powers in State Courts*, 81 MINN. L. REV. 1543, 1561 (1997) (emphasis omitted)); see also Rodriguez, *supra* note 22, at 576 (noting that “[s]tate constitutional rules emerge from distinct, and often vexing, political predicaments” and that “legal decisions, including matters of constitutional interpretation, are made very much in the close shadow of political choice”). There are exceptions. See, e.g., *Westerfield v. Ward*, 599 S.W.3d 738, 744 (Ky. 2019) (noting a “uniquely stringent separation of powers provision” in the Kentucky state constitution); *Bredesen v. Tenn. Jud. Selection Comm’n*, 214 S.W.3d 419, 434 (Tenn. 2007) (same for Tennessee).

<sup>188</sup> See Ann Woolhandler & Michael G. Collins, *Judicial Federalism and the Administrative States*, 87 CALIF. L. REV. 613, 619–20 (1999).

In describing the relation of the Texas court to the [Texas Railroad] Commission no useful purpose will be served by attempting to label the court's position as legislative or judicial—suffice it to say that the Texas courts are working partners with the Railroad Commission in the business of creating a regulatory system for the oil industry. . . . The court may even formulate new standards for the Commission's administrative practice and suggest that the Commission adopt them.<sup>189</sup>

State courts often perform nonjudicial functions inconsistent with Article III's limits on "judicial" power.<sup>190</sup> In Tennessee, a council of state judges appoints the state attorney general.<sup>191</sup> Judges in North Carolina can convene grand juries.<sup>192</sup> A reported practice in Virginia is for legislators to initiate a "friendly" suit testing the constitutionality of controversial legislation.<sup>193</sup> State courts regulate the bench and bar and participate as advisers in law-reform efforts.<sup>194</sup> As Justice Christine Durham put it: "[B]ecause of state court rule-making functions, management and administrative functions, we have a very regular and quite vigorous and ongoing relationship with the other branches of state government."<sup>195</sup>

These differences in state court practices suggest that some claims could be justiciable in state court under the relevant state political question doctrine even though those same claims would be nonjusticiable in federal court under an Article III-based federal political question doctrine. In application, states do appear to assert more judicial authority under their political question doctrines than federal courts would under the federal doctrine. Some state courts, for example, find judicially manageable

<sup>189</sup> 319 U.S. 315, 325–26 (1943) (citations omitted).

<sup>190</sup> See Hershkoff, *supra* note 166, at 1905 (reporting that the practice of state governmental branches "tends . . . toward blended functions that allow for complementary and overlapping activity by the different branches and foci of power"); Robert F. Williams, *State Constitutional Law Processes*, 24 WM. & MARY L. REV. 169, 208 (1983) (noting "the nonadjudicatory functions of state supreme courts").

<sup>191</sup> See Hershkoff, *supra* note 166, at 1837.

<sup>192</sup> See *In re Alamance Cnty. Ct. Facilities*, 405 S.W.2d 125, 126 (N.C. 1991).

<sup>193</sup> See THOMAS R. MORRIS, *THE VIRGINIA SUPREME COURT: AN INSTITUTIONAL AND POLITICAL ANALYSIS* 132 (1975).

<sup>194</sup> Hershkoff, *supra* note 166, at 1873 n.214 ("Today many states' judicial branches participate in law reform efforts through quasi-bureaucratic processes that are separate from adjudication but nevertheless accepted as part of the judicial function."); James P. White, *State Supreme Courts as Regulators of the Legal Profession Part I: Supreme Courts and Legal Education Reform*, 72 NOTRE DAME L. REV. 1155, 1165 (1997). In a pandemic-fueled 2020, several state supreme courts adopted a "diploma privilege" exempting 2020 law graduates from having to take the state bar exam as a condition to being admitted to the bar. See Rachel Stone, *Push for Diploma Privilege Unites Law Grads Nationwide*, LAW360 (July 8, 2020), <https://www.law360.com/articles/1289972/push-for-diploma-privilege-unites-law-grads-nationwide> [<https://perma.cc/M58K-V6RV>].

<sup>195</sup> Christine Durham, Justice, Utah Sup. Ct., Remarks on the Influence of International Human Rights Law on State Courts and State Constitutions at the Annual Meeting of the American Society of International Law (Mar. 28, 1996), *in* 90 AM. SOC'Y INT'L L. PROC. 259, 261 (1996).

standards in state constitutional provisions that seem to defy them, including requirements that the state provide “quality” or “efficient” public schools<sup>196</sup> and the application of the Pennsylvania constitution’s free and equal elections clause to partisan gerrymandering.<sup>197</sup> The Massachusetts high court has rejected nonjusticiability in hearing a constitutional challenge to the procedural validity of a state constitutional amendment,<sup>198</sup> and other state courts have held justiciable challenges to state impeachment trials and questions involving annexation,<sup>199</sup> all of which have nonjusticiable analogues in federal court.<sup>200</sup>

Although these cases addressed state law claims, there is no Article III bar to state court justiciability of analogous *federal* claims, even if those claims would be nonjusticiable in federal court. Indeed, several state courts have adjudicated claims under the Guarantee Clause that would likely be deemed nonjusticiable in federal court.<sup>201</sup> For example, the South Carolina supreme court recently held that the Guarantee Clause provides “no independent, federal right . . . prohibiting taxation without representation” and thus ordered summary judgment entered for the state defendants in a § 1983 claim against them.<sup>202</sup> The court did *not* hold the claim nonjusticiable as a political question, even though it noted that federal courts would tend to do so.<sup>203</sup> Similarly, in 2012, the West Virginia supreme court rejected, on the merits, an Equal Protection Clause challenge to state electoral districts as an unconstitutional partisan gerrymander,<sup>204</sup> akin to the claim that *Rucho* held to be nonjusticiable in federal court.<sup>205</sup> An Article III-grounded federal political question doctrine permits these asymmetrical results.

## 2. *Asymmetry Oddities*

This federal–state asymmetry creates a number of oddities. The primary oddity is that state courts could become the principal judicial forum for adjudicating important questions of federal law.

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<sup>196</sup> See *Columbia Falls Elementary Sch. Dist. No. 6 v. State*, 109 P.3d 257, 260–61 (Mont. 2005); *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 212–13 (Ky. 1989).

<sup>197</sup> See *League of Women Voters of Pa. v. Commonwealth*, 178 A.3d 737, 741 (Pa. 2018) (“While federal courts have, to date, been unable to settle on a workable standard by which to assess such claims under the federal Constitution, we find no such barriers under our great Pennsylvania charter.”).

<sup>198</sup> See *Backman v. Sec’y of the Commonwealth*, 441 N.E.2d 523, 526–27 (Mass. 1982).

<sup>199</sup> See Hershkoff, *supra* note 166, at 1863–66.

<sup>200</sup> See *Nixon v. United States*, 506 U.S. 224, 226 (1993) (federal impeachment); *Coleman v. Miller*, 307 U.S. 433, 456 (1939) (federal constitutional amendment).

<sup>201</sup> See, e.g., *infra* notes 220–234 (discussing cases).

<sup>202</sup> *Campbell v. Hilton Head No. 1 Pub. Serv. Dist.*, 580 S.E.2d 137, 140 (S.C. 2003).

<sup>203</sup> *Id.* at 140–41, 140 n.7.

<sup>204</sup> See *State v. Tennant*, 730 S.E.2d 368, 390 (W. Va. 2012).

<sup>205</sup> See *supra* note 142.

This problem has arisen in the analogous context of standing. As Judge William Fletcher has documented, “state courts have been able to decide questions of federal law when, under the standards of article III, a litigant has no standing, or a dispute is moot or unripe.”<sup>206</sup> Further, because Article III limits apply to Supreme Court review of such state court decisions,<sup>207</sup> many state court decisions will be unreviewable by the Supreme Court.<sup>208</sup> Standing asymmetry has created, in Professor Matthew Hall’s words, “a jurisdictional gap—a category of cases in which state courts may exercise jurisdiction over questions of federal law, but the Supreme Court may not review their decisions on appeal.”<sup>209</sup> Taking advantage of this asymmetry, plaintiffs increasingly resort to state courts in cases presenting Article III standing problems in federal court.<sup>210</sup>

Although standing asymmetry certainly has its ills, its prevention of federal court resolution of the particular legal question is likely to be, in most cases, limited and temporary. For instance, Article III standing prevents federal court adjudication only with respect to the particular parties in the litigation rather than with respect to the legal issue at hand.<sup>211</sup> Even though a particular plaintiff might not have standing, *some* plaintiff likely will have standing to litigate the issue in federal court and eventually enable authoritative resolution by the Supreme Court. Further, the Court has held that it has Article III authority to review a state court judgment entered against a defendant even if the plaintiff lacked Article III standing; the defendant’s loss effectively gives the defendant standing to seek review in the Supreme Court.<sup>212</sup> So even despite standing asymmetry, federal questions should eventually receive federal court answers.

By contrast, an Article III-based political question doctrine risks causing far more severe asymmetry because the doctrine is based on the issue rather than the parties. If the political question doctrine deprives federal courts of Article III authority over the question itself, then it deprives them

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<sup>206</sup> Fletcher, *supra* note 174, at 264.

<sup>207</sup> Cramp v. Bd. of Pub. Instruction, 368 U.S. 278, 282–83 (1961).

<sup>208</sup> See Doremus v. Bd. of Educ., 342 U.S. 429, 434–35 (1952) (dismissing a state court appeal for lack of Article III standing but leaving the underlying state court judgment intact). For exploration, see Robert A. Schapiro, *Toward a Theory of Interactive Federalism*, 91 IOWA L. REV. 243, 304 (2005).

<sup>209</sup> Hall, *supra* note 178, at 1259.

<sup>210</sup> See Bennett, *supra* note 169, at 1229. In one example, the California supreme court upheld the standing of California taxpayers to challenge, under federal civil rights laws, the involuntary administration of psychotropic drugs on California prisoners, see *Keyhea v. Rushen*, 5 Cal. Rptr. 2d 762, 765–66 (1992), a basis for standing rejected by the U.S. Supreme Court, see *Hein v. Freedom from Religion Foundation, Inc.*, 551 U.S. 587, 593 (2007) (rejecting most taxpayer standing in federal courts).

<sup>211</sup> See David Marcus, *The Public Interest Class Action*, 104 GEO. L.J. 777, 808–09 (2016).

<sup>212</sup> See *ASARCO Inc. v. Kadish*, 490 U.S. 605, 617–18 (1989).

of authority with respect to that question for *all* parties and no matter which party seeks review in the Supreme Court.

As Judge Fletcher has argued, Article III asymmetry hinders “the Supreme Court’s most important institutional function,” which “is to serve as the final appellate tribunal on questions of federal law.”<sup>213</sup> Jurists have long worried that state judges might be swayed by local prejudices, perhaps because of their connection to their electorates, even when adjudicating questions of federal law.<sup>214</sup> States might also disagree about the meaning of federal law, creating a patchwork of interpretations of law that ought to be uniform throughout the nation.<sup>215</sup> The states’ own variegated political question doctrines might make a question justiciable only in *some* state courts—meaning that citizens of one state might be able to seek adjudication of a particular question of federal law while citizens of other states could not. Supreme Court review would be unavailable to correct those state court errors and instances of disuniformity,<sup>216</sup> resulting in “public mischiefs that . . . would be truly deplorable.”<sup>217</sup>

To illustrate, consider the Guarantee Clause. Although the federal courts consider nearly all Guarantee Clause questions nonjusticiable,<sup>218</sup> and

<sup>213</sup> Fletcher, *supra* note 174, at 283–84.

<sup>214</sup> See *Martin v. Hunter’s Lessee*, 14 U.S. (1 Wheat.) 304, 347 (1816) (“[S]tate attachments, state prejudices, state jealousies, and state interests might sometimes obstruct, or control, or be supposed to obstruct or control, the regular administration of justice.”). For a more modern debate on the relative competence of federal and state courts adjudicating federal questions, see Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105, 1131 (1977) (finding federal courts superior); Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205, 230 (1985) (same); and Paul M. Bator, *The State Courts and Federal Constitutional Litigation*, 22 WM. & MARY L. REV. 605, 633–35 (1981) (defending state court adjudication of federal constitutional questions).

<sup>215</sup> Cf. *Martin*, 14 U.S. (1 Wheat.) at 347–48 (noting “the importance, and even necessity of uniformity of decisions throughout the whole United States”).

<sup>216</sup> Although the Framers understood that state courts would hear federal claims, see THE FEDERALIST NO. 82, at 555 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (“[I]n every case in which they were not expressly excluded by the future acts of the national legislature, [state courts] will of course take cognizance of the causes to which those acts may give birth.”), they assumed the Supreme Court would be available to review state court decisions. See *id.* NO. 81, at 542 (“That there ought to be one court of supreme and final jurisdiction, is a proposition which is not likely to be contested.”); *id.* NO. 22, at 143–44 (arguing for Supreme Court appellate jurisdiction over state courts to create uniformity); James E. Pfander, *Federal Supremacy, State Court Inferiority, and the Constitutionality of Jurisdiction-Stripping Legislation*, 101 NW. U. L. REV. 191, 201–19 (2007) (detailing the history).

<sup>217</sup> See *Martin*, 14 U.S. (1 Wheat.) at 348; see also THE FEDERALIST NO. 80, at 535 (describing the prospect of state court final authority over federal law as “a hydra in government, from which nothing but contradiction and confusion can proceed”).

<sup>218</sup> See WRIGHT ET AL., *supra* note 49, § 3534.1 n.138 (citing cases). *Contra* *New York v. United States*, 505 U.S. 144, 185 (1992) (“[P]erhaps not all claims under the Guarantee Clause present nonjusticiable political questions.”); *Kerr v. Hickenlooper*, 744 F.3d 1156, 1172–81 (10th Cir. 2014)



although the U.S. Supreme Court in *Pacific States* held that challenges to state constitutional referendum and initiative processes were nonjusticiable political questions in federal court,<sup>219</sup> some (though not all) state courts have been more willing to adjudicate such questions. Some state courts have concluded, on the merits, that ballot initiatives and referenda do not contravene the Guarantee Clause.<sup>220</sup> *Pacific States* itself, because it dismissed the writ of error for lack of jurisdiction,<sup>221</sup> allowed the underlying Oregon Supreme Court decision on the merits to stand, which had upheld an earlier state case construing the Guarantee Clause:

[T]he defendants are met with the contention that the question as to whether an amendment to the Constitution has been regularly proposed, adopted, and ratified is for the political department of the government, not for the courts . . . . [W]e have carefully examined our right to inquire into the regularity of the adoption of the proposed amendment, and are clear that its validity is a judicial, and not a political, question. . . .

Nor do we think the amendment void because in conflict with [the Guarantee Clause]. The purpose of this provision of the Constitution is to protect the people of the several states against aristocratic and monarchical invasions, and against insurrections and domestic violence, and to prevent them from abolishing a republican form of government. . . . But it does not forbid them from amending or changing their Constitution in any way they may see fit, so long as none of these results is accomplished. No particular style of government is designated in the Constitution as republican, nor is its exact form in any way prescribed. A republican form of government is a government administered by representatives chosen or appointed by the people or by their authority. . . . [T]he initiative and referendum amendment does not abolish or destroy the republican form of government, or substitute another in its place.<sup>222</sup>

A number of other state courts have held similarly.<sup>223</sup> Meanwhile, other state courts have held such Guarantee Clause claims nonjusticiable in state

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(deciding a Guarantee Clause challenge to a Colorado ballot initiative to require voter approval for virtually any tax or spending increase was not precluded by the political question doctrine).

<sup>219</sup> *Pac. States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118, 133, 150–51 (1912).

<sup>220</sup> See, e.g., *State v. Davis*, 943 P.2d 283, 286 (Wash. 1997) (dismissing the appeal after conducting an “examination of the record” revealing many precedents finding initiative laws to be constitutional under the Guarantee Clause); *In re Initiative Petition No. 348*, 820 P.2d 772, 780–81 (Okla. 1991) (upholding the state initiative process against a challenge under the Guarantee Clause). For a discussion, see Hans A. Linde, *When Is Initiative Lawmaking Not “Republican Government”?*, 17 HASTINGS CONST. L.Q. 159, 161 (1989).

<sup>221</sup> 223 U.S. at 151 (“[I]t follows that the case presented is not within our jurisdiction, and the writ of error must therefore be, and it is, dismissed for want of jurisdiction.”).

<sup>222</sup> *Kadderly v. City of Portland*, 74 P. 710, 714–15, 719–20 (Or. 1903); see also *State v. Pac. States Tel. & Tel. Co.*, 99 P. 427, 428 (Or. 1909) (citing this passage).

<sup>223</sup> See *In re Initiative Petition No. 348*, 820 P.2d at 780–81 (holding the state initiative process constitutional under the Guarantee Clause).

court.<sup>224</sup> Thus, some states have held initiative or referendum processes to be consistent with the Guarantee Clause, while other states refuse to resolve the issue. Various other state court interpretations of the Guarantee Clause exist, including that it is consistent with a state constitutional provision requiring approval of state laws by the county electorate,<sup>225</sup> that it requires state taxes to be used only for public purposes,<sup>226</sup> that it is consistent with a “three-strikes” law,<sup>227</sup> that it allows a state to give the governor the power to issue executive orders subject to a legislative veto,<sup>228</sup> and that it prevents American Indian tribes from asserting immunity to state election laws.<sup>229</sup> This patchwork of interpretations of the federal Constitution means differing applicability in different states, and different opportunities for enforcement in different states. Meanwhile, the U.S. Supreme Court can supply neither uniformity nor correction.

In addition to these practical problems, state court adjudication of the Guarantee Clause is legally odd because the Guarantee Clause specifically obligates the “United States”—not the states themselves—to guarantee to the states a republican form of government.<sup>230</sup> True, the clause implicitly obligates the states to create and maintain a republican form of government.<sup>231</sup> But as interpreted by the Supreme Court, the Guarantee Clause specifically allocates to the United States the power to *decide* when that government is republican and when it is not.<sup>232</sup> Indeed, *Luther* made enough of this directive—interpreting the “United States” to mean, specifically, Congress and the President—as to exclude the federal courts from independently resolving a republican-in-form challenge.<sup>233</sup> Yet deciding whether a state government is republican in form under the clause is precisely what state courts have purported to do. That asymmetry between state and federal courts can only be explained by grounding the political

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<sup>224</sup> See *Huddleston v. Sawyer*, 932 P.2d 1145, 1159–62 (Or. 1997) (holding Guarantee Clause challenges to ballot initiatives nonjusticiable); *State v. Manussier*, 921 P.2d 473, 481–82 (Wash. 1996) (same).

<sup>225</sup> See *Cagle v. Qualified Electors of Winston Cnty.*, 470 So. 2d 1208, 1210–11 (Ala. 1985).

<sup>226</sup> See *Heimerl v. Ozaukee County*, 40 N.W.2d 564, 567 (Wis. 1949); *City of Cleveland v. Ruple*, 200 N.E. 507, 510 (Ohio 1936); *Beach v. Bradstreet*, 82 A. 1030, 1032 (Conn. 1912).

<sup>227</sup> See *State v. Davis*, 943 P.2d 283, 284–85, 286 (Wash. 1997).

<sup>228</sup> See *VanSickle v. Shanahan*, 511 P.2d 223, 242–43 (Kan. 1973).

<sup>229</sup> See *Agua Caliente Band of Cahuilla Indians v. Super. Ct.*, 148 P.3d 1126, 1138–39 (Cal. 2006).

<sup>230</sup> U.S. CONST. art. IV, § 4 (“The United States shall guarantee to every State in this Union a Republican Form of Government . . .”).

<sup>231</sup> See *Minor v. Happersett*, 88 U.S. (21 Wall.) 162, 175 (1874) (“The guaranty necessarily implies a duty on the part of the States themselves to provide such a government.”).

<sup>232</sup> See *Luther v. Borden*, 48 U.S. (7 How.) 1, 42 (1849).

<sup>233</sup> *Id.* (“[T]he right to decide is placed there, and not in the courts.”).

question doctrine in Article III, which presents no bar to state court adjudication.<sup>234</sup>

The consequences of Article III asymmetry become preposterous when followed to the logical extreme. If Article III allows state courts to determine the meaning of “republican form of government” in the Guarantee Clause despite a commitment of the question to Congress or the President, then Article III should present no bar to state court determination of the meaning of the word “try” in the Impeachments Clause, of “war” in the Declare War Clause, or of “citizen of the United States” in the Qualifications Clauses, among other important constitutional questions seemingly outside the appropriate scope of authority of state courts. These questions would be nonjusticiable political questions in federal court. But if the reason they are political questions in federal court is because of Article III, then state courts could hear and decide them.<sup>235</sup> That cannot be true.

#### IV. REFOCUSING ON SUBSTANTIVE LAW

Article III cannot be the source of the federal political question doctrine. What, then, is the source of the political question doctrine, and does it have *any* ties to Article III?

The answer is that the political question doctrine is sourced in the substantive law at issue. It is the Guarantee Clause itself (or the Impeachments Clause itself, or even the Equal Protection Clause itself) that makes something nonjusticiable. Application of the doctrine can have (but need not always have) Article III *effects* by, say, calling for the application of standards that fall outside what Article III contemplates as “judicial” power.<sup>236</sup> But the doctrine begins with substantive law.<sup>237</sup> This Part explains this reorientation in more detail and explores some of its ramifications.

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<sup>234</sup> See Edward A. Stelzer, Note, *Bearing the Judicial Mantle: State Court Enforcement of the Guarantee Clause*, 68 N.Y.U. L. REV. 870, 894–98 (1993).

<sup>235</sup> The Constitution and federal law may restrict state courts in other ways, such as through immunity doctrines or bars on certain kinds of relief. See 17A WRIGHT ET AL., *supra* note 49, § 4213 (noting that state courts cannot issue writs of mandamus against federal officers or writs of habeas corpus for those in federal custody, and that the Supreme Court has never decided whether state courts can enjoin federal officers, but that state courts can issue most other forms of relief against federal officers). But these limitations need not necessarily arise in state court cases presenting federal political questions and, in any event, have nothing to do with Article III.

<sup>236</sup> Somewhat differently, Professor John Harrison argued, prior to *Rucho*, that the political question doctrine operates wholly outside of Article III. See Harrison, *supra* note 46, at 497–98. As I explain below, I believe the doctrine can have important Article III effects that help explain cases like *Rucho*, which seem in tension with Professor Harrison’s theory.

<sup>237</sup> This idea is hinted at, but not explained, in WRIGHT ET AL., *supra* note 49, § 3534.3 (suggesting “that political-question doctrine invariably has roots deeper than Article III alone”).

*A. The Primacy of Substantive Law*

The political question cases fall into roughly two categories corresponding to each of the first two *Baker* factors. Those categorizations are driven by substantive law. In Factor 1 cases, a “textual commitment” refers to the underlying substantive law—the Impeachments Clause, the Militia Clause, the Qualifications Clause, or the like—and asks whether the substantive law allocates interpretive or decision-making authority over the question to an entity other than the federal courts.<sup>238</sup> If so, then Article III has nothing more to add. Nonjusticiability under Factor 1 thus arises from substantive law rather than anything in Article III.

Article III is itself allocative by committing judicial powers to the courts and, by implication, excluding the courts from legislative and executive powers. But the Article III allocative standards do not drive the Factor 1 determination and, indeed, are irrelevant to it. A question could meet all of the requirements of Article III, in that it is brought in the form of a constitutional “case” and with “judicial” standards available for adjudication, but if the substantive law commits the question instead to a coordinate branch, then the question is nonjusticiable in the federal courts *despite* Article III.<sup>239</sup>

Pure Factor 2 cases are somewhat different. To date, *Rucho v. Common Cause* is the only pure Factor 2 case,<sup>240</sup> finding that the Constitution provided no judicially manageable or discoverable standards for distinguishing

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<sup>238</sup> *Zivotofsky v. Clinton*, 566 U.S. 189, 196 (2012) (looking to Article II to determine whether the federal courts could resolve whether a statute unconstitutionally infringed the executive power); *Nixon v. United States*, 506 U.S. 224, 229–31 (1993) (interpreting the Impeachments Clause to commit to the Senate the option to use a committee to take evidence during an impeachment trial); *Gilligan v. Morgan*, 413 U.S. 1, 5–7 (1973) (construing the Militia Clause to allocate decision-making authority over militia training to Congress and the President); *Powell v. McCormack*, 395 U.S. 486, 521–22 (1969) (relying on the text of the Qualifications Clause to determine which questions were committed to the House and which were justiciable); *Pac. States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118, 133, 150–51 (1912) (construing the language of the Guarantee Clause to allocate the republican-form guarantee to Congress); *Luther v. Borden*, 48 U.S. (7 How.) 1, 42 (1849) (same). While some of these cases also used *Baker* Factor 2, they did so to aid the determination of Factor 1. *See, e.g., Zivotofsky*, 566 U.S. at 196–97 (calling the question a “familiar” question of judicial review customary for the courts); *Nixon*, 506 U.S. at 228–29 (“[T]he lack of judicially manageable standards may strengthen the conclusion that there is a textually demonstrable commitment to a coordinate branch.”).

<sup>239</sup> *See Baker v. Carr*, 369 U.S. 186, 198–209 (1962) (analyzing the political question doctrine independently after determining proper subject matter jurisdiction and authority under Article III); *cf. Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 96 (1998) (emphasizing “the fundamental distinction between arguing no cause of action and arguing no Article III redressability”); *Bell v. Hood*, 327 U.S. 678, 682 (1946) (holding the lack of a legal claim for relief under the Fourth and Fifth Amendments to be a question of merits, not a question of Article III jurisdiction).

<sup>240</sup> 139 S. Ct. 2484, 2515 (2019) (Kagan, J., dissenting) (“For the first time in this Nation’s history, the majority . . . cannot find a workable legal standard to apply.”).

constitutional from unconstitutional partisan gerrymandering.<sup>241</sup> Pure Factor 2 cases are not based on a determination that substantive law allocates authority to a specific decision-maker. Indeed, *Rucho* disclaimed any such allocation.<sup>242</sup> But Factor 2 cases are still based on the underlying substantive law. *Rucho* itself focused on the standards supplied by the substantive law, noting that the Constitution prohibits only partisan gerrymandering that is “too much.”<sup>243</sup> The Court rejected proposed tests that were consistent with Article III because they were incompatible with the standards supplied by the Equal Protection Clause.<sup>244</sup> Thus, Factor 2 cases like *Rucho* are based on the standards supplied by the substantive law. If a court determines that the standards supplied by the substantive law are not judicially discoverable or manageable, then that determination will have an Article III *effect* of rendering an adjudicative decision based on those standards outside the “judicial” power.<sup>245</sup> So Factor 2 does implicate Article III. But the determination of the existence of a political question is sourced, just like in Factor 1 cases, in substantive law.

### B. Implications and Corollaries

Locating the political question doctrine in substantive law has a number of effects. I explore six below.

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<sup>241</sup> *Id.* at 2500 (majority opinion). This rationale is hard to square with the multitude of other constitutional provisions presenting similar difficulties that the Court has deemed justiciable, including the Equal Protection Clause, the Commerce Clause, and the First Amendment. *See* Pushaw, *supra* note 90, at 1176 (“[M]any constitutional provisions, not just those the Court has deemed ‘political,’ appear to lack judicially discoverable and manageable standards. . . . In fact, much of modern constitutional law arguably involves policy choices that should be resolved through the political process.”); MARTIN H. REDISH, *THE FEDERAL COURTS IN THE POLITICAL ORDER* 122–26 (1991); *cf.* *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 423 (1819) (stating that courts inquiring into what laws are “necessary” would “pass the line which circumscribes the judicial department and . . . tread on legislative ground”). It also ignores Professor Richard Fallon’s astute observation that “[j]udicially manageable standards . . . are far more often the products or outputs of constitutional adjudication than inherent elements of the Constitution’s meaning.” Richard H. Fallon, Jr., *Judicially Manageable Standards and Constitutional Meaning*, 119 HARV. L. REV. 1275, 1277 (2006). Finally, *Rucho* did not offer judicially manageable standards for determining when there are no judicially manageable standards. *See* G. Michael Parsons, *Gerrymandering & Justiciability: The Political Question Doctrine After Rucho v. Common Cause*, 95 IND. L.J. 1295, 1345–48 (2020). Nevertheless, such is the legacy of *Rucho*.

<sup>242</sup> 139 S. Ct. at 2495–96.

<sup>243</sup> *Id.* at 2501 (internal quotation marks omitted).

<sup>244</sup> *Id.* at 2502–03 (rejecting the racial-gerrymandering standard as inapposite to the Equal Protection Clause inquiry for political gerrymandering).

<sup>245</sup> *See id.* at 2500. It is an open question as to whether technological advances could turn an otherwise nonjudicial standard into a judicial standard within the scope of Article III. *See* Andrew Chin, Gregory Herschlag & Jonathan Mattingly, *The Signature of Gerrymandering in Rucho v. Common Cause*, 70 S.C. L. REV. 1241, 1242–43 (2019) (“[W]e have developed and witnessed the emergence of promising new statistical methods for identifying partisan gerrymandering and quantifying its effects.”).

### 1. *Jurisdictionality*

Political question cases based on Factor 1 do not present defects in jurisdiction, at least as that term is currently understood.<sup>246</sup> If the allocated decision-maker has decided the question, then the federal court can apply that decision and, if appropriate, resolve the remainder of the case on the merits.<sup>247</sup> If the allocated decision-maker has not decided the question, then the court can dismiss the claim for failure to state a claim upon which relief can be granted,<sup>248</sup> enter summary judgment, resolve the claim on other grounds, or abstain or stay resolution of the claim or issue until the appropriate decision-maker has delivered an answer.<sup>249</sup> In no circumstance should the court dismiss for lack of jurisdiction a case presenting a Factor 1 political question.<sup>250</sup>

The nonjurisdictionality of Factor 1 questions does not mean that parties could force a federal court, by operation of litigation waiver or forfeiture, to decide an issue committed to another branch. The defense of failure to state a claim upon which relief can be granted may be raised for the first time at trial.<sup>251</sup> Further, identification of textual constitutional

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<sup>246</sup> A reconceptualization of jurisdiction based on allocative force might lead to a different set of remedies. See Scott Dodson, *Jurisdiction and Its Effects*, 105 GEO. L.J. 619, 633–37, 651–53 (2017) (setting out an allocative theory of jurisdiction and applying it to the political question doctrine).

<sup>247</sup> *Luther v. Borden*, 48 U.S. (7 How.) 1, 47 (1849) (stating that if “a question [is] to be settled by the political power,” then “when that power has decided, the courts are bound to take notice of its decision, and to follow it”); see also Harrison, *supra* note 46, at 487 (making this argument); cf. Grove, *supra* note 21, at 1909 (showing that the traditional political question doctrine was about deference rather than jurisdiction). *Nixon* thus granted the wrong relief. There, Nixon filed a declaratory judgment action seeking a declaration “that the conviction voted by the Senate on the impeachment charges is void” because the procedures used violated the Impeachments Clause. *Nixon v. United States*, 744 F. Supp. 9, 10 (D.D.C. 1990). The district court dismissed the claim as nonjusticiable, *id.* at 14, but the court instead should have entered judgment on the merits for the defendant. The Senate’s conviction answered the question, committed by the Impeachments Clause to the Senate, of whether the Senate’s procedures complied with the Impeachments Clause, and the answer resolved the legal claim—whether the court should declare the impeachment void—against the plaintiff.

<sup>248</sup> *Gilligan v. Morgan*, 413 U.S. 1, 3–4, 6 (1973) (reversing the judgment of the court of appeals, which itself had reversed in part the judgment of the district court dismissing the case for failure to state a claim).

<sup>249</sup> Unlike in the *Erie* context, the federal court should not “guess” at what the specified decision-maker would do. In the *Erie* context, federal courts are authorized by Article III and federal statute to decide cases under state law and have a general duty to do so even when state law presents unanswered questions. See *Ankenbrandt v. Richards*, 504 U.S. 689, 705–06 (1992) (reversing the Fifth Circuit’s holding that it lacked jurisdiction in a diversity case). By contrast, a question allocated by the Constitution exclusively to a different decision-maker deprives federal courts of authority even to guess at what the decision-maker would do.

<sup>250</sup> *Pacific States* thus reached the wrong result when it dismissed the writ of error for lack of jurisdiction. See *Pac. States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118, 133, 150–51 (1912). For the correct result, see *infra* text accompanying notes 287–290.

<sup>251</sup> See FED. R. CIV. P. 12(h)(2)(C).

commitments is not likely to be overlooked, and nothing prevents a court from invoking them *sua sponte* or from affirming the existence of a political question over all parties' objections.<sup>252</sup> In sum, Factor 1 political questions do not divest federal courts of jurisdiction, and the court can protect the allocated decision-maker's prerogative to answer the political question notwithstanding any litigant conduct.

Factor 2 cases get to the same answer through a different path. A case whose adjudication on the merits depends upon the resolution of nonjudicial standards supplied by the substantive federal law cannot be adjudicated by federal courts consistent with Article III. But that does not mean that the *case* falls outside of Article III. To the contrary, the case itself falls *within* Article III and potentially could be adjudicated if the court can avoid answering the questions whose resolution is prohibited by Article III. If the court cannot avoid such questions, then, like in Factor 1 cases, the remedy is to decide the case by, for example, striking a defense containing a Factor 2 political question or dismissing a claim for failure to state a claim upon which relief could be granted. Factor 2 cases do present the possibility that the parties will stipulate to a judicially manageable standard for resolution of the political question and that the court will decide the question based on that standard.<sup>253</sup> The court would not be *required* to adhere to the parties' stipulated test,<sup>254</sup> but the court could without violating Article III.

## 2. *Effects on State Courts*

Although Factor 1 and Factor 2 cases are resolved the same way with respect to federal jurisdiction, they affect state courts differently. Factor 1 political questions arise because substantive law, rather than Article III, allocates decision-making or interpretive authority to a specific decision-maker. To whom that allocation is made and whether the allocation is exclusive are questions of federal substantive law that, unlike Article III, are binding on state courts under the Constitution's Supremacy Clause.<sup>255</sup> If the Impeachments Clause commits impeachment trials solely to the Senate, then

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<sup>252</sup> See Scott Dodson, *Party Subordination in Federal Litigation*, 83 GEO. WASH. L. REV. 1, 14–17 (2014) (explaining why courts retain authority to enforce the law despite party preferences and litigation conduct); FED. R. CIV. P. 16(c)(2) (giving courts the authority to eliminate claims or defenses and to amend pleadings).

<sup>253</sup> See, e.g., *Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27, 48 (2011) (assuming, without deciding, that the legal standard applied by the court of appeals is correct and resolving the case using that standard).

<sup>254</sup> See Dodson, *supra* note 252, at 17–19 (discussing when courts may abide by party stipulations of legal standards).

<sup>255</sup> U.S. CONST. art. VI, cl. 2 (“This Constitution . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”).

neither federal courts nor state courts can usurp that authority, regardless of Article III limitations or state court authorizations. Factor 1 political questions thus apply with equal force in state court because of the normal application of the Supremacy Clause to federal substantive law.<sup>256</sup> The preemptive force of the substantive law resolves most of the state court–federal court tension created by Article III asymmetry in Factor 1 cases.

One peculiarity potentially remains. What if a constitutional provision textually commits a decisional or interpretive question to the states, or even to state *courts*? Examples include Article I, Section Four (committing to the state legislatures exclusive authority over the “places” of choosing U.S. senators<sup>257</sup>); Article I, Section Two (committing authority for issuing a writ of election to fill a vacancy in the U.S. House of Representatives to “the Executive Authority” of the represented state<sup>258</sup>); Article I, Section Eight, Clause Sixteen (reserving authority for the appointment of militia officers to the states<sup>259</sup>); and Article II, Section One (committing authority for the appointing of electors for presidential elections to the state legislatures<sup>260</sup>),

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<sup>256</sup> See Harrison, *supra* note 46, at 497 (“When some source of federal law assigns final decisional authority to a political actor, the state courts must respect that federal rule just as much as the federal courts must.”).

<sup>257</sup> U.S. CONST. art. I, § 4 (“The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the places of chusing Senators.”).

<sup>258</sup> *Id.* art. I, § 2, cl. 4 (“When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies.”). The Seventeenth Amendment makes a similar commitment for Senate vacancies. *Id.* amend. XVII, § 2 (“When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: Provided, That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.”).

<sup>259</sup> *Id.* art. I, § 8, cl. 16 (“reserving to the States respectively, the Appointment of the Officers” of the state militias).

<sup>260</sup> *Id.* art. II, § 1, cl. 2 (“Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors . . .”). Determining the scope of the state’s appointment authority under the Electors Clause is not a political question. See *infra* Section IV.B.3 (distinguishing between nonjusticiable political questions and justiciable ancillary questions); cf. Chiafalo v. Washington, 140 S. Ct. 2316, 2323 (2020) (holding that the Electors Clause gives states the power to enforce pledge laws by fining faithless electors). But asking a court to exercise the appointment power under the Electors Clause would present a Factor 1 political question allocated to a decision-maker other than the courts. Thus, the bill of complaint filed by the State of Texas as an original action in the Supreme Court alleging that other states usurped their legislatures’ prerogatives under the Electors Clause, see Bill of Complaint at 3, Texas v. Pennsylvania, No. 22-O-155 (S. Ct. Nov. 8, 2020), presented a justiciable question that the Court could have answered in a declaration (had other defects in the complaint not prevented adjudication). But the injunctive relief sought—especially asking the Court to “enjoin” the defendant states from using the election results to appoint electors and asking the Court to “direct” the defendant states’ legislatures “to appoint a new set of presidential electors,” *id.* at 40—likely would have been prohibited by the political question doctrine. For more on this point, see Scott Dodson, Texas v. Pennsylvania and the Political-Question Doctrine, 2021 U. ILL. L. REV. ONLINE 141, 142.



among others. Although the federal political question doctrine is closely associated with the federal separation of powers,<sup>261</sup> its manifestation in Factor 1 cases operates according to the allocative text of the substantive law. In such cases, a textual commitment to a state legislature is no different from a textual commitment to Congress.

If the constitutional allocation of authority in any of these provisions extends to state *courts* as part of the “state” or its lawmaking authority,<sup>262</sup> or as appropriately delegated by state law,<sup>263</sup> then the political question doctrine might give state courts ultimate authority over such federal constitutional questions. In such a case, the political question doctrine would require federal courts—including the Supreme Court—to defer to the interpretation of the U.S. Constitution provided by the state courts. Such a result is not without irony, but it is consistent with the idea behind the political question doctrine’s Factor 1: the people are entitled, through their Constitution, to allocate power as they see fit, including by assigning some final interpretive authority to the state courts.

Factor 2 cases pose different challenges. In these cases, the substantive law does not allocate authority over the claim away from the federal courts but rather requires the application of nonjudicial standards prohibited to federal courts by Article III. This situation is in contrast with instances in which the substantive law provides no claim at all. If the law supplied no claim for relief at all, then the absence of a claim would be binding on state courts too, and state courts would be prohibited from ordering affirmative relief.<sup>264</sup> But Factor 2 cases like *Rucho* operate differently. *Rucho* did not deny the existence of a claim; rather, it denied that federal courts could, consistent with Article III, adjudicate the claim using the standards the claim

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<sup>261</sup> See *supra* Part I. Most political questions do implicate the federal separation of powers because the Constitution’s principal object is to allocate authority among the federal branches, but that is no reason to exclude the rarer textual commitments to the states from the political question doctrine.

<sup>262</sup> Cf. *Ariz. State Legis. v. Ariz. Indep. Redistricting Comm’n*, 135 S. Ct. 2652, 2668 (2015) (interpreting Article I’s delegation of redistricting to the state legislatures to be a delegation of lawmaking power that the state could choose to implement by initiative and gubernatorial veto). For the view that a constitutional commitment to state “legislatures” manifests a restriction on the exercise of that delegated power through other state governmental mechanisms or entities, see generally Michael T. Morley, *The Independent State Legislature Doctrine, Federal Elections, and State Constitutions*, 55 GA. L. REV. 1, 8 (2020).

<sup>263</sup> I say more about delegation of political questions below. See *infra* Section IV.B.5.

<sup>264</sup> Because the scope of federal law is defined by federal law, states cannot order more or less relief than what federal law prescribes. *Oregon v. Hass*, 420 U.S. 714, 719 (1975) (“[A] State may not impose such greater restrictions as a matter of federal constitutional law when this Court specifically refrains from imposing them.” (emphasis omitted)).

called for.<sup>265</sup> In effect, federal claims for unconstitutional partisan gerrymandering exist but require the application of standards prohibited to the federal courts by Article III.

Under the Supremacy Clause, substantive federal law and standards apply fully in state court. But Article III does not. Although a state could impose Article III requirements on its courts as a matter of choice, a state need not do so, and many have not.<sup>266</sup> State law may empower state courts to use a broad range of decisional standards, including nonjudicial or even political standards that Article III disables federal courts from using. It is thus possible that state courts could have adjudicated the federal claims in *Rucho* even though the federal courts could not.

Although I detailed some of the ills of asymmetrical jurisdiction above,<sup>267</sup> I think those ills are not as problematic in state partisan-gerrymandering cases—the only pure *Baker* Factor 2 category to date.<sup>268</sup> Partisan-gerrymandering claims involve questions of *state* politics, an area of familiarity to some state courts; some states even arrange a loose collaboration between their legislatures and their courts for districting.<sup>269</sup> Although state courts might generate a patchwork of different interpretations of how the Constitution applies to various districting plans, federal uniformity is not as important in this scenario because a state’s partisan gerrymandering affects only candidates standing for election in that state. *Rucho* itself acknowledged that state law can constrain state redistricting beyond what federal law requires,<sup>270</sup> meaning that state law itself creates a patchwork of restricting standards from state to state. That Texas has a different view of the Constitution’s restrictions on partisan gerrymandering in Texas than Oklahoma’s view in Oklahoma is no different than if Texas and Oklahoma had different *state* constitutional standards for gerrymandering. The states’ prerogatives over districting already contemplate nonuniformity.<sup>271</sup>

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<sup>265</sup> *Rucho v. Common Cause*, 139 S. Ct. 2484, 2499 (2019) (“[The claim requires] political judgment about how much representation particular political parties deserve . . . . But federal courts are not equipped to apportion political power as a matter of fairness, nor is there any basis for concluding that they were authorized to do so.” (emphasis omitted)).

<sup>266</sup> See *supra* text accompanying notes 170–200.

<sup>267</sup> See *supra* Section III.B.2.

<sup>268</sup> Were the Court to expand Factor 2 far beyond partisan gerrymandering, asymmetric jurisdiction might be more troubling.

<sup>269</sup> See, e.g., *Brooks v. Hobbie*, 631 So. 2d 883, 889–90 (Ala. 1993) (stating that the legislature has “initial responsibility” and the courts have responsibility if the legislature “fails to act”).

<sup>270</sup> 139 S. Ct. at 2507–08.

<sup>271</sup> See *Chapman v. Meier*, 420 U.S. 1, 27 (1975) (“We say once again what has been said on many occasions: reapportionment is primarily the duty and responsibility of the State through its legislature or other body, rather than of a federal court.”).

A more intractable and pernicious concern is the potential for partisan entrenchment of state courts. Because most state judges are elected according to state-drawn districts,<sup>272</sup> state judges might decide state redistricting cases in ways that directly benefit their reelection chances. They may underenforce the Constitution when partisan gerrymanders work in their favor and overenforce it when they do not. Further, the likely identity between the party controlling a state legislature and a party controlling that state's judiciary means that partisan-gerrymandering challenges in state courts are likely to be rejected on the merits, resulting in a systemic underenforcement of the Constitution exceedingly permissive of partisan gerrymanders. Across states, gerrymandering could create a race to the bottom: if a Republican-controlled state is increasingly gerrymandered Republican, a Democrat-controlled state might try to compensate by more extremely gerrymandering its districts to be Democratic. Meanwhile, *Rucho* prevents the more neutral, unelected federal judiciary from intervening and preventing these situations.

Still, protections against such extremes do exist. States can adopt, and many have adopted, neutral redistricting procedures to avoid overly partisan gerrymanders.<sup>273</sup> In addition, some state laws and constitutions exert controls on partisan gerrymandering that are equivalent to or even stricter than the federal Constitution and that state courts can (and do) enforce.<sup>274</sup> If those state laws supply substantive standards that could be applied by federal courts consistently with Article III, then such state law challenges to partisan

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<sup>272</sup> See Dodson, *supra* note 183, at 178–80.

<sup>273</sup> See, e.g., COLO. CONST. art. V, §§ 44–46 (creating a commission); MICH. CONST. art. IV, § 6 (same). The Supreme Court has upheld the constitutionality of such commissions. See *Ariz. State Legis. v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2658–59 (2015). But see *Morley*, *supra* note 262, at 38–45 (challenging their constitutionality).

<sup>274</sup> See, e.g., FLA. CONST. art. III, § 20(a) (“No apportionment plan or individual district shall be drawn with the intent to favor or disfavor a political party or an incumbent.”); MO. CONST. art. III, § 3(b)(5) (“Districts shall be designed in a manner that achieves both partisan fairness and, secondarily, competitiveness . . . . ‘Partisan fairness’ means that parties shall be able to translate their popular support into legislative representation with approximately equal efficiency.”); IOWA CODE § 42.4(5) (2021) (“No district shall be drawn for the purpose of favoring a political party, incumbent legislator or member of Congress, or other person or group.”). The presence of state laws might suggest that, as a practical matter, any asymmetry regarding federal claims would be marginal at best because parties would assert only state law claims. Yet the number of redistricting cases that are litigated as federal constitutional challenges is evidence of the propensity to mount federal law challenges. The reasons are many. Parties may wish to influence state constitutional provisions that are keyed to analogous federal constitutional provisions. Impact litigation brought by interest groups less concerned about a particular state may prefer to obtain federal precedent that can be used in other states. Precedent on federal law might be the only way to control partisan gerrymandering in a state like West Virginia, which has mandated such extreme judicial deference to the compatibility of state law with the state constitution, see *State v. Gainer*, 143 S.E.2d 351, 357 (W. Va. 1965), as to provide virtually no state law restriction on state gerrymanders, see *State v. Tennant*, 730 S.E.2d 368, 388–90 (W. Va. 2012).

gerrymanders might even be brought in federal court on grounds of diversity or supplemental jurisdiction. Finally, Congress could provide statutory uniformity.<sup>275</sup>

In sum, Factor 1 cases should see no difference in state or federal court because substantive law supplying the allocation to a particular decision-maker will control in both forums. In Factor 2 cases, the standards supplied by substantive law will be the same in both judicial systems, but some state courts may be authorized to use those standards to decide questions that would be nonjusticiable in federal court.

### 3. *Determining the Allocation*

Because the political question doctrine is not sourced in Article III, courts—including federal courts—will have jurisdiction over ancillary questions related to a political question in the substantive law. The most obvious ancillary question is determining when a political question exists, either because it allocates decision-making authority away from the federal courts or because the substantive law’s content lacks judicially discoverable or manageable standards.<sup>276</sup>

Another, perhaps equally important, justiciable question exists in Factor 1 cases: *which* decision-maker has authority, under the substantive law, to decide the political question presented? Courts can answer that question and enforce the Constitution’s allocation through judicial relief. For example, if the House of Representatives purported to “try” an impeachment, a court could declare that the House has no power to try an impeachment and enjoin the House from proceeding. Similar questions could arise in the context of, say, the President attempting to declare war or a state seeking to judge the qualifications of a U.S. congressperson. The courts therefore retain an important role to play in arbitrating which decision-maker has the allocated authority to decide a political question, even if the courts cannot decide the political question itself.

*Luther* correctly implements these principles: by deferring to the decisions of the political branches with authority to decide the Guarantee

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<sup>275</sup> See, e.g., H.R. 1, 116th Cong., §§ 2401(a), (c) (2019) (requiring independent commissions and establishing nonpartisan criteria).

<sup>276</sup> See *Baker v. Carr*, 369 U.S. 186, 211 (1962) (“Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution.”); see also HERBERT WECHSLER, *PRINCIPLES, POLITICS AND FUNDAMENTAL LAW* 11–12 (1961) (“[T]he courts are called upon to judge whether the Constitution has committed to another agency of government the autonomous determination of the issue raised, a finding that itself requires an interpretation.”). For a criticism of this power, see Grove, *supra* note 21, at 1911–13, 1962–64 (arguing that this power is a tool of judicial supremacy).

Clause question presented, and by chastising the lower federal court for usurping that authority, the Supreme Court exercised jurisdiction and authority to protect the Constitution's delegation of the question to a coordinate branch.<sup>277</sup> Similarly, in *Zivotofsky*, the Court noted the political question of determining the political status of Jerusalem but retained authority for deciding whether Congress's attempt to influence that political question invaded the President's authority over it.<sup>278</sup>

*Pacific States*,<sup>279</sup> by contrast, reached the wrong result. There, the Oregon Supreme Court held, on the merits and after independent adjudication, that Oregon's initiative procedure was consistent with the Guarantee Clause.<sup>280</sup> On writ of error, the Supreme Court dismissed the writ for lack of jurisdiction based on *Baker* Factor 1 and the conclusion that the question of determining whether a state government was republican in form was committed to Congress.<sup>281</sup> But by so holding, the Supreme Court allowed to stand the state court's resolution of that very question, which was instead Congress's prerogative to answer. That was a mistake. The Supreme Court's determination that the Guarantee Clause question was committed to Congress was equally binding on the Oregon Supreme Court and rendered the Oregon Supreme Court's judgment an unconstitutional invasion of Congress's powers. Accordingly, the Supreme Court should have vacated the state court's judgment to protect Congress's prerogative in deciding the political question at hand.<sup>282</sup>

In sum, the scope of the textual commitment, the identity of the decision-maker allocated authority under the commitment, and whether to protect that decision-maker's constitutional prerogative are all within judicial authority and jurisdiction.

#### 4. *Multiple Laws*

Sourcing the political question doctrine in substantive law rather than Article III also helps reconcile the doctrine with the Supreme Court's reservation of authority to decide certain cases involving political questions. The reconciliation involves the applicability of multiple laws. Although a

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<sup>277</sup> *Luther v. Borden*, 48 U.S. (7 How.) 1, 46–47 (1849).

<sup>278</sup> *Zivotofsky v. Clinton*, 566 U.S. 189, 196 (2012). In other cases, the Court has noted a political question but held the case *not* to infringe upon the allocated decision-maker's prerogative. *E.g.*, *Roudebush v. Hartke*, 405 U.S. 15, 19 (1972) (holding that a state recount in a contested Senate election did not infringe the Senate's constitutionally committed authority to decide which candidate to seat).

<sup>279</sup> *Pac. States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118 (1912).

<sup>280</sup> *State v. Pac. States Tel. & Tel. Co.*, 99 P. 427, 428 (Or. 1908).

<sup>281</sup> *Pac. States*, 223 U.S. at 133, 150–51.

<sup>282</sup> The Supreme Court has asserted the power of vacatur over state court judgments before. *See Hall, supra* note 178, at 1291–92; 16B WRIGHT ET AL., *supra* note 49, § 4015.

political question in one constitutional provision may allocate authority over that question to a nonjudicial decision-maker, a different constitutional provision might confer justiciability over a certain facet of that question.

For example, although the Senate may have the “sole” power to “try” impeachments under the Impeachments Clause, the Due Process Clause of the Fifth Amendment might provide for judicial scrutiny of the outer bounds of the process provided. Such a result might explain why several justices supported judicial review of impeachment convictions based on methods that seriously weaken the integrity of those convictions, such as coin flips.<sup>283</sup> Importantly, the question of whether the Senate tried the impeached official would still be a nonjusticiable political question committed to the Senate, but whether that trial comported with the Fifth Amendment might be a justiciable question for the courts.<sup>284</sup> The same principles might apply to Fifth Amendment challenges to the President’s pardoning power<sup>285</sup> if, say, the President issued a blanket pardon to all white federal prisoners but no Black federal prisoners. These principles would apply equally to an identical challenge brought in state court.

Courts have followed these principles in analogous state political question cases. In *Larsen v. Senate of the Commonwealth*, for example, a state court judge was impeached and convicted under provisions of the Pennsylvania constitution that mimic the provisions of the federal Constitution.<sup>286</sup> The impeached judge filed a § 1983 lawsuit in federal court, challenging the procedures used by the state senate as denying due process under the Fourteenth Amendment. The Third Circuit held that although the state constitution committed the impeachment process to the relevant state political branches, the Fourteenth Amendment claim presented no political

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<sup>283</sup> See *Nixon v. United States*, 506 U.S. 224, 239 (1993) (White, J., concurring); *id.* at 253–54 (Souter, J., concurring); *cf.* *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 289 (1998) (O’Connor, J., concurring) (“Judicial intervention [under the Due Process Clause] might, for example, be warranted in the face of a scheme whereby a state official flipped a coin to determine whether to grant clemency [to an inmate on death row], or in a case where the State arbitrarily denied a prisoner any access to its clemency process.”).

<sup>284</sup> Professor Michael Gerhardt rejects judicial review of impeachments under the Fifth Amendment because, in his view, the Due Process Clause secures no more process than what the Impeachments Clauses already provide. See Michael J. Gerhardt, *Rediscovering Nonjusticiability: Judicial Review of Impeachments After Nixon*, 44 DUKE L.J. 231, 235–65 (1994). Gerhardt’s conclusion, even if correct, is based upon analysis and construction of the *Fifth Amendment*, not Article III, and sounds more like a conclusion on the merits of a Fifth Amendment claim than a conclusion that the federal courts lack power to adjudicate such a claim. Further, ancillary questions, such as whether the Fifth Amendment applies to impeachment trials and, if so, whether the Fifth Amendment’s standards are judicially discoverable and manageable, would all be justiciable under the principles articulated in *supra* Section IV.B.3.

<sup>285</sup> U.S. CONST. art. II, § 2, cl. 1 (granting the President the “Power to grant Reprieves and Pardons for Offences against the United States”).

<sup>286</sup> 152 F.3d 240, 243–44 (3d Cir. 1998).

question bar to judicial review; nothing textually committed the Fourteenth Amendment claim to any other state or federal body, and the Due Process Clause provided judicially discoverable and manageable standards for adjudication.<sup>287</sup> *Larsen* and others help illustrate the principle that substantive law—sometimes multiple substantive laws—informs justiciability in Factor 1 cases.

Factor 2 cases illustrate this principle as well. In *Baker*, the Court held that, although the Guarantee Clause renders most diluted-voting-power challenges to state election districting nonjusticiable, the same challenges under the Equal Protection Clause could be justiciable, in part because the Equal Protection Clause supplies familiar and judicially manageable standards for one-person-one-vote and racial-gerrymandering claims.<sup>288</sup> In *Rucho*, the Court separately considered challenges to partisan gerrymandering under the Equal Protection Clause, the First Amendment, and Article I.<sup>289</sup> Although the Court found that all three sources supplied only nonjudicial standards for partisan gerrymandering, the Court considered each discrete source and its standards for assessing the constitutionality of partisan gerrymandering.<sup>290</sup> Had any one source supplied justiciable standards, then the Court could have—should have—adjudicated the challenge on the merits despite the presence of any nonjusticiable political questions in the other sources.<sup>291</sup>

If no constitutional source supplies judicial standards appropriate for adjudication by federal courts under Article III, Congress could supply

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<sup>287</sup> *Id.* at 246–48; *see also* *Bacon v. Lee*, 549 S.E.2d 840, 850, 855–56 (N.C. 2001) (holding that although the state constitution committed exclusive authority over state pardons to the Governor, the question of whether the Governor exercised that pardon authority in a manner consistent with the Fourteenth Amendment was a justiciable question); *cf. Woodard*, 523 U.S. at 289 (O’Connor, J., concurring) (stating that state inmates on death row have a life interest that justifies application of some minimal protections under the Fourteenth Amendment’s Due Process Clause to a state’s clemency procedures). *Contra* *Bredesen v. Tenn. Jud. Selection Comm’n*, 214 S.W.3d 419, 434–39 (Tenn. 2007) (considering a Fourteenth Amendment challenge to the state Governor’s use of race in considering appointments to the state judiciary to be nonjusticiable, in part because of the lack of judicially manageable standards, though nevertheless deciding the claim on the merits).

<sup>288</sup> *See Baker v. Carr*, 369 U.S. 186, 226, 237 (1962).

<sup>289</sup> *Rucho v. Common Cause*, 139 S. Ct. 2484, 2491 (2019).

<sup>290</sup> *Id.* at 2491–2501.

<sup>291</sup> Some language in the Court’s opinion can be read as supporting a blanket determination of nonjusticiability for partisan-gerrymandering claims regardless of the source of the challenge. *Id.* at 2506–07 (“We conclude that partisan gerrymandering claims present political questions beyond the reach of the federal courts.”). But the Court elsewhere suggested that a different source could offer justiciable standards. *Id.* at 2507 (“In 2015, the Supreme Court of Florida struck down that State’s congressional districting plan as a violation of the Fair Districts Amendment to the Florida Constitution. The dissent wonders why we can’t do the same. The answer is that there is no ‘Fair Districts Amendment’ to the Federal Constitution.” (internal citation omitted)). Thus, the better reading of *Rucho*, in my view, is that the particular sources used to challenge partisan gerrymandering in *Rucho* present nonjusticiable claims.

statutory standards. To combat partisan gerrymandering, Congress could, as the House attempted in a bill in 2019, exercise its Article I authority over state election districts by preventing states from taking political-party affiliation into consideration when drawing congressional districts, preventing states from drawing congressional districts that unduly disfavor any political party, and granting federal courts jurisdiction to hear claims for violations of those prohibitions.<sup>292</sup> Were such a bill to become law and a plaintiff with standing were to challenge a state districting map under that federal statute, then the statutory claim could be justiciable in federal court despite the nonjusticiability of challenging partisan gerrymandering under constitutional standards. *Rucho* even appeared to sanction such a regime.<sup>293</sup> The acceptance of the principle of multiple laws in Factor 2 cases, then, also supports the sourcing of the political question doctrine in substantive law rather than Article III.

### 5. Delegation

Lodging the political question doctrine in substantive law rather than in Article III opens the possibility of delegation from the constitutionally allocated decision-maker to some other decision-maker, including, potentially, to federal or state courts. The extent to which the Constitution allows interbranch delegation is subject to voluminous commentary and continues to be debated.<sup>294</sup> I do not mean to take sides in that debate. Rather, I mean only to say that the constitutionally allocated decision-maker in a *Baker* Factor 1 case could—if permitted by delegation norms—delegate

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<sup>292</sup> See H.R. 1, 116th Cong., § 2413(a)(2) (2019) (“[T]he redistricting plan developed by the independent redistricting commission shall not, when considered on a Statewide basis, unduly favor or disfavor any political party.”); *id.* § 2413(a)(3) (preventing a state districting map from taking into consideration the “political party affiliation or voting history of the population of a district”); *id.* § 2432 (providing for enforcement actions by the U.S. Attorney General or private citizens to sue in federal court).

<sup>293</sup> 139 S. Ct. at 2507–08.

<sup>294</sup> Compare *Mistretta v. United States*, 488 U.S. 361, 371–72 (1989) (“[W]e long have insisted that ‘the integrity and maintenance of the system of government ordained by the Constitution’ mandate that Congress generally cannot delegate its legislative power to another Branch.”), with *J.W. Hampton, Jr. & Co. v. United States*, 278 U.S. 394, 409 (1928) (endorsing congressional delegation), *Gundy v. United States*, 139 S. Ct. 2116, 2123–25 (2019) (reaffirming a broad scope of congressional authority to delegate), and *id.* at 2135–42 (Gorsuch, J., dissenting) (espousing a more limited delegation scope). For a sampling of academic commentary, see generally Larry Alexander & Saikrishna Prakash, *Reports of the Nondelegation Doctrine’s Death Are Greatly Exaggerated*, 70 U. CHI. L. REV. 1297, 1297–99 (2003); Aditya Bamzai, *Delegation and Interpretive Discretion: Gundy, Kisor, and the Formation and Future of Administrative Law*, 133 HARV. L. REV. 164, 164–68 (2019); John F. Manning, *The Nondelegation Doctrine as a Canon of Avoidance*, 2000 SUP. CT. REV. 223, 228; Caleb Nelson, *Adjudication in the Political Branches*, 107 COLUM. L. REV. 559, 563–65 (2007); Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721, 1723–25 (2002). Despite this commentary, any delegation prohibition goes largely unenforced in practice. See Fallon, *supra* note 241, at 1302 & n.123.



back to the federal courts the political question, and Article III would not prevent the federal court from answering it.<sup>295</sup>

Congress might, for example, grant federal courts authority to adjudicate questions otherwise committed to Congress. In *Luther*, the Court suggested just such a legislative–judicial partnership for resolving Guarantee Clause claims. *Luther* first approved of Congress’s delegation of its authority under the Guarantee Clause to the President.<sup>296</sup> The Court then suggested little difference between that delegation and a congressional delegation to the courts:

It rested with Congress, too, to determine upon the means proper to be adopted to fulfil this guarantee. They might, if they had deemed it most advisable to do so, have placed it in the power of a court to decide when the contingency had happened which required the federal government to interfere.<sup>297</sup>

Such judicial delegation is consistent with the widespread belief in the nineteenth and twentieth centuries that the political branches could assign to the courts responsibility for deciding political questions.<sup>298</sup> Unless such a statutory delegation is exclusive to the federal courts, both state and federal courts could then adjudicate claims otherwise beyond their reach under Factor 1.<sup>299</sup>

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<sup>295</sup> In a slightly different context, the Constitution expressly allows Congress to delegate appointment authority over inferior officers—ordinarily a power committed to the President that is likely to be considered a political question—to the courts. *See* U.S. CONST. art. II, § 2, cl. 2 (“[B]ut the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.”). And Congress has done so, allowing U.S. courts of appeals to appoint bankruptcy judges and allowing U.S. district courts to appoint magistrate judges. *See* 28 U.S.C. §§ 152(a), 631(a). Although this express delegation of appointment power is made by Congress rather than the President, the courts have exercised this appointment authority without concerns about the political question doctrine or Article III. Implicitly authorized delegations to the courts ought to be treated similarly.

<sup>296</sup> *Luther v. Borden*, 48 U.S. (7 How.) 1, 42 (1849) (stating that Congress can, and did, delegate to the President the obligations to “guarantee” and “protect”).

<sup>297</sup> *Id.* at 43.

<sup>298</sup> *See* Oliver P. Field, *The Doctrine of Political Questions in the Federal Courts*, 8 MINN. L. REV. 485, 499, 501–02 (1924) (“Congress can divest a political question of its character by providing that it be settled by the courts.”); Grove, *supra* note 21, at 1969 (“[C]ourts and commentators in the nineteenth century assumed that Congress could transform a ‘political question’ into a ‘judicial question’ by asking courts to decide the issue.”).

<sup>299</sup> One example of a Factor 1 delegation might be the Foreign Gifts and Decorations Act, which authorizes judicial enforcement of Congress’s authority to approve federal officers’ receipts of foreign gifts under the Emoluments Clause. *See* 5 U.S.C. § 7342(b). The Emoluments Clause prohibits federal officials from accepting gifts from foreign powers “without the Consent of Congress.” U.S. CONST. art. I, § 9, cl. 8. It is unclear whether this is a Factor 1 political question. *Compare* Benjamin Wallace Mendelson, *The Nonjusticiable Emoluments Clause*, 34 J.L. & POL. 197, 198 (2019) (yes), *with* Citizens for Resp. & Ethics in Wash. v. Trump, 939 F.3d 131, 158–59 (2d Cir. 2019) (no), *and* Jed Handelsman

In later dictum, however, the Supreme Court stated: “Congress may not confer jurisdiction on Art. III federal courts to render advisory opinions, or to entertain ‘friendly’ suits, or to resolve ‘political questions,’ because suits of this character are inconsistent with the judicial function under Art. III.”<sup>300</sup> In reliance on such a position, some lower courts, including, recently, the D.C. Circuit, have held that Congress cannot delegate political questions to federal courts: “[A] statute providing for judicial review does not override Article III’s requirement that federal courts refrain from deciding political questions.”<sup>301</sup>

These sentiments are based on an erroneous assumption that the political question doctrine is grounded in Article III. Perhaps the nondelegation doctrine would prevent such delegation, or perhaps the nondelegation doctrine requires a clear statement of delegation of political questions that a general statute like, say, § 1983, does not provide.<sup>302</sup> But Article III is no barrier to congressional delegation of Factor 1 political questions to the courts under the framework outlined in this Article.

As for Factor 2 cases, Congress cannot force the federal courts to use standards prohibited by Article III. Congress could not, for example, force federal courts to adjudicate challenges to partisan gerrymandering directly under the Equal Protection Clause, as through § 1983. That is because, unlike Factor 1 cases, in which nonjusticiability arises because the substantive law allocates authority away from the federal courts, Factor 2 nonjusticiability arises because the substantive law supplies standards that cannot be applied by the federal courts in a manner consistent with Article III. For Factor 2 cases, Congress cannot expand Article III by forcing the federal courts to do what Article III prevents them from doing.<sup>303</sup>

There are, however, alternatives. Congress potentially could authorize federal courts to enforce even nonjusticiable standards under its Fourteenth Amendment Section Five power.<sup>304</sup> Under its Section Five power, Congress

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Shugarman & Gautham Rao, *Emoluments, Zone of Interests, and Political Questions: A Cautionary Tale*, 45 HASTINGS CONST. L.Q. 651, 665–69 (2018) (no).

<sup>300</sup> *Sierra Club v. Morton*, 405 U.S. 727, 732 n.3 (1972) (citations omitted).

<sup>301</sup> *El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836, 843 (D.C. Cir. 2010); *see also* Bin Ali Jaber v. United States, 861 F.3d 241, 250 (D.C. Cir. 2017) (reaffirming *El-Shifa*).

<sup>302</sup> *Cf. Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014) (“We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast ‘economic and political significance.’”).

<sup>303</sup> *Cf. Muskrat v. United States*, 219 U.S. 346, 361–62 (1911) (holding that Congress cannot statutorily prescribe a “case” under Article III); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 166–67 (1803) (holding that Congress cannot enlarge the Supreme Court’s original jurisdiction under Article III).

<sup>304</sup> U.S. CONST. amend. XIV, § 5 (“The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.”). Professor Rachel Barkow thinks Section Five is a political question textually committed to Congress. *See* Barkow, *supra* note 21, at 242. If so, then most Section Five legislation illustrates Factor 1 delegation.

can supply statutory standards that are more protective of the constitutional right if designed to prevent unconstitutional behavior.<sup>305</sup> By prescribing a set of Article III-compliant judicial standards designed to enforce the Equal Protection Clause in partisan-gerrymandering claims, Congress could obviate the problem of identifying judicial standards for distinguishing unconstitutional from constitutional partisan gerrymandering, which was the crux of nonjusticiability in *Rucho*.<sup>306</sup> To be sure, Section Five itself circumscribes Congress’s power in setting such prophylactic standards.<sup>307</sup> But that is not a problem inherent to the political question doctrine.

In addition, Congress could authorize non-Article III entities—including state courts, Article I tribunals, and Article II actors—to decide questions that would be considered political under *Baker* Factor 2.<sup>308</sup> None of these entities wields the “judicial power” of Article III,<sup>309</sup> so all are unconstrained by *Baker* Factor 2 absent statutory restriction.<sup>310</sup> Further, the Supreme Court would be barred—by Factor 2!—from reviewing decisions

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<sup>305</sup> See *City of Boerne v. Flores*, 521 U.S. 507, 530, 532 (1997) (confirming that Section Five permits prophylactic legislation).

<sup>306</sup> *Rucho v. Common Cause*, 139 S. Ct. 2484, 2499 (2019) (“[Federal courts] must be armed with a standard that can reliably differentiate unconstitutional from ‘constitutional political gerrymandering.’”). Note that the use of Section Five to supply judicially manageable standards to enforce the Equal Protection Clause is independent of, and quite different from, Congress’s power under Article I to set statutory standards to police partisan gerrymandering, as explained in *supra* text accompanying notes 292–293.

<sup>307</sup> See *City of Boerne*, 521 U.S. at 519–20 (requiring enforcement legislation to be “congruen[t] and proportional[.]” to the constitutional violation).

<sup>308</sup> Cf. Zachary D. Clopton, *Justiciability, Federalism, and the Administrative State*, 103 CORNELL L. REV. 1431, 1432–34 (2018) (arguing that Congress and the states should fill federal court nonjusticiability gaps through alternative adjudicatory mechanisms such as state courts or agency tribunals). One example might be the Census Act, which delegates Congress’s constitutional authority over the decennial census, see U.S. CONST. art. I, § 2, cl. 3 (providing that the census shall be conducted “in such Manner as [Congress] shall by Law direct”), to the Department of Commerce and gives the Secretary of Commerce broad discretion for conducting the census, see 13 U.S.C. § 141(a) (delegating to the Secretary oversight of the census “in such form and content as he may determine”), a delegation sanctioned by the Supreme Court, see *Dep’t of Com. v. New York*, 139 S. Ct. 2551, 2566–67 (2019).

<sup>309</sup> See William Baude, *Adjudication Outside Article III*, 133 HARV. L. REV. 1511, 1581 (2020) (arguing that only Article III courts exercise the “judicial Power”); Hershkoff, *supra* note 166, at 1868–75 (stating that non-Article III federal tribunals perform quasi-judicial/quasi-administrative roles and can issue advisory opinions and the like); 13A WRIGHT ET AL., *supra* note 49, § 3531.13 (asserting that Article I tribunals are not bound by Article III justiciability doctrines). For example, the Trademark Trial and Appeal Board has adjudicated trademark applications challenged by parties who would not have standing to do so in federal court. See, e.g., *Ritchie v. Simpson*, 170 F.3d 1092, 1094–95 (Fed. Cir. 1999).

<sup>310</sup> Congress can impose Article III-type requirements on Article I courts by statute. See, e.g., 28 U.S.C. § 2519 (giving the Court of Federal Claims jurisdiction over a “case or controversy”).

by these decision-makers, at least on the basis of faithful application of the substantive standards.<sup>311</sup>

#### 6. *The State Political Question Doctrine in Federal Courts*

Because some states have developed their own versions of the political question doctrine,<sup>312</sup> one question that arises is whether the state or federal version applies when a federal court hears a state law claim. An Article III-sourced conception of the political question doctrine would require federal courts to apply the federal version—but not the state version—even when the case is based solely on state law. A state constitutional question committed by the state constitution to the governor, for example, would be justiciable in federal court if posed within a case otherwise meeting the requirements of Article III, even if the state constitution would make the question nonjusticiable in state court.<sup>313</sup>

By contrast, a substantive-law conception of justiciability would lead to more sensible, symmetrical results in Factor 1 cases. A state law question committed to a state governmental entity other than a state court presents no claim for relief, just like Factor 1 cases in federal court under federal law.<sup>314</sup> Under the Rules of Decision Act, a federal court presented with such a state law claim must apply the substantive state law as the state court would.<sup>315</sup> Thus, the state political question doctrine would lead to the same result in either state or federal court, though it would do so as a product of federal choice of law rather than direct application of the state political question doctrine in federal court.

To illustrate, consider *Bacon v. Lee*, a North Carolina supreme court decision resolving a challenge to the Governor’s clemency process under both state law and the Fourteenth Amendment.<sup>316</sup> Because the Governor had the “exclusive prerogative” over clemency,<sup>317</sup> the court held the state law challenges to be nonjusticiable (though it resolved the Fourteenth

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<sup>311</sup> As discussed above, *supra* Section IV.B.4, other substantive laws that do not present nonjusticiable political questions, such as perhaps the Due Process Clause, might apply to the statutorily prescribed decision-making process and be reviewable on those grounds by the Supreme Court.

<sup>312</sup> See *supra* text accompanying notes 183–185.

<sup>313</sup> One could view the federal doctrine grounded in Article III but the state doctrine grounded in substantive law such that, in effect, *both* doctrines could apply to limit federal court adjudication of state claims. But that would be an odd, fundamental divergence for a state doctrine so heavily derived from its federal counterpart, and I know of no authority adopting or advocating for such a divergence.

<sup>314</sup> See *supra* Section IV.B.1.

<sup>315</sup> See 28 U.S.C. § 1652; see also *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938) (confirming the applicability of state substantive common law in federal diversity courts).

<sup>316</sup> 549 S.E.2d 840, 843–45 (N.C. 2001).

<sup>317</sup> *Id.* at 847.

Amendment challenge on the merits).<sup>318</sup> Had the case been decided by a federal court exercising federal question jurisdiction over the Fourteenth Amendment claim and supplemental jurisdiction over the state law claims, the federal court would have decided the state claims in the same way—dismissing them because of a textual commitment to the Governor. Of course, regardless of any state law allocation on the state claim, *Bacon* was right to adjudicate the Fourteenth Amendment claim on the merits, as a federal court would have done had the case been brought in federal court instead.<sup>319</sup>

Factor 2 cases are somewhat more complicated. Because a state can authorize its courts to use nonjudicial standards, a state substantive law may call for the application of nonjudicial standards that would be appropriate for state courts under state law but outside of Article III’s grant of “judicial” power to federal courts. Many state constitutions, for example, require the maintenance of “quality” or “efficient” public schools, or appropriate financing of them, and state courts largely have held such mandates justiciable.<sup>320</sup> If those questions would be nonjusticiable in federal court under *Baker* Factor 2,<sup>321</sup> then a federal court hearing such a case would

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<sup>318</sup> *Id.* at 857.

<sup>319</sup> *See, e.g.*, *Bond v. Floyd*, 385 U.S. 116, 130–31 (1966) (holding that federal courts have jurisdiction to determine whether a state legislature excluded a member in violation of federal law, even if the exclusion question would be nonjusticiable in state court under only state law); *Larsen v. Senate of the Commonwealth*, 152 F.3d 240, 245–48 (3d Cir. 1998) (holding justiciable, despite state law committing the question to a coordinate state political branch, a federal law challenge to the state impeachment process). Some state courts have gotten confused on this point, however. *See, e.g.*, *Edington v. City of Overland Park*, 815 P.2d 1116, 1124 (Kan. Ct. App. 1991) (holding a candidate’s claims that his nomination to city council was rejected in violation of federal civil rights laws to be nonjusticiable political questions because the state constitution committed exclusive authority over city council candidacies to the local government); *Carter v. Hamlin Hosp. Dist.*, 538 S.W.2d 671, 673 (Tex. App. 1976) (holding nonjusticiable an Equal Protection Clause challenge to the drawing of a state hospital district because district drawing is committed to the discretion of the state legislature); *see also Farrington v. City of Richfield*, 488 N.W.2d 13, 16 n.2 (Minn. Ct. App. 1992) (characterizing as having “some merit” the assertion of the political question doctrine over a claim of nonappointment to city council in violation of federal civil rights laws). These cases are wrong. While the state political question doctrine might prevent the state court from resolving *state law* issues committed to coordinate state governments, state courts cannot use their political question doctrines to avoid federal law claims that would be justiciable in federal court. Regardless of the source of the federal political question doctrine, the Constitution’s Supremacy Clause requires state courts to have sufficient jurisdiction to hear federal claims and would preempt state political question limitations to the contrary. *See Testa v. Katt*, 330 U.S. 386, 394 (1947) (holding that state courts must have broad enough jurisdiction to hear federal law claims).

<sup>320</sup> For examples of state courts adjudicating the adequacy and efficiency of state schools under state constitutions, see *Columbia Falls Elementary School District No. 6 v. State*, 109 P.3d 257, 260–61 (Mont. 2005), and *Rose v. Council for Better Education, Inc.*, 790 S.W.2d 186, 212–13 (Ky. 1989). For a detailed discussion of state political question considerations of these types of state constitutional provisions, see Stern, *supra* note 82, at 192–94.

<sup>321</sup> *See* Stern, *supra* note 82, at 189–91 (making this argument).

confront standards set by substantive state law that it could not employ under Article III, and thus the federal court would have to dismiss those claims under the federal political question doctrine (or potentially certify them to the state courts).<sup>322</sup>

In *Vincent v. Voight*, for example, the Wisconsin Supreme Court held justiciable a challenge to the state’s school-finance system—alleged to have perpetuated unequal access to financial resources among school districts—under the Wisconsin constitution’s equal protection clause,<sup>323</sup> which the Wisconsin Supreme Court treats as equivalent to the Equal Protection Clause of the U.S. Constitution’s Fourteenth Amendment.<sup>324</sup> The court held that it could decide the issues “in the exercise of [its] constitutional role” because the questions fell within “an area where all three of the co-equal branches of state government share power and authority consistent with the Wisconsin Constitution.”<sup>325</sup> The court then proceeded to uphold the state system despite the recognition by Justice Diane Sykes that “[a]ny definition of education or standard for educational adequacy is inherently a political and policy question.”<sup>326</sup> Had the claim instead been presented to a federal court, the federal court very well may have had to dismiss for lack of judicially manageable and discoverable standards as contemplated by Article III.

Another example is *Common Cause v. Lewis*, a case filed in North Carolina superior court challenging, on state law grounds, the same North Carolina partisan gerrymanders at issue in *Rucho*.<sup>327</sup> The state court found the claims justiciable and, on the merits, held the districts unlawful under various state constitutional provisions, including North Carolina’s equal protection clause,<sup>328</sup> which is worded nearly identically to the Fourteenth Amendment’s.<sup>329</sup> The North Carolina state courts employ a test for unlawful partisan gerrymandering under the state clause akin to the test rejected in *Rucho* as too political and not judicial.<sup>330</sup> Despite *Rucho*, the state court held

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<sup>322</sup> *Contra* F. Andrew Hessick, *Cases, Controversies, and Diversity*, 109 NW. U. L. REV. 57, 60–61 (2015) (arguing that federal diversity courts should apply state justiciability rules that would allow adjudication even when federal justiciability rules would not).

<sup>323</sup> *See* 614 N.W.2d 388, 395–96 (Wis. 2000).

<sup>324</sup> *Id.* at 413 n.26.

<sup>325</sup> *Id.* at 396 n.2.

<sup>326</sup> *Id.* at 429 (Sykes, J., concurring in part and dissenting in part).

<sup>327</sup> No. 18 CVS 014001, 2019 WL 4569584, at \*2 (N.C. Super. Ct. Sept. 3, 2019).

<sup>328</sup> *See id.* at \*112–18.

<sup>329</sup> *Compare* U.S. CONST. amend. XIV, § 2 (“[N]or shall any State . . . deny to any person within its jurisdiction the equal protection of the laws.”), *with* N.C. CONST. art. I, § 19 (“No person shall be denied the equal protection of the laws . . .”).

<sup>330</sup> *Compare Lewis*, 2019 WL 4569584, at \*114 (requiring proof that state officials’ “predominant purpose” was to entrench partisanship by diluting the votes for their rivals and proof that the lines drawn

the claim justiciable because of “satisfactory and manageable criteria . . .’ for adjudicati[on]” and found that the partisan gerrymander violated the state equal protection clause.<sup>331</sup>

Such was the state court’s prerogative under state law. But say the case had been filed in, or removed to, federal court. Could the federal court adjudicate, consistent with the federal political question doctrine, the state claims deemed justiciable in state court? The answer is no, because *Rucho* and Article III would prohibit the federal court from applying the state substantive law’s standards.<sup>332</sup> The political question doctrine’s source—substantive law—remains the same for state law political questions too.

### CONCLUSION

The political question doctrine has long been understood as rooted in Article III. But that understanding has ambiguous support in the case law and leads to oddities in application by state courts. Reorienting the political question doctrine around substantive law is more consistent with the doctrine’s historical development and helps explain why federal courts distinguish the political question doctrine from Article III jurisdiction and why they retain some authority over political question cases. This reorientation also gives state courts confronting political questions a more appropriate role and resolves a number of ancillary issues about application of the doctrine. The result is a more sensible and workable political question doctrine.

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in fact had the intended effect by substantially diluting votes, then shifting the burden to the defendant to prove that a legitimate, nonpartisan reason justified the map), *with Rucho v. Common Cause*, 139 S. Ct. 2484, 2502–03 (2019) (rejecting a “predominant purpose” test).

<sup>331</sup> *Lewis*, 2019 WL 4569584, at \*113–18, \*127. Other state courts have held similar claims to be justiciable. *See League of Women Voters v. Commonwealth*, 178 A.3d 737, 741 (Pa. 2018); *League of Women Voters of Fla. v. Detzner*, 172 So. 3d 363, 416 (Fla. 2015); *Terrazas v. Ramirez*, 829 S.W.2d 712, 717 (Tex. 1991); *Johnson v. State*, 366 S.W.3d 11, 23 (Mo. 2012) (en banc).

<sup>332</sup> *See Harper v. Lewis*, No. 5:19-CV-452-FL, 2019 WL 5405279, at \*1–3 (E.D.N.C. Oct. 22, 2019) (refusing, under *Rucho*, to resolve the same state law issues presented in *Lewis*).

