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# American Constitutional Conventions: The Judicially Unenforceable Rules That Combine With Judicial Doctrine and Public Opinion to Regulate Political Behavior

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## American Constitutional Conventions: The Judicially Unenforceable Rules That Combine With Judicial Doctrine and Public Opinion to Regulate Political Behavior

JAMES G. WILSON\*

“In short, by the side of our written Law, there has grown up an unwritten or conventional constitution.”<sup>1</sup>

### I. INTRODUCTION TO THE CONCEPT OF CONSTITUTIONAL CONVENTIONS

The concept of nonjusticiability, reflected primarily through the “political question” and the “standing” doctrines, fails to give the Supreme Court (and the rest of us) adequate guidance on how to resolve many constitutional disputes, such as impeachment procedures and standards, congressional expulsions, the scope of federal court jurisdiction, and the use of force abroad. These two doctrines put the Supreme Court on the horns of a false dichotomy. The Court tends to withdraw completely from an issue and from enforcing a textual passage, such as the Republican Guarantee Clause, whenever it makes a determination of

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\* Professor of Law, Cleveland State University. B.A., Princeton University. J.D., University of Chicago. I asked for and received a tremendous amount of assistance on this article. I would like to thank Hans Linde, the late George Haskins, Geoffrey Marshall, Rodney Brazier, Sheldon Gelman, Marjorie Kornhauser, Lynne Henderson, Steve Steinglass, Susan Becker, Debbie Geier, Steve Lazarus, Dean Steve Smith, and Mimi Lord for their help. The Cleveland-Marshall Fund once again provided needed assistance.

1. EDWARD A. FREEMAN, *GROWTH OF THE ENGLISH CONSTITUTION* 109 (1872), *quoted in* A.V. DICEY, *AN INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION* 420 (10th ed. 1959).

nonjusticiability.<sup>2</sup> Conversely, once the Court has determined that it can competently handle an issue, as it did in a recent Origination case,<sup>3</sup> it tends to intervene aggressively.

The Court, for example, decided in early 1992 to hear District Judge Walter Nixon's claim that he should not have been impeached for bribery because the Senate did not provide sufficient procedural safeguards.<sup>4</sup> Judge Nixon asserted that his case should have been heard by all the Senators, not by a committee of twelve Senators that reported back to their colleagues. If the Court feels obligated to eliminate all unfair procedures, it might resolve Nixon's case on the merits.<sup>5</sup> It could extend its existing procedural due process doctrine to impeachment proceedings. But once the Court starts reviewing impeachment proceedings, where can it stop? Could the Court review the impeachment of one of its own members?

Later in this article, I will propose that the Court should not provide any meaningful review of either the process or substance of impeachment proceedings. But such judicial abstinence can excessively legitimate political behavior that violates constitutional norms. What if Judge Nixon had only been allowed to appear before a single, biased Senator? If the Court refused to correct that procedural abuse because it was "nonjusticiable," the citizenry might interpret the Court's decision as a complete validation of such an impeachment. A finding of nonjusticiability in the pending Walter Nixon case may convince the Senate that it can do whatever it wants, because there is no constitutional recourse or restraint. Another perspective is needed.<sup>6</sup>

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2. In a recent case, the Court stated that it might delve into textual passages that have previously been considered nonjusticiable. *New York v. United States*, 112 S.Ct. 2408, 2433 (1992). If the Court does make such a move, the law/convention distinction can help it decide how far to go.

3. *United States v. Munoz-Flores*, 495 U.S. 385 (1990).

4. *Nixon v. United States*, 112 S.Ct. 1158 (1992).

5. *Nixon v. United States*, 744 F.Supp. 9 (D.D.C. 1990), *aff'd*, 938 F.2d 239 (D.C.Cir. 1991), *cert. granted*, 112 S.Ct. 1158 (1992). The lower courts held that the claim was nonjusticiable.

6. As we shall see, the concept of conventions improves our understanding of how the Constitution functions and of how it should function. For example, the Senate created a new convention in 1992, when the Democratic and Republican leadership agreed not to force journalists Nina Totenberg and Timothy Phelps to testify as to their sources. The Judiciary Committee was trying to ascertain how Anita Hill's evidence against Clarence Thomas was leaked to the press. The Senate decided that using their contempt power to require such testimony would put a "chilling effect" on the media. William Eaton, *Senate Will Not Try To Force Reporters To Testify On Leaks*, L.A. TIMES-MIRROR, Mar. 26, 1992, at 23. Thus Congress, not the Supreme Court, established a new constitutional doctrine, a new constitutional convention, that influences both structural and individual rights. See also TIMOTHY PHELPS & HELEN WINTERNITZ, *CAPITOL GAMES* 430-33 (1992).

American lawyers, judges, political scientists, and politicians<sup>7</sup> can improve their constitutional analysis of issues like the Walter Nixon impeachment by importing a concept that British lawyers have refined over the past century: "constitutional conventions."<sup>8</sup> The British give the phrase two meanings: "constitutional conventions" are judicially unenforceable allocations of constitutional power *and* judicially unenforceable regulations of constitutional power.<sup>9</sup> "Conventions" have been called "unwritten" because they are neither codified by statute nor part of the English common law. Yet the British legal community frequently writes about "conventions"; they are staples in any English constitutional law

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7. For discussions about the role those outside the judiciary play in interpreting the American Constitution, see LOUIS FISHER, *CONSTITUTIONAL DIALOGUES: INTERPRETATION AS POLITICAL PROCESS* (1988); JOHN AGRESTO, *THE SUPREME COURT AND CONSTITUTIONAL DEMOCRACY* (1984); SOTIRIOS BARBER, *ON WHAT THE CONSTITUTION MEANS* (1984); and Walter F. Murphy, *Who Shall Interpret? The Quest for the Ultimate Constitutional Interpreter*, 48 *REV. POL.* 401 (1986).

8. English conventions should not be mistaken for American constitutional conventions, the formal meetings that can create or transform America's written Constitution. This article's use of the word "conventions" also should be distinguished from Professor Dworkin's "conventionalism," a close relative of H.L.A. Hart's "rule of recognition":

In America it is settled by convention that law is made by statutes enacted by Congress or the state legislatures in the manner prescribed by the Constitution, and in England that decisions by the House of Lords are binding on the lower courts. Conventionalism holds that legal practice, properly understood, is a matter of respecting and enforcing these conventions, of treating their upshot, and nothing else, as law.

RONALD DWORKIN, *LAW'S EMPIRE* 114-15 (1986). Such "meta-conventions" are largely outside this article's jurisdiction. We are trying to determine when the Court should intervene, and few would argue that the Supreme Court should completely abstain from determining what is or is not law.

The word "convention" has a complex intellectual history; its meaning has not been fixed by any linguistic convention. For example, the philosopher David Lewis maintained that conventions arise only when parties arbitrarily choose one valid solution over another to achieve regularity. DAVID K. LEWIS, *CONVENTION* 96 (1969). Lewis' conventions only facilitate co-ordination. We can drive on either the left or right side of the road, but we must make a choice. Constitutional conventions, on the other hand, are followed for a variety of reasons. Sometimes the alternative is less desirable. *Id.* at 95. Lewis would probably call constitutional conventions "rules." *See id.* at 103. David Hume placed the notion of "convention" at the center of his jurisprudence. He argued that people need to form "conventions" about property, which in turn lead to a broader definition of justice. *See* DAVID HUME, *A TREATISE OF HUMAN NATURE* 489-90 (L.A. Selby-Bigge ed., Oxford University Press 1888) (1740).

9. Unlike the British Constitution, which is permeated with both types of conventions, the text of the American Constitution explicitly delegates most important constitutional powers. Furthermore, the Supreme Court determines which additional powers, such as the President's power to issue Executive Orders, can be "implied" from the text since the federal government is, in theory, a government of limited powers. Consequently, this article shall emphasize the judicially unenforceable, "unwritten" regulations of existing constitutional powers that arise under the American Constitution. I hope to develop a more complete inventory of all American conventions in the future, including those that distribute constitutional power. Allocation of power is, after all, a regulation of power.

course.<sup>10</sup> For example, "convention" requires the British Prime Minister to resign or to dissolve Parliament, thereby forcing a general election, whenever he or she loses the confidence of the House of Commons.<sup>11</sup> The English courts would not compel a recalcitrant Prime Minister to comply with that rule. Only some combination of politicians, the people, the Monarchy, or even the military could resolve such a severe constitutional crisis. Other "conventions" include the Queen's virtually mandatory obligation to assent to all legislation put before her,<sup>12</sup> and the Prime Minister's legally unconstrained powers to hire and to dismiss any Cabinet members.<sup>13</sup> These examples demonstrate that "conventions" vary radically in the amount of discretion they provide to politicians.

Professor Geoffrey Marshall's description of the methodology for

10. Because of conventions, standard English constitutional law books cover more ground than their American counterparts, including such subjects as parliamentary structure and process, the Cabinet, the discretionary powers of the Executive, the Civil Service, and the police. See S. DE SMITH & RODNEY BRAZIER, *CONSTITUTIONAL AND ADMINISTRATIVE LAW* (6th ed. 1989); COLIN TURPIN, *BRITISH GOVERNMENT AND THE CONSTITUTION: TEXT, CASES AND MATERIALS* (1985); GEOFFREY WILSON, *CASES AND MATERIALS ON CONSTITUTIONAL AND ADMINISTRATIVE LAW* (2d ed. 1976). England's simultaneous presentation of the political and the legal constitutions is preferable to America's focus on Supreme Court cases and on a few sections of the Constitution. English law students do not have such a legalistic conception of their constitution. For a similar criticism, see W. Michael Reisman, *International Incidents: Introduction to a New Genre in the Study of International Law*, 10 *YALE J. INT'L L.* 1, 8 n.13 (1984).

11. This convention did not directly force Margaret Thatcher to resign as Prime Minister in 1990. She stepped down because she lost control of her party MPs during the Conservative Party's annual election of their leader. Walter Bagehot, *The Succession*, *THE ECONOMIST*, Nov. 24, 1991, at 64. The winner of that election, John Major, satisfied the basic constitutional convention because all the Conservative MPs, who make up a large majority in the House of Commons, would support him against any rival party challenges. Many Conservative backbenchers and Cabinet Ministers wanted a different leader, but not at the expense of a forced general election that might cost them their power and even their jobs. See Rodney Brazier, *The Downfall of Margaret Thatcher*, 54 *MOD. L. REV.* 471 (1991).

12. GEOFFREY MARSHALL, *CONSTITUTIONAL CONVENTIONS: THE RULES AND FORMS OF POLITICAL ACCOUNTABILITY* 21-22 (1984). As the title of Marshall's book indicates, most British conventions facilitate political accountability. Chief Justice Marshall noted the link between accountability and political questions in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803): "By the constitution of the United States, the President is invested with certain important political powers, . . . and is accountable only to his country in his political character, and to his own conscience." *Id.* at 165-66. Chief Justice Marshall's distinction between law and politics demonstrates that the concept of conventions is consistent with *Marbury*. Indeed, this article attempts to make Marshall's distinction more compelling. The principle of conventions also coexists with the technical meaning of *Marbury* because *Marbury* only requires that the Supreme Court initially consider all constitutional claims. *Marbury* does not require the Court always to have the last word. See Terrance Sandalow, *Comments on Powell v. McCormack*, 17 *UCLA L. REV.* 164, 172-74 (1969).

13. Although the Queen has the legal power to hire and fire all government officials, convention requires her to defer to the Prime Minister. RODNEY BRAZIER, *CONSTITUTIONAL PRACTICE* 57-60 (1988).

determining British constitutional conventions is so succinct that a reader can miss its breadth: "the essential quality that should mark a constitutional convention [is] the combination of consistent historical precedents, and a convincing *raison d'être*."<sup>14</sup> Determining which precedents are relevant and what weight should be given to such episodes rivals, in terms of difficulty, analysis of legal precedent. Yet the concept of conventions is not simply historical. The British Constitution sometimes changes rapidly<sup>15</sup> because a single event creates or alters a convention: "There may be an agreement among the people concerned to work in a particular way and to adopt a particular rule of conduct. This rule has not arisen from custom; it has no previous history as a usage."<sup>16</sup>

There will be even less agreement over what is a "convincing *raison d'être*." The ambiguity of *raison d'être* implies that one can legitimately rely upon virtually any form of constitutional argument—text, historical intentions, precedent, policy, and/or political morality—when defining or modifying particular constitutional conventions. Furthermore, the formulation of precise conventions becomes very contextual because the non-legal sanctions for breaches of convention range from indifference, a drop in opinion polls, and forced resignation from office, to armed rebellion. But such problems should not deter us from studying conventions, which distinguish between a constitution's legal and non-legal components. As Professor Marshall noted: "There seems little to be gained by insisting that the rules of political behavior that are observed in these matters are fundamentally of the same nature as rules of law."<sup>17</sup>

Several reasons exist for developing a similar conception for Ameri-

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14. MARSHALL, *supra* note 12, at 45. Marshall's invocation of a "convincing *raison d'être* is not as conclusory or simplistic as it might first appear. Karl Llewellyn wrote that the preferred technique of judicial rulemaking sought "the rule with a singing reason." KARL LLEWELLYN, *THE COMMON LAW TRADITION* 210-15, 493-96 (1960).

15. Some changes in conventions are gradual. Prior to the 1960s, it was thought that the government must resign whenever it lost a major vote. The current rule is that the Prime Minister must resign whenever he or she loses a vote of "no confidence." MARSHALL, *supra* note 12, at 55. This new rule makes governments more stable and partially liberates backbenchers (members of the majority party who are not in the government) by allowing them to vote against some of their own government's initiative without inevitably risking their careers by triggering an election. Thus a fundamental convention—determining when a government must seek to dissolve Parliament—can change over time.

16. SIR KENNETH WHEARE, *MODERN CONSTITUTIONS* 180 (1951), *quoted in* MARSHALL, *supra* note 12, at 9. Professor Marshall cited two examples of the instantaneous formation of conventions: "that the United Kingdom would not legislate for Commonwealth countries except upon their request and consent, and that any change in the Royal style and titles should require the consent of all the member countries . . ." MARSHALL, *supra* note 12, at 9.

17. GEOFFREY MARSHALL, *CONSTITUTIONAL THEORY* 12 (1971).

can constitutional conventions, much of the American Constitution is created and controlled outside the courthouse.<sup>18</sup> American constitutional conventions are widespread; they implement and control much of the text of the Constitution. To support that positive-normative claim, this article will discuss a variety of existing American constitutional conventions.

Consider the presidential electoral college. The constitutional text does not dictate how its members must vote, but convention requires all members of a state delegation to support the presidential candidate who received the most votes in their state. If a lawsuit were ever filed in the federal courts to obtain compliance with that convention, the Supreme Court should not enforce the convention. For example, the Supreme Court ought not order a West Virginia elector, who voted in 1988 for Lloyd Bentsen as President and for Michael Dukakis as Vice-President, to change that vote.<sup>19</sup> Henry Jones Ford described how this convention was created, well over a century ago, in direct conflict with the Framers' original intentions:

A fact of the highest importance, which has been made manifest by this process, is the plastic nature of constitutional arrangements, however rigid their formal character. The electoral college has been entirely divested of its original functions, without a change in the letter of the law. Instead of possessing discretionary powers, it has become as mechanical as a typewriter. The case is conclusive evidence of the ability . . . of public opinion to modify the actual constitution to any extent required. It has also revealed wherein the true strength of a constitution resides. There is not a syllable in the organic or in the statute law to safeguard the present consti-

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18. The concept of conventions can be reconciled with many of the legal academy's ever-growing number of "schools"—pragmatism, republicanism, feminism, humanism, liberalism, critical legal studies, environmentalism, and conservatism. All these movements should be as aware of political conventions as they are of constitutional legal doctrine; specific conventions can be more important than many legal decisions. Since conventions will be more overtly political in nature, they provide another battle-ground for contesting ideologies. The English system is actually easier to evaluate than the American one because British conventions are primarily designed to improve accountability. Accountability (and its cousin, majoritarianism) cannot explain the American Constitution, which contains a more complex political morality.

American conventions tend to be anti-theoretical because they serve the diverse number of values contained within the Constitution. They also reveal how the Constitution changes over time in response to the people's will; the American public has never been committed to any single ideology. Thus conventions help us better understand America's unique, perpetually changing constitutional morality.

19. The elector cast that vote to protest the entire structure of the electoral college. *Bush, Quayle - Winners Again*, CHI. TRIB., Dec. 20, 1988, § 1, at 4. That convention has been criticized. Skip Roberts has proposed that States should pass laws changing the winner-take-all "custom" that currently determines how electors cast their votes. George F. Will, *Electoral College's Campus Radical*, WASH. POST, June 3, 1990, at D7.



tutional function of the electors, and yet such is the force of public sentiment that there is practically no danger that any elector will ever violate his party obligations, although it cannot be doubted that those obligations have been established in opposition to the expectation of the constitution.<sup>20</sup>

Thus a crucial part of the American Constitution, the method of electing Presidents, is partially "unwritten" in the same sense that much of the English Constitution is "unwritten."<sup>21</sup>

The example of the electoral college reveals how conventions adapt to changed circumstances. This fluid, evolutionary nature of conventions adds another perspective to the debate over how to interpret the Constitution. For example, "originalists"<sup>22</sup> like ex-Judge Bork need to explain why originalism is the only "legitimate" form of constitutional interpretation when conventions have changed so much of the Constitution. All American lawyers and judges should explain how their constitutional legal doctrine and legal theory co-exists with the political doctrine of constitutional conventions.

Most of us know that it is difficult, if not impossible, to infer an "ought" from an "is." Arguably, the widespread existence of conventions only shows that conventions ought to be studied, not that they ought to exist. But there are also strong normative arguments for developing a doctrine of American constitutional conventions. Conventions can and do serve many of the same valuable purposes that constitutional legal doctrine should fulfill. Conventions prevent tyranny, constrain dis-

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20. HENRY J. FORD, *THE RISE AND GROWTH OF AMERICAN POLITICS* 161 (1898).

21. While this article was being completed, Ross Perot was dominating the 1992 presidential election in the summer of 1992. His candidacy raised a strong possibility that the country might end up with a "hung Electoral College," which would refer the final decisions to the House and Senate. Guy Guliotaa, *3-Way White House Race Could Greatly Complicate Electoral Process*, WASH. POST, May 28, 1992, at A19. Indeed, Perot cited the "gridlock" that would result if the election was sent to the House as a key reason for withdrawing from the race. *'I Just Wanted to Do the Right Thing'*, NEWSWEEK, July 27, 1992, at 26.

If a presidential election did end up being decided by Congress, that process should be regulated completely by convention, even though the Bush campaign had considered legal action during Perot's candidacy. S.A. Paolantonio & David Hess, *Bush Team Plots Course If There is No Winner*, CHI. TRIB., May 30, 1992, at 1. Under such circumstances, I believe the House should adopt, as a convention, the rules that it would select the candidate who received the most votes throughout the country. The Senate should pick that candidate's vice presidential nominee. Otherwise we would have a President without any mandate and with little legitimacy. Such a convention also has the virtue of applying a neutral standard to a crucial constitutional controversy.

22. See ROBERT H. BORK, *THE TEMPTING OF AMERICA* 143 (1990). Raoul Berger may be the most consistent advocate. See RAOUL BERGER, *GOVERNMENT BY JUDICIARY* (1977). Paul Brest, on the other hand, rebuts originalism. Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204 (1980). For a useful summary of the debate over constitutional interpretation, see Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1889 (1987).

cretion, distribute power, enhance efficiency and accountability, strengthen separation of powers, and generate an internal political morality. The written text initially allocates many broad constitutional powers to different groups of political leaders, but the exercise of such powers is often not amenable to effective judicial review. Only conventions can control the politicians' implementation of many constitutional powers. Furthermore, if the Rehnquist Court becomes increasingly majoritarian, generally deferring to elected branches' resolution of constitutional claims, then it is vital that the country develop an additional set of constitutional constraints to regulate the politicians. The politicians should not assume that they have unlimited discretion because the Court has refused to intervene.

The relationship between law and convention should be symbiotic, not adversarial. Conventions and legal doctrine can arise under the same constitutional text, enabling the American Constitution to fulfill its multiple functions. For instance, the President's power to wage war can arguably best be controlled by a mixture of convention, Supreme Court doctrine, and even congressional statutory law. Because each clause of the Constitution serves different purposes, we need different combinations of judicial decisions, conventions, and statutes to enable each constitutional clause to best fulfill its functions. Furthermore, the choice between law and convention cannot be made by relying on any single mode of interpretation, be it text, history, or policy.<sup>23</sup> Nor can the choice be reduced to the frequently articulated distinction between structure and rights.<sup>24</sup> One needs to assess the particular factors of each case and the overall desirability of either alternative.<sup>25</sup>

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23. By being so political and so fluid, the concept of conventions undermines any attempt to reduce all constitutional interpretation to a single interpretive technique.

24. See JESSE H. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS* 127-28, 169-70 (1980); J. Peter Mulhern, *In Defense of the Political Question Doctrine*, 137 U. PA. L. REV. 97, 164-69 (1988). Structure and rights cannot and should not be completely separated; some conventions affect individual rights. For example, convention could help regulate the use of the special prosecutor, whose powers affect both the Constitution's basic structure and the individual rights of executive officers who are being investigated. See *Morrison v. Olson*, 487 U.S. 654 (1988).

25. Broad as the scope of this article is, it will *not* discuss what "fundamental" individual rights may exist under America's "unwritten constitution." See Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703 (1975). Thus it will not consider such nontextual, fundamental rights as the right to travel. See, e.g., *Shapiro v. Thompson*, 394 U.S. 618 (1969) (right of new resident in state to receive welfare); *Memorial Hospital v. Maricopa County*, 415 U.S. 250 (1974) (striking down one year residency requirement before an indigent could receive emergency medical care). All such rights are, by definition, judicially enforceable, and thus are not conventions. In this article, I shall use the British concept of conventions primarily to assist in determining the American Constitution's governmental structure: its formal and informal distributions of power.

The notion of conventions also creates a bridge between law and political science by allowing American constitutional lawyers to share with the political community their technical skills and experience, their tools of “legal reasoning,” to develop precise conventional rules that will make the Constitution stronger and politicians more accountable. Many legal skills are required because some conventions are so broad that they approach the status of truisms (such as the convention against tyranny or the convention against self-aggrandizement by any branch of government<sup>26</sup>), while other conventions coexist with some of the American Constitution’s most subtle legal problems (such as the scope of congressional power to alter federal court jurisdiction under Article I and Article III). American constitutional lawyers and judges have spent two centuries deriving specific, complicated rules from general constitutional standards, as well as from the more technical parts of the document. In addition, conventions cannot be precisely formed without considering Supreme Court case law because legal doctrine and “conventional doctrine” frequently coexist under the same constitutional text. Constitutional lawyers are also needed because conventions can be created, defended, and altered by conscious application of the constitutional text, the Framers’ intentions, relevant precedent, policy considerations, and morality — the same sources that animate constitutional legal analysis and debate.<sup>27</sup> The process also works in reverse. Careful contemplation of the political components of the Constitution enhances legal constitutional theory and adjudication.

On a purely legal level, the concept of conventions is important because it assists the Supreme Court in determining which constitutional issues should be ultimately resolved by the political branches. Congress, the President, and/or the public will determine the existence of conventions, their precise contours, any violations, and any sanctions. By simultaneously revealing and refining the existence of nonlegal constitutional constraints on political behavior which violate constitutional norms, constitutional conventions prevent the Supreme Court from deciding constitutional controversies which are so disturbing that

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26. Note that the “convention” prescribing one branch of the government from dominating another has a legal equivalent. Sometimes the Supreme Court can and should form legal doctrine under the separation of powers doctrine to prevent one branch from overwhelming another.

27. The debate over which forms of constitutional argument can be “legitimately” used by the Court is at the heart of contemporary constitutional jurisprudence. See, e.g., BORK, *supra* note 22 (only heretics look at anything aside from text, history, and precedent). For a critique of Bork, including exhaustive documentation of internal inconsistencies, see Richard A. Posner, *Bork and Beethoven*, 42 STAN. L. REV. 1365 (1990).

they cry for a remedy, but for a remedy that should be political, not legal.<sup>28</sup> Just as the Court is more willing to intervene when it can perceive a judicial remedy, it is less likely to produce final judicial resolutions if it is aware of alternative, political solutions. The elected branches can sanction those who breach conventions, with the voters retaining the last word. In other words, certain constitutional wrongs can only be effectively prevented or corrected by the politicians and/or the voters. Many constitutional debates should focus on the precise form of conventions, not solely on legal doctrine. Many law review articles appear unaware of how the distinction between law and convention can improve their inquiries, even though they are primarily concerned with formulating appropriate constitutional conventions, not with developing constitutional law.<sup>29</sup>

One sticky, legal doctrinal issue remains: Should the Supreme Court hold that all conventions are nonjusticiable "political questions," or should the Court simply decide that the plaintiff loses on the merits because final resolution of the issue is committed to another branch? The doctrinal semantics become even more intricate because the Court sometimes relies upon "standing"<sup>30</sup> to dismiss suits which have heavy political

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28. Only some separation of powers issues are outside the scope of effective judicial review. I reject Professor Choper's proposal that the Court should abstain from all separation of powers disputes. CHOPER, *supra* note 24, at 295-96. For example, I argued in a recent companion piece that contemplation of the British system supports a fairly rigid, formalistic interpretation of the Appointments Clause, particularly in criminal cases. James G. Wilson, *Altered States: A Comparison of Separation of Powers in the United States and in the United Kingdom*, 18 HASTINGS CONST. L. Q. 125 (1990). Conventions help us determine when the judiciary should intervene in separation of powers cases. These two articles suggest one partial solution: The Court should insure that the personnel within each of the three branches are fairly immune from each other, but should tolerate much fluidity in how those three branches share many constitutional powers.

29. Virtually every article cited in this article addresses issues that might be best solved, at least in part, by creating constitutional conventions.

30. During the 1970s and 1980s the Supreme Court added a substantive component to its standing requirements, using the doctrine to exclude claims that it believed would corrode separation of powers. For examples of this usage, see *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208 (1974), *Warth v. Seldin*, 422 U.S. 490 (1975), *Laird v. Tatum*, 408 U.S. 1 (1972), *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982), and *Allen v. Wright*, 468 U.S. 737 (1984). Such holdings are a hybrid of the "political question doctrine." This article will not attempt to determine which doctrine should be used when, if only because the author believes that the Court should never have added any substantive component to standing beyond "injury in fact." See Wayne McCormack, *The Justiciability Myth and the Concept of Law*, 14 HASTINGS CONST. L. Q. 595, 599-611, 627-630 (1987). See also William A. Fletcher, *The Structure of Standing*, 98 YALE L. J. 221 (1988); Gene R. Nichol, Jr., *Abusing Standing: A Comment on Allen v. Wright*, 133 U. PA. L. REV. 635 (1985).

On the other hand, Professor Brilmayer maintains that standing advances non-constitutional values. Lea Brilmayer, *The Jurisprudence of Article III: Perspectives on the "Case or Controversy" Re-*

overtones. Legal scholars have intensified the debate by praising the political question doctrine,<sup>31</sup> or by claiming it is nonexistent,<sup>32</sup> unnecessary,<sup>33</sup> mythical,<sup>34</sup> prone to unpredictable applications,<sup>35</sup> and dangerous.<sup>36</sup> Because I am primarily interested in demonstrating the value of conventions as a tool of constitutional analysis, I shall not dwell upon the difficult doctrinal/semantic problem of determining what precise doctrine the Court should apply when it dismisses a case involving constitutional conventions. I do not want the concept of conventions, this article's contribution, to become entangled with the murky, controversial judicial concept of nonjusticiability.<sup>37</sup> This article's crucial points are that cases involving conventions should almost always be dismissed, and that the debate over the constitutionality of the challenged action should then continue within the body politic.

We shall return to these doctrinal issues at the end of the article. The concept of conventions helps determine the appropriate scope of judicial review, whatever doctrinal phraseology the Court adopts. The concept supports the notion that the Court should be extraordinarily reluctant to enter into many constitutional controversies; the plaintiff should almost always lose. This maneuver does not immunize the concept of conventions from criticism. By supporting the conclusion that the Court should not regulate some political behavior that arises under the Constitution, the concept of conventions creates pockets of "lawlessness," similar to those Professor Redish condemned as vile products of the political question doctrine.<sup>38</sup>

The idea of conventions enables us to evaluate the Supreme Court's actual decisions more carefully, whatever doctrinal vehicle is chosen. The Court's instincts have generally been sound in determining when it should defer to another branch on such questions. However, the Court

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quirement, 93 HARV. L. REV. 297 (1979). Justice Scalia has explicitly defended the use of "standing" to guarantee separation of powers. Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881 (1983).

31. Mulhern, *supra* note 24.

32. See Michael E. Tigar, *Judicial Power, The "Political Question Doctrine," And Foreign Relations*, 17 UCLA L. REV. 1135 (1970); McCormack, *supra* note 30, at 595.

33. See Tigar, *supra* note 32; Louis Henkin, *Is There A "Political Question" Doctrine?*, 85 YALE L. J. 597 (1976).

34. McCormack, *supra* note 30, at 595.

35. Martin H. Redish, *Judicial Review and the "Political Question"*, 79 NW. U. L. REV. 1031 (1985).

36. See *id.* at 1060.

37. I want to thank Hans Linde for making this point.

38. Redish, *supra* note 35.

may err if it continues to rely upon its existing political question doctrine, which is expressed in reluctant, ambiguous, and conclusory terms, or on its standing doctrine, which is equally malleable. For example, the Court misjudged when it attempted to remedy gerrymandering in *Davis v. Bandemer*.<sup>39</sup> Two 1990 Supreme Court decisions, *Rutan v. Republican Party of Illinois*<sup>40</sup> and *United States v. Munoz-Flores*,<sup>41</sup> also heighten one's anxiety that the Court may not apply the political question doctrine as well in the future as it has in the past.

This article shall briefly describe the British theories of constitutional conventions in Part II so American readers can become more familiar with the concept. Because the United States, unlike England, has a written constitution that cannot be changed by legislative majorities, Part III will slightly alter the English concept of conventions to fit the American scheme. Part IV will focus on several recent American constitutional conflicts — ranging from the military attack on Iraq to the proper scope of questions and answers during Supreme Court confirmation hearings, a constitutional problem that reappeared when Judge Souter and Judge Thomas refused to tell the Senate Judiciary Committee how they would decide the abortion issue.<sup>42</sup> Part V considers how the concept of conventions relates to such legal constructs as the “political question doctrine,” particularly as expressed in *Rutan*, *Munoz-Flores*, and *Davis*. Part VI will consider objections to the claim that conventions should become part of American constitutional rhetoric and analysis.

## II. THE ROLE OF CONVENTIONS IN THE BRITISH CONSTITUTION

### A. *The Law-Convention Distinction in Theory*

Because American lawyers work with a written constitution that is continually reinterpreted by judges, they may neglect a major threshold question that British constitutional lawyers must address: What is a nation's “constitution”?<sup>43</sup> Professor Colin Munro inaugurated his series of

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39. 478 U.S. 109 (1986). See *infra* text accompanying notes 252-257.

40. 496 U.S. 62 (1990). See *infra* text accompanying notes 248-251.

41. 495 U.S. 385 (1990). See *infra* text accompanying notes 234-247.

42. Nine Senators voted against Souter. Senator Cranston explained: “He has demanded (that) we take him on faith in this critical area of constitutional rights. That I cannot do.” David G. Savage, *Souter Confirmed For High Court in 90-9 Vote*, L.A. TIMES, Oct. 3, 1990, at 1.

43. COLIN R. MUNRO, *STUDIES IN CONSTITUTIONAL LAW* 1 (1987) [hereinafter *MUNRO, STUDIES*]. See also COLIN R. MUNRO, *WHAT IS A CONSTITUTION?* 563 (1983) [hereinafter *MUNRO, CONSTITUTION*].

Professor Koh observed that America has created a “national security constitution” that extends far beyond the generalities contained in the constitutional text. HAROLD KOH, *THE NATIONAL*

essays on the British Constitution by answering: "Every state in the world has a constitution in the original sense of the word, by which is meant the body of rules and arrangements concerning the government of the country."<sup>44</sup> British lawyers must consider this question (and provide an answer similar to Munro's conclusion) because they have no document or documents which are supreme and/or which set forth their constitution's basic organizational format.<sup>45</sup> With one exception,<sup>46</sup> no modern<sup>47</sup> English constitutional scholar accepts the view that the British Constitution is completely "unwritten" or even nonexistent.<sup>48</sup> Munro observed "generalisations about 'written constitutions' or 'unwritten constitutions' are unfounded, because they depend upon a distinction which

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SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR 67-72 (1990). Koh noted that several other constitutional powers are primarily regulated by congressional "framework statutes." *Id.* at 69. Examples of "framework statutes" include the National Security Act, the Administrative Procedure Act, the War Powers Act, the Congressional Budget and Impoundment Act, and Gramm-Rudman. See Gerhard Casper, *Constitutional Constraints on the Conduct of Foreign and Defense Policy: A Nonjudicial Model*, 43 U. CHI. L. REV. 463 (1976); Gerhard Casper, *The Constitutional Organization of the Government*, 26 WM. & MARY L. REV. 177, 187-93 (1985); E. Donald Elliott, *I.N.S. v. Chadha: The Administrative Constitution, the Constitution, and the Legislative Veto*, 1983 SUP. CT. REV. 125, 169-73; Kenneth W. Dam, *The American Fiscal Constitution*, 44 U. CHI. L. REV. 271, 279-90 (1977); Kate Stith, *Rewriting the Fiscal Constitution: The Case of Gramm-Rudman-Hollings*, 76 CAL. L. REV. 593 (1988). Such statutes must be part of any description of constitutional law and convention.

Koh also linked his broad definition of the American Constitution with Professor Black's structural constitution: "But as Charles Black has recognized, a constitution 'constitutes' not by merely enumerating individual rights and institutional powers, but more broadly by declaring how an entire government is to be structured." KOH, *supra*, at 68. See also Charles L. Black, Jr., *The Working Balance of the American Political Departments*, 1 HAST. CONST. L.Q. 13 (1974); Steven L. Carter, *Constitutional Adjudication and the Indeterminate Text: A Preliminary Defense of an Imperfect Mud-dle*, 94 YALE L.J. 821, 853-55 (1985); Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1426-29 (1987).

44. MUNRO, *STUDIES*, *supra* note 43, at 1. See also MUNRO, *CONSTITUTION*, *supra* note 43, at 563.

45. Some important elements of the British Constitution are contained in The Bill of Rights of 1688, (1688) 1 W. & M. 2, ch.2. Such statutes indicate that much of the British Constitution is "written." See, e.g., BLACKSTONE'S STATUTES ON PUBLIC LAW (Peter Wallington & Robert G. Lee eds., 1988). Admittedly, the English Bill of Rights is not as comprehensive as the American Constitution, but the most important distinction between the two legal documents is that the English Bill of Rights is not "entrenched." Parliament can repeal or alter it at any time with a simple majority vote. MUNRO, *STUDIES*, *supra* note 43, at 4.

46. F.F. Ridley, *There is No British Constitution: A Dangerous Case of The Emperor's Clothes*, 41 PARL. AFF. 340 (1988).

47. Munro dismissed Horwill's graceful description of the British Constitution as being "transmitted orally from generation to generation, like the earliest poetry of ancient Greece." H.W. HORWILL, *THE USAGES OF THE AMERICAN CONSTITUTION* 1 (1925), *quoted and dismissed in* MUNRO, *STUDIES*, *supra* note 43, at 2.

48. MUNRO, *STUDIES*, *supra* note 43, at 5.

is misleading and inexact."<sup>49</sup> Instead, British legal scholars grapple with the potpourri of written statutes, practices, judicial opinions, and theoretical writings<sup>50</sup> that constitute the British Constitution.

Such a wide-ranging inquiry is nothing new. One of the curiosities of the British Constitution is that it has developed spontaneously, yet became relatively fixed after one man, Professor Dicey, described several of its central features in the late nineteenth century. In a culture wary of theorizing, one mind organized and rationalized a complex historical-legal phenomenon.<sup>51</sup> Dicey expanded and integrated three pre-existing concepts<sup>52</sup> to explain (and to defend) his country's constitution: parliamentary sovereignty,<sup>53</sup> the rule of law, and the distinction between law and convention. This article, of course, focuses on conventions.<sup>54</sup>

Dicey explained that laws are enforced by courts, but conventions consist of "customs, practices, maxims, or precepts which are not enforced or recognized by the courts, [conventions] make up a body not of laws, but of constitutional or political ethics . . ." <sup>55</sup> Dicey's distinction explains how an "unwritten constitution" coexists with the law. Accord-

49. *Id.* at 7.

50. Munro seemed to limit the British Constitution to customary practices, statutes, and judicial opinions. *Id.* at 2-3. One should also include theoretical writings; British courts frequently cite the works of theoretical writings of constitutional lawyers, particularly A. V. Dicey. *See* DICEY, *supra* note 1.

51. The English bias against theory is a fundamental cultural trait, even among English legal theorists. "[N]o person ever thinks out public policies from first principles. He does not collect all the literature from Plato and Aristotle onwards in order to find out whether there should be a limitation of the hours of work in a factory." SIR IVOR JENNINGS, *THE BRITISH CONSTITUTION* 4 (5th ed. 1971). The modern English Constitution is thus partially based upon an anomaly (another English trait). It is antitheoretical, yet it was largely conceptualized by one thinker, Dicey.

52. "The concept of sovereignty he owed to Austin, the term 'rule of law' to W.E. Hearn and his understanding of conventions to the work of the historian Edward A. Freeman." John F. McDowd, *Dicey in Historical Perspective—A Review Essay*, in PATRICK MCAUSLAN & JOHN F. MCEL-DOWNEY, *LAW, LEGITIMACY, AND THE CONSTITUTION* 40 (1985).

53. Parliamentary sovereignty can be an additional source of confusion. Dicey stated that the courts cannot overrule any statute passed by the House of Commons, the House of Lords, and the monarchy. This cornerstone of British constitutional law is not a convention. This "rule of recognition" is a unique common law doctrine, created and applied by the courts, but untouchable by Parliament. *Id.* at 83. For example, the court in *Pickin v. British Railway Board*, 1974 App. Cas. 765, held that a citizen could not bring before the court his claim that fraud had occurred in the passage of a bill. The court held that it must enforce the laws once it receives a document certified by the Speaker of the House as having been passed by the Queen in Parliament (Commons, Lords, and Crown). *Id.* at 771-72. Otherwise, the court would have to second-guess Parliament. The *Pickin* Court noted the problems that might arise if the court were to determine that fraud had occurred, *id.* at 776, but Parliament conducted its own inquiry and determined otherwise.

54. This section relies heavily on Professor Marshall's work. *See* MARSHALL, *supra* note 17, at 3-12.

55. DICEY, *supra* note 1, at 417. Dicey's distinction between law and convention was not origi-



ing to Dicey, the “true opposition” is not between the “unwritten constitution” and the law, but “between laws properly so called, whether written or unwritten, and understandings, or practices, which, though commonly observed, are not laws in any true sense of that word of all.”<sup>56</sup> Dicey observed that every country’s constitution has conventions. He referred to the American electoral college as an example: “The understanding that an elector is not really to elect, has now become so firmly established, that for him to exercise his legal power of choice is considered a breach of political honour too gross to be committed by the most unscrupulous of politicians.”<sup>57</sup> This example demonstrates how constitutional conventions exist under written constitutional text. Most American conventions are “unwritten rules” that determine how politicians should actually apply the initial allocation of power granted them by the written Constitution.<sup>58</sup>

Dicey’s distinction between law and conventions also explains how the British can accuse a politician of acting “unconstitutionally,”<sup>59</sup> even though there is no legal recourse. Such allegations signify that a British politician is violating a judicially unenforceable constitutional standard that protects an important constitutional value (usually accountability).<sup>60</sup>

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nal; he frequently cited Edward A. Freeman’s *Growth Of The English Constitution*. See DICEY, *supra* note 1, at 418-22.

56. DICEY, *supra* note 1, at 420.

57. *Id.* at 29-30. This convention conflicts with the Framers’ specific intentions:

Washington and his fellow-politicians contrived an electoral college, to be composed (as was hoped) of the wisest people in the nation, which, after due deliberation, was to choose for president the wisest man in the nation. But that college is a sham; it has no independence and no life. No one knows, or cares to know, who its members are. They never discuss, and never deliberate.

WALTER BAGEHOT, *THE ENGLISH CONSTITUTION* 150 (Cornell Paperbacks, 1966)(1867). Constitutional conventions should and will change dramatically over time, undercutting many of the Framers’ specific intentions concerning how the Constitution would operate. The Framers’ intentions thus remain relevant, but even less weighty than in constitutional adjudication. If Americans do not become aware of their conventional constitution, the body politic, the legal community, and the Supreme Court will be acting in twilight, insufficiently aware of the continual political transformations currently taking place within the Constitution.

58. A few controversial political powers are purely conventional, both in their formation and their application. The elected branches’ “power” to ignore the law and the President’s “power” to suspend the Constitution during times of emergency are not implied powers that the Court can legally regulate. The relationship of these metalegal issues to the theory of conventions shall be analyzed in a later work.

59. Professor Geoffrey Marshall presented several hypothetical situations in which the Queen might be allowed to breach the basic convention of royal deference to the Prime Minister in order to prevent more egregious “unconstitutional” violations of the constitution by the Prime Minister. MARSHALL, *supra* note 12, at 23-25.

60. Of course, American politicians can act unconstitutionally *and* illegally; they can violate the

The politician may be acting within the constitutional framework, under the color of constitutional law, and may be immune from any judicial sanction, but still be violating constitutional values. Concluding that some political acts are both "unconstitutional and legal" may grate many Americans' sensibilities, but that proposition helps explain how the American Constitution should sometimes be interpreted. American politicians can sometimes violate the Constitution, yet the Supreme Court will be unable to respond effectively.

Dicey defined the scope of constitutional law more precisely than Austin by separating the distinction between law and convention from the issue of sovereignty, Austin's primary focus.<sup>61</sup> Dicey maintained that the "law of the constitution" consisted only of those parts of the constitution that courts could protect. He spoke less clearly about the constitutional lawyer's need to study the rest of the constitution. Dicey's work consistently "demonstrate[d] the connection between the habits and the conventions of political life and the rules of constitutional law,"<sup>62</sup> but he also stated that political conventions "need trouble no lawyer or the class of any professor of law."<sup>63</sup> Yet English constitutional law classes have

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Constitution in a way that requires judicial intervention. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

61. Dicey's distinction between law and conventions can be traced back to Austin's murky description of the British Constitution as a mix of "positive law" and "positive morality." JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* 258-59 (1954). Dicey's distinction incorporated Austin's positivistic jurisprudential definition that "law" consists of those rules which are enforced by courts. Conventions are the leftovers. But Dicey did not adopt the rest of Austin's constitutional theory, which remained inadequate and incomplete because Austin linked his definition of the constitution to his more questionable definition of sovereignty. Austin asserted that the sovereign was the body which was not subject to the positive law. *Id.*

Maitland, a contemporary of Dicey, pointed out that Austin's definition effectively excluded the House of Commons, whose membership is partially regulated by law. "[M]ost certainly any student set to study constitutional law would be ill-advised if he were to trust that his examiners would not go beyond Austin's definition." F.W. MAITLAND, *THE CONSTITUTIONAL HISTORY OF ENGLAND* 531 (1908). Maitland's point also confirms that constitutional branches are regulated and defined by a blend of law and conventions. Professor Marshall added that Austin also improperly limited constitutional law to questions of sovereignty: "All the laws which relate to the liberties of the subject, to Ministers' powers, and to the duties of the police are usually thought of as having constitutional importance, but they are not directly connected with the definition of the Sovereign." MARSHALL, *supra* note 17, at 6.

Marshall's curative definition of constitutional law is broad: "Any branch of the law, whether it deals prima facie with finance or crime or local government, may throw up constitutional questions." *Id.* Marshall did not convert all legal questions into constitutional questions; he was asserting that constitutional questions can arise within any legal area.

62. MARSHALL, *supra* note 17, at 9.

63. DICEY, *supra* note 1, at 31. Such ambivalence is even less warranted for American constitutional lawyers because the Supreme Court must invariably decide which constitutional issues are justiciable and which are not. American laws and conventions are entangled, thereby increasing the

considered conventions ever since.

The distinction between law and convention, like all major legal/political distinctions, has been subject to criticism and revision. Professor Ivor Jennings concluded that conventions "are rules whose nature does not differ fundamentally from that of the positive law of England."<sup>64</sup> Dr. A.L. Goodhart complained that Dicey implies "that the most interesting and the most important parts of the British system of government fall outside the field of Constitutional Law."<sup>65</sup> Professor Geoffrey Wilson went further, arguing that the convention should be eliminated because it is dogmatic and the product of an outmoded jurisprudence.<sup>66</sup> Sir Kenneth Wheare suggested that constitutional conventions consist of "those rules of conduct governing the exercise of official (or State) power which are recognized as obligatory by the legislative, executive or judicial offices of the State."<sup>67</sup>

Professor Marshall powerfully defended Dicey. According to Marshall, Jennings' accurate observation that law cannot be understood without also considering conventions does not support the conclusion that law and conventions are indistinguishable. Marshall noted that conventions differ from law. They vary widely in their character, significance, and prescriptive force: "No one really knows where the boundaries of convention lie and though there are some few conventions that are as firm, clear, and compulsive as laws, there are not very many of them."<sup>68</sup> Marshall added that the process of determining the precise definition of conventions and the precise sanctions for violations "are not in the least like litigation."<sup>69</sup> Jennings' complaint that the theory of conventions leads to a constitution that "is not a system at all but a mass of disconnected rules depending upon historical accidents," generated Marshall's reply that Jennings might have indicted the British constitution but failed to undermine Dicey's basically accurate description of that constitution.

Marshall then shifted to the offensive. Dicey's observation helps us understand all constitutions: "On any account the constitution or system

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lawyer's need to define and separate them. On a practical level, American lawyers need to understand which issues are regulated by convention so they will not engage in futile litigation.

64. IVOR JENNINGS, *THE LAW AND THE CONSTITUTION* 74 (5th ed. 1959). Marshall was not convinced by any of Jennings' criticisms of Dicey. MARSHALL, *supra* note 12, app. C at 254-46.

65. A.L. Goodhart, *O. Hood Phillips' The Constitutional Law of Great Britain and the Commonwealth*, 75 L. Q. REV. 112, 113 (1959).

66. GEOFFREY WILSON, *CASES AND MATERIALS ON CONSTITUTIONAL AND ADMINISTRATIVE LAW* v (1966).

67. Goodhart, *supra* note 65, at 114.

68. MARSHALL, *supra* note 17, at 14.

69. *Id.* at 11.

of government of a country is a wider concept than the law of the constitution. That was precisely Dicey's starting point."<sup>70</sup> Nor did Marshall see any reason to accept Goodhart's concerns that Dicey excluded many of the interesting parts of the constitution from formal constitutional law.<sup>71</sup> Large segments of any constitution should be kept out of the hands of judges and lawyers. Marshall's overall conclusion follows from his consistent defense of Dicey, but it may trouble many American constitutional lawyers: "Naturally enough, a simple diet of judicial decisions, statutes, and delegated legislation is inadequate nourishment for a constitutional lawyer. Like the historian and the political theorist he needs often to straddle but not, for that reason, to blur, the boundary between law and politics."<sup>72</sup>

Academics have criticized Dicey for not fully understanding his own concept of conventions. He has been justly reproached for stating: "the breach of these . . . conventions will almost immediately bring the offender into conflict with the courts and the law of the land."<sup>73</sup> That argument more than implies that conventions are ultimately judicially enforceable, even though it is inconceivable under existing British legal doctrine that a court would review the Crown's refusal to grant a royal assent to pending legislation already passed by the House of Commons and the House of Lords. Marshall defended Dicey by limiting the sweeping statement to the example Dicey provided. Dicey had argued that a government which refused to resign after dissolution would soon run out of legal funds because it could not raise money with approval from the House of Commons, as required by The Bill of Rights of 1688.<sup>74</sup> Marshall noted that Dicey also offered his own counterexamples, thereby indicating that the statement was not meant to be universal; a court could not reject a piece of legislation because it only received one reading instead of three.<sup>75</sup> But even if Dicey did err or exaggerate (he did refer to "conventions," not to a single convention), Marshall concluded that Dicey's basic distinction between law and convention "is clear enough and worth maintaining."<sup>76</sup>

Sir Kenneth Wheare tried to modify Dicey in the opposite direction

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70. *Id.*

71. *Id.*

72. *Id.* at 12.

73. DICEY, *supra* note 1, at 446.

74. MARSHALL, *supra* note 12, at 5-6.

75. See MARSHALL, *supra* note 17, at 7-12.

76. MARSHALL, *supra* note 12, at 17.

by giving conventions even more potency.<sup>77</sup> Wheare described a convention as “a binding rule, a rule of behavior accepted as obligatory by those concerned in the working of the Constitution.”<sup>78</sup> Many conventions are not “binding”; they can be ignored or modified at any time. Once again, Marshall helped solve the problem by expanding the power of conventions beyond the idea of obligation:

So although we can sensibly ask what the uses or purposes of conventions are, it may be unnecessary to ask why they are obeyed when they are obeyed, since we pick out and identify as conventions precisely those rules that *are* generally obeyed and generally thought to be obligatory. Those who obey moral or other non-legal rules they believe to be obligatory, characteristically do it because of their belief that they are obligatory, or else from some motive of prudence or expected advantage.<sup>79</sup>

Marshall then noted that the word “obligatory” obscures crucial distinctions among conventions, which “as a body of constitutional morality, deal not just with obligations but also with rights, powers, and duties.”<sup>80</sup> Although I may be the last person in the world who can define and separate the concepts of governmental “obligation,” “right,” “power,” and “duty,” I believe Marshall correctly pointed out that all British constitutional conventions cannot be reduced to “duty.” Conventions give parts of the government “rights” and “powers” as well as saddle politicians with “obligations.” Marshall thus offered an additional distinction: “It [is] often useful to distinguish duty-imposing from right-conferring conventions.”<sup>81</sup> In other words, British conventions both allocate and regulate governmental power.

Marshall provided a useful summary of the character of British conventions:

1. Conventions are rules that define non-legal rights, powers and obligations of office-holders in the three branches of government, or the relations between governments or organs of government.

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77. K.C. WHEARE, *MODERN CONSTITUTIONS* 179 (1951). Dicey also has been accused of applying his definition of conventions too narrowly. He concluded that most conventions regulate prerogative powers, even though many conventions help determine parliamentary structure and process. See MARSHALL, *supra* note 12, at 5-6. Of course, erroneous application of a distinction does not necessarily undercut the distinction's validity. Some academics have tried to distinguish between “conventions” and “practices,” an exercise that Marshall found futile and misleading. *Id.* at 212 n.2. See also MARSHALL, *supra* note 17, at 12.

78. WHEARE, *supra* note 77, at 179.

79. MARSHALL, *supra* note 12, at 6.

80. *Id.* at 7.

81. *Id.* at 210.

2. Conventions have as their main goal the effective working of the machinery of political accountability.
3. Conventions can in most cases be stated only in general terms, their applicability in some circumstances being clear, but in other circumstances uncertain and debatable.
4. No general reason needs to be advanced to account for compliance with duty-imposing conventions beyond the fact that when they are obeyed (rather than disobeyed, rejected or changed), they are believed to formulate valid rules of obligation.
5. Conventions are distinguishable from rules of law, though they may be equally, or even more important than rules of law.
6. Conventions may, in practice, modify the application or enforcement of rules of law.
7. Conventions are not direct sources of legal rights and duties, but they may be used or invoked by courts in the application or interpretation of existing rules of law.<sup>82</sup>
8. Conventions may be incorporated by reference or specification into newly-enacted constitutional instruments or rules of law.
9. In some cases law may provide for the existence of conventions to be certified or declared by judicial declaration.<sup>83</sup>

#### B. *The English Law-Convention Distinction in Practice*

The relationship between English law and convention is never static; it is more a function of history than of principle. Because the British Parliament is supreme under the doctrine of parliamentary sovereignty, it can "convert" any existing convention into law by passing a statute. A conflict between the elected House of Commons and the unelected House of Lords provides a compelling example. Late in the nineteenth century

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82. The British Constitution would not be British if it did not have anomalies. When the Attorney General sought in *Attorney-General v. Jonathan Cape Ltd.*, [1976] Q.B. 752, to enjoin ex-Cabinet member Richard Crossman from publishing his Cabinet diaries fifteen years after he left office, the court hedged its conclusion by allowing Crossman to publish his diaries, stating in dicta that the Attorney General might be able to enjoin the publication of similar documents if there were a breach of confidence. The court derived a breach of the common law doctrine of confidentiality from the convention of collective responsibility, which requires Cabinet confidentiality. This judicial exception to non-judicial enforcement of conventions could be the beginning of an onslaught; if the court can legalize this convention, why can't it enforce others? Professor Marshall attempted to limit *Jonathan Cape* on the ground that the court only found that the breach of convention fell "within the ambit of the existing law restraining breaches of confidence in general." MARSHALL, *supra* note 12, at 15. This chicken-egg argument is not completely convincing; without the convention, there would be no legal intervention. It is also not clear that the convention is "existing law"; according to Dicey, conventions are, by definition, judicially unenforceable. DICEY, *supra* note 1, at 24. The *Jonathan Cape* case permits a creative future court to find other common law violations that might allow the court to intervene into the world of political conventions. On the other hand, one should not make too much of a single exception found in dicta.

83. MARSHALL, *supra* note 12, at 210-211 (footnote added).

Dicey had written “[t]he general rule that the House of Lords must in matters of legislation ultimately give way to the House of Commons is one of the best-established maxims of constitutional ethics.”<sup>84</sup> But in the early twentieth century, the House of Lords, dominated by Conservatives, blocked several pieces of Liberal Party legislation, including a proposed Budget, thereby violating the convention that the Lords would not obstruct essential legislation.<sup>85</sup> The Liberal Prime Minister, Asquith, asked the King to pack the Lords with enough Liberal peers to form a majority so that he could pass the contested proposals.<sup>86</sup> The King responded that he would not use the drastic remedy of packing the Lords unless the Prime Minister first took the issue of the relationship between the two Houses to the people to decide in a general election. The Prime Minister deferred to the King and promptly won the next election.<sup>87</sup> The Lords then capitulated, passing the Parliament Act of 1911 (which was subsequently amended in 1949).<sup>88</sup> That Act established that the Lords could only permanently block legislation that extended the statutory limit of five years between general elections.<sup>89</sup> A majority of the Lords could delay all monetary legislation for one month, and could postpone all other legislation for approximately one year.<sup>90</sup> The Diceyan convention of the House of Lords’ deference to the House of Commons had become the statutory law of deference.

Marshall concluded that this sequence of events generated a derivative convention that the Prime Minister cannot pack the House to seek some fundamental constitutional change of the Lords without first seeking a general election or a referendum.<sup>91</sup> Whether or not he is correct, Marshall’s claim demonstrates how a convention can arguably be formed by a single precedent.<sup>92</sup> The American Congress may have created a similar convention when it refused President Roosevelt’s request to pack the Supreme Court in 1937. Politicians, however, can ignore a string of precedents that have essentially created a convention. For example,

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84. DICEY, *supra* note 1, at 458.

85. WILSON, *supra* note 10, at 23.

86. *Id.* at 21-26. Dicey wrote that “packing” was a legitimate response to resistance by the House of Lords. DICEY, *supra* note 1, at 432.

87. WILSON, *supra* note 10, at 23.

88. Parliament Act, 1911, 1 & 2 Geo.5, ch.13 (Eng.) *amended by* Parliament Act, 1949, 12, 13 & 14 Geo. 6, ch. 13 (Eng.).

89. *Id.*

90. *Id.*

91. MARSHALL, *supra* note 12, at 22.

92. Marshall himself stated that “whilst a number of precedents may not establish a rule, a single precedent with a good reason *can* establish a rule.” MARSHALL, *supra* note 12, at 11.

Prime Minister Thatcher terminated an emerging convention against creating new hereditary peers (members of the House of Lords who can pass their title and seat on to their progeny), when she made two such appointments in the 1980s.<sup>93</sup> Parliament could resolve that issue by converting the discarded convention into law; it could pass a statute proscribing new hereditary peerages. If a Prime Minister then attempted to appoint hereditary peers, the British Courts could intervene, finding such actions *ultra vires*. The Government would have broken "the Rule of Law."

### C. *The British Courts and Constitutional Conventions*

The British judiciary quickly incorporated Dicey's major themes into their doctrine, if only because Dicey clarified their existing constitutional jurisprudence. Although the courts have, with one possible exception, found conventions unenforceable in any way, they have considered how conventions explain their constitution and how conventions provide alternative remedies. For example, in *Liversidge v. Anderson*,<sup>94</sup> the court held that it would not review the wartime incarceration of alleged "security risks" based upon the Home Secretary's conclusory affidavit that the imprisoned person was a threat to national security. The court noted that the Home Secretary was bound by the convention of individual responsibility; he could be questioned in Parliament about how he implemented his broad power. In *Adegbenro v. Akintola*,<sup>95</sup> the Privy Council considered the conventional relationship between the Nigerian Prime Minister and a legislature that had expressed lack of confidence in that Prime Minister because the statute creating the Nigerian Constitution incorporated British conventions.<sup>96</sup> Conventions also can influence statutory interpretation; the court held in *British Coal Corporation v. The King*<sup>97</sup> that Parliament must have intended the Judicial Committee to be treated as a judicial body "because of the firmly established convention as to the way in which its advice was accepted by the Crown."<sup>98</sup> Such interpretations make sense; judicial impotence does not mean legal irrelevance. Indeed, one of the major points of this article is that the Supreme

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93. BRAZIER, *supra* note 13, at 200-01.

94. [1942] App. Cas. 206 (P.C. 1941).

95. [1963] A.C. 614 App. Cas. (P.C. 1963) (appeal taken from Nig.) See MARSHALL, *supra* note 12, at 14.

96. MARSHALL, *supra* note 12, at 14.

97. [1935] App. Cas. 500 (P.C. 1935) (appeal taken from Que.).

98. MARSHALL, *supra* note 12, at 14.



Court should not make constitutional law without considering the entire constitution, the legal and the conventional.

### III. THE TWO MAJOR FORMS OF AMERICAN CONSTITUTIONAL CONVENTIONS: "NONCONVERTIBLE CONSTITUTIONAL CONVENTIONS" AND "CONVERTIBLE CONSTITUTIONAL CONVENTIONS"

Dicey's law-convention dichotomy, which so clearly describes the English Constitution, cannot blithely be superimposed upon the significantly different American constitutional system. Dicey's distinction accurately captures the combination of law and political rules that exists in a country that does not have an entrenched written constitution. The British Constitution remains a perpetual, ever-changing mixture of the two forms of power. The English system also permits facile transitions between law and convention. Parliament, legally omnipotent under the doctrine of parliamentary sovereignty, can transform any convention into law or eliminate any law to permit a convention to develop.<sup>99</sup>

The American legal order does not offer such a simple duality because it has two levels of law: supreme constitutional law and lower order federal statutes, state statutes, and common law. The American constitutional process is also far more complex. *Marbury v. Madison*<sup>100</sup> established that Congress is not sovereign but is bound by the written constitution. Furthermore, the text of the United States Constitution allocates most essential governmental powers. Recall that the British concept of constitutional conventions refers to unwritten allocations of constitutional powers *and* to unwritten regulation of those powers. Because the written, entrenched American Constitution initially distributes most<sup>101</sup> important governmental powers to the three branches and/or the states, American constitutional conventions primarily determine how such powers should subsequently be applied. Even these constitutional powers that have arisen outside the text—such as executive orders and agreements, congressional investigations, and judicial contempt—must be "implied" from existing powers since the federal government is a gov-

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99. The notable exception is the unique judicial doctrine of parliamentary sovereignty. Under that doctrine, parliaments cannot bind their successors. Thus parliaments cannot change the judicial doctrine since that would bind successors.

100. 5 U.S. (1 Cranch) 137 (1803).

101. Some important American constitutional powers are implied. Examples include judicial review, executive privilege, presidential power to remove officials, executive orders, executive agreements, congressional investigations, and congressional contempt powers. LOUIS FISHER, CONSTITUTIONAL DIALOGUES 45 (1988).

ernment of limited powers. The Supreme Court can and should initially decide if those "implied powers" are legitimate extrapolations from the textually created powers.<sup>102</sup> The Supreme Court should not, however, enforce the conventions that regulate the implementation of those powers, whether they be textual or implied.

One can exaggerate the differences between the two systems. Much of the British Constitution is determined by the written guidelines set forth in the Bill of Rights of 1688. Many English conventions complement that statute's written disposition of and limitation of fundamental governmental powers and relationships. In addition, the American Constitution, broadly defined, contains additional "unwritten" rules and powers. Examples include the structures of political parties<sup>103</sup> and the powers of the Federal Reserve Board.<sup>104</sup>

Because neither the President nor Congress are sovereign, we need to distinguish between those constitutional powers, initially established and/or regulated by convention, that Congress can "convert" into statute and those it cannot. While the supreme British Parliament can re-fashion any convention into law, Congress, bound by the written constitution, can only transfigure some conventions into statutory law and cannot legally change other conventions at all.<sup>105</sup> For example, Con-

102. That review is deferential. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

103. The Supreme Court has been properly reluctant to exercise full judicial review over party structures. The Court battled racist primaries, *Nixon v. Herndon*, 283 U.S. 536 (1927); *Nixon v. Condon*, 286 U.S. 73 (1932); *Smith v. Allwright*, 321 U.S. 649 (1944); *Terry v. Adams*, 345 U.S. 461 (1953), but refused to intervene in a bitter internal Democratic party dispute over credentials, *O'Brien v. Brown*, 409 U.S. 1 (1972) (per curiam). Because political parties exist outside the text of the written Constitution but are, nevertheless, part of America's political constitution, they need to be treated differently than the "textual constitutional conventions" which are the focal point of this article.

104. Consider the Federal Reserve Board's constitutional power to regulate the currency. None of the following practices described by Professor Kettl in his study of the Fed are determined by statute, much less by constitutional text: (1) the Chairman's dominance, DONALD F. KETTL, *LEADERSHIP AT THE FED* 13 (1986); (2) the Fed's nonpartisanship, *id.* at 110; (3) The Fed's commitment to secrecy, *id.* at 171; (4) the Fed's primary relationship with the President, *id.* at 89, 132; and (5) the hostility to any plans to "pack" the Fed, *id.* at 131. On a slightly more trivial level, the Fed Chairman and the Treasury Secretary have met for lunch once a week since 1936. *Id.* at 57. Kettl concluded that the Fed's power "depends on the support it can build, not on its legal status." *Id.* at 193. The Fed's independence and power are more a function of politics than of law. The Fed also has to satisfy Congress, which has made statutory changes to the Fed's structure and has periodically threatened more radical alterations. *Id.* at 154-59. Although judicial review of such practices may be constitutionally permissible, it would be impractical; how can a court order an agency to make its chairman dominant? That question is no longer hypothetical; Chairman Greenspan apparently was unable to convince the Board to reduce interest rates in early 1991. Louis Uchitelle, *Greenspan's Authority on Rates Is Said to Have Been Diminished*, N.Y. TIMES, Apr. 8, 1991, at A1.

105. The President can also convert some conventions into law via executive orders. The

gress probably cannot pass a law limiting the President's discretion in exercising the pardon or in choosing ambassadors, but Congress arguably can create the War Powers Act to control, at least in part, the use of violence abroad.<sup>106</sup>

The Supreme Court must review congressional attempts to convert existing constitutional conventions into statutory law. The Court can hold that Congress acted unconstitutionally because it converted a non-convertible convention into statutory law. For instance, the Court acted properly when it held that Congress could not override aspects of presidential pardons of Civil War rebels in *United States v. Klein*.<sup>107</sup> The Court also retains power to void an unconstitutional provision in an otherwise "convertible convention." For example, the Supreme Court could strike down the legislative veto<sup>108</sup> in the War Powers Act, even though the rest of the Act may be a permissible conversion of pre-existing conventional power into statutorily regulated power. Whenever the Court decides that Congress has the constitutional power to convert part or all of a convention into statutory law, the Court must then enforce the statute. The dispute would no longer revolve around a judicially unenforceable constitutional convention, but would have become a question of reviewable statutory law.<sup>109</sup>

These observations generate two "paradoxes." First, the Court has the authority to void a statute regulating certain powers that are or should be regulated by convention (pardons, for instance), but cannot review particular applications of that power. The Court has the limited judicial capacity to protect a "nonconvertible convention," which it must define to some degree, but it has no additional power to apply or entirely define that convention.<sup>110</sup> Second, the Court cannot consider any constitutional disputes controlled by convention, but must intervene once Con-

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Supreme Court cannot convert any conventions into law because, by definition, conventions are judicially unenforceable rules of constitutional behavior. The supermajority, on the other hand, represented by the amendment process, can change any convention into constitutional law.

106. Until the 1990 budget agreement, Congress allocated billions of discretionary dollars to the Pentagon, which then consulted with Congress. Decision-making was thus primarily partially by convention. The 1990 budget agreement converted much of that convention into law; Congress now will more closely direct Pentagon spending. *Congress Imposes New Restrictions on Secret Funds*, N.Y. TIMES, Oct. 31, 1990, at A1.

107. 80 U.S. (13 Wall.) 128, 147-48 (1872).

108. The Court would rely on *I.N.S. v. Chadha*, 462 U.S. 919 (1983).

109. The all-or-nothing doctrine of nonjusticiability may be incapable of such refinements.

110. This limited judicial function demonstrates that the concept of conventions uneasily coexists with the concept of nonjusticiability, which requires the court to withdraw before considering the merits at all. The doctrines remain similar in that they lead to judicial restraint.

gress has properly converted conventions into law (such as the Executive's duty to be truthful to Congress). Even then, the Court must recognize that Congress will rarely convert into law an entire textual power previously regulated by convention. For a repulsive example, imagine a congressional statute setting a five-year prison sentence for black officials who lied to congressional committees but only a three-year sentence for prevaricating white officials. The Court should strike down that statute as a violation of the Equal Protection component of the Due Process Clause of the Fifth Amendment. But the Court probably could not intervene if Congress did not pass such a statute but instead used its contempt power only against black officials. Congress might have the constitutional power to abuse its contempt powers in such a way since the Court could not stop Congress,<sup>111</sup> but it would be breaking the constitutional convention against racist application of its conventional powers. Thus we see that the Court inevitably must be aware of conventions and must sometimes participate in their formulation, if only to decide how or how not to remain involved. A textual constitutional power can eventually consist of a mixture of constitutional law, statutory law, and constitutional convention. This conclusion reveals another value of studying the concept of conventions; much American constitutional law and power is determined by statute, not just by the Supreme Court and its decisions. One has to study judicial constitutional decisions, constitutional statutes, and constitutional conventions to understand how American constitutional powers are actually exercised and controlled.

#### IV. AN INVENTORY OF AMERICAN TEXTUAL CONSTITUTIONAL CONVENTIONS

The best "proof" of American conventions is simply to describe them. This section shall summarily list many American constitutional problems that might be better understood by applying the concept of American textual constitutional conventions. I do not mean to imply that all of the following issues, some of which are profoundly difficult, must be exclusively regulated by convention. Nor is the following list meant to be complete; conventions are evolutionary creatures, inherently

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111. It is also possible that the Court would intervene, relying upon *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), which proscribed racist application of a facially neutral, valid statute, and *Davis v. Passman*, 442 U.S. 228 (1979), which allowed a sex-discrimination suit to be brought against a Congressman. Nevertheless, the Court might decide in our sordid hypothetical that the use of contempt power was protected by "legislative immunity."

fluid, partially unknowable. The next section will analyze a few selected conventions in some depth.

The concept of constitutional conventions can improve our understanding of the following congressional powers and responsibilities: (1) to declare war; (2) to supervise and investigate governmental agencies;<sup>112</sup> (3) to make rules for expelling and/or punishing members of Congress; (4) to conduct investigatory hearings, including the application of the contempt power;<sup>113</sup> (5) to determine standards to be used to evaluate nominees to the Supreme Court; (6) to establish criteria for approving other presidential nominees; (7) to establish procedures to evaluate presidential nominees; (8) to establish criteria for determining what constitutes an impeachable offense; (9) to create procedures for impeachment proceedings; (10) to implement treaties; (11) to supervise the Executive; (12) to monitor internal legislative procedures;<sup>114</sup> (13) to oversee relationships between the House and Senate; (14) to allocate internal power

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112. Congress initially did not want to listen to Executive officials. "The heads of departments are chief clerks. Instead of being the ministry, the organs of the executive power, and imparting a kind of momentum to the operation of the laws, they are precluded even from communicating with the House by reports. In other countries they may speak as well as act. We allow them to do neither." 5 HAMILTON'S WORKS, 201, *quoted in* FORD, *supra* note 20, at 88. Ford's history demonstrates over and over that strict fidelity to the Framers' original conceptions of the Constitution and to their initial efforts to implement that Constitution would create a form of government that virtually all of us would find quaint, at best.

113. For a thoughtful discussion of the appropriate amount of judicial review of congressional investigations, see Alexander M. Bickel, *Foreword: The Passive Virtues*, 75 HARV. L. REV. 40, 64-71 (1961). Bickel concluded: "The sum of it is that the power to investigate operates of necessity under a suspension of many otherwise applicable rules." *Id.* at 69. The suspension of judicial rules increases the need for clearly formulated political rules and for conventions. For example, Congress should self-consciously adopt a convention that sets greater limits on its contempt power when used against private citizens than against Executive officials. Those limits could be both procedural and substantive. For a grim view of congressional investigations, see RICHARD CRILEY, *THE FBI V. THE FIRST AMENDMENT* (1990).

114. Professor Foreman has argued that the growth of congressional committees and sub-committees created an unanticipated change in the Constitution, comparable to the growth of political parties. CHRISTOPHER H. FOREMAN, *SIGNALS FROM THE HILL* 24 (1988). Foreman's book described several conventions: (1) the dominant power of the committee or sub-committee chairman, *id.* at 94, 108; (2) the deference each appropriations subcommittee gives to its peers, *id.* at 92; and (3) the tendency for appropriations committees to convene secretly when they finally allocate resources, *id.*

Michael Miller has argued that the courts should frequently review legislative procedures. Michael Miller, *The Justiciability of Legislative Rules and the 'Political' Political Question Doctrine*, 78 CAL. L. REV. 1341 (1990). Miller's proposal would embroil the courts in much litigation. For instance, Senators Domenici and Gavel ignored a rule requiring publicity during Senate hearings over a controversial bill assessing waterway user fees. T.R. REID, *CONGRESSIONAL ODYSSEY* 36 (1980). The courts should not void bills simply because they failed to comply with all conventional procedures during their often complex evolution.

among its members, whether based upon party affiliation or seniority; (15) to share foreign affairs obligations with the President; (16) to regulate "leaks" (17) to maintain an understanding of the Republican Government clause; (18) to allocate the discretion given the Executive to spend revenues;<sup>115</sup> (19) to determine the amount of publicity given to proceedings;<sup>116</sup> (20) to suspend habeas corpus;<sup>117</sup> (21) to oversee the amendment process;<sup>118</sup> (22) to delegate legislative authority to the Executive Branch;<sup>119</sup> and even (23) to suspend the rest of the Constitution.<sup>120</sup>

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115. Congress has given the Executive total discretion in how to spend billions of dollars to "protect national security." See TIM WEINER, *BLANK CHECK: THE PENTAGON'S BLACK BUDGET* (1990).

116. "There is nothing in the Constitution requiring Congress to hold public sittings." FORD, *supra* note 20, at 63.

117. "The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." U.S. CONST. art. I, § 9, cl. 2.

Professor Schlesinger offered the following set of "standards" to determine the use of the emergency prerogative, a power that is by definition non-legal. These standards demonstrate how specific conventions can be made for even the most dramatic, non-legal issues:

1. There must be a clear, present and broadly perceived danger to the life of the nation and to the ideals for which the nation stands.

2. The President must define and explain to Congress and the people the nature and urgency of the threat.

3. The understanding of the emergency and the judgment that the life of the nation is truly at stake, must be broadly shared by Congress and the people.

4. Time must be of the essence, existing statutory authorizations must be inadequate, and waiting for normal legislative action must constitute an unacceptable risk.

5. The danger must be one that can be met in no other way than by presidential initiative beyond the laws and the Constitution

6. Secrecy must be strictly confined to the tactical requirements of the emergency. Every question of broad policy must be opened to national debate.

7. The President must report what he has done to Congress, which, along with the Supreme Court and ultimately the people, will serve as the judge of his action.

8. None of the presidential actions can be directed against the domestic political process and rights.

ARTHUR M. SCHLESINGER, *THE IMPERIAL PRESIDENCY* (1973).

118. John R. Vile, *American Views of the Constitutional Amending Process: An Intellectual History of Article V*, 35 AM. J. LEG. HIST. 44 (1991).

119. Congress has the tendency to delegate its toughest decisions, whether they be the wars in Indochina or the GATT Trade Talks. See John Hart Ely, *The American War in Indochina, Part I: The (Troubled) Constitutionality of the War They Told Us About*, 42 STAN. L. REV. 877, 984-97 (1990) [hereinafter Ely, *Part I*]. Ely asserted that if he could write on a "blank slate," he would have found the Gulf of Tonkin Resolution to be an unconstitutional delegation of power. *Id.* at 896. For a disturbing discussion of the use of the GATT powers, see Walter Russell Mead, *Bushism, Found*, HARPER'S, Sept. 1992, at 37.

120. Professor Lobel concluded that placing the enormous power to "suspend" the Constitution to save the country outside the Constitution was a "liberal" response. Jules Lobel, *Emergency Power and the Decline of Liberalism*, 98 YALE L. J. 1385 (1989). Lobel may be correct. The alternatives are either the complete proscription of such power or the legitimation of such power through the Constitution. The Court is torn between choosing collapse or tyranny. Although Congress and the

Constitutional conventions also help describe the Presidency: (1) the standards used by the Electoral College; (2) the role of the Cabinet;<sup>121</sup> (3) the powers of such groups as the Office of Management and Budget and the National Security Agency; (4) the degree of candor, if any, with Congress and the public; (5) the scope of the executive privilege; (6) the implementation of treaties; (7) the sharing of foreign affairs obligations with Congress, including the use of executive orders and proclamations; (8) the use of armed forces in combat; (9) the implementation of the Twenty-Fifth Amendment, which determines how the country shall be ruled when the President is incapacitated; (10) the application of the pardon power;<sup>122</sup> (11) the exercise of prosecutorial discretion;<sup>123</sup> (12) the conduct of national security agencies (the FBI, CIA, NSC, and whatever else);<sup>124</sup> (13) the regulation of "leaks"; (14) the internal structure of the Executive; (15) the meaning of the Republican Guarantee Clause; (16)

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President share enormous "emergency" powers, they should not be able to easily circumvent fundamental constitutional rights and obligations by invoking "necessity." Thus, we should have a unique mix of law and constitutional morality. Only morality and accountability ultimately constrain the President from suspending the Constitution. The courts retain limited jurisdiction to review such suspensions. They should be able to award damages after the fact, but not issue injunctions during the emergency. Finally, Congress has the power, regulated only by convention, to indemnify the President for any awards made against him. For a thorough description of this traditional doctrine and how it was applied in the nineteenth century, see Lobel, *supra*, at 1387-97. Justice Jackson pursued a similar line of reasoning when he concluded that the Court should not legitimate the Japanese intern camps during World War II by deciding the case on the merits; the Court should have stayed out because the issue was not on "law." See *Korematsu v. United States*, 323 U.S. 214, 242-48 (1944) (Jackson, J., dissenting).

121. Many of the Framers thought that the Senators and the President would work together in administering the government. FORD, *supra* note 20, at 79-80.

122. Professor Kobil has proposed that the clemency powers of the Chief Executive be limited by "an independent commission with the requisite expertise which is directed to focus on justice-enhancing reasons for remitting punishment." Daniel T. Kobil, *The Quality of Mercy Strained: Wrestling the Pardon Power from the King*, 69 TEX. L. REV. 569, 639 (1991). However, the executive "should still retain and exercise that portion of the clemency power that is suited to his skills, as recognized by the Framers of the Constitution: the granting of clemency for reasons related to the public welfare." *Id.* Kobil conceded that the Federal Constitution could preclude his suggestion, but also stated that the scope of judicial review is limited to pardons that may violate some other part of the Constitution. *Id.* at 620. Thus his immediate focus is on changing the powers of Congress and state legislatures which "could create a system of legislative clemency to augment existing executive clemency procedures." *Id.* at 615. Perhaps Kobil's distinction, which is hard to apply, could be reformulated into a convention that could regulate presidential pardons.

123. See *Linda R.S. v. Richard D.*, 410 U.S. 614 (1973) (Court refused to enjoin state officials to enforce child support law). Professor McCormack concluded that the Court should simply hold that the government has no duty to prosecute a case. McCormack, *supra* note 30, at 607 (discussing *Diamond v. Charles*, 476 U.S. 54 (1986)).

124. See CARNES LORD, *THE PRESIDENCY AND THE MANAGEMENT OF NATIONAL SECURITY* (1988).

the exercise of the veto; (17) the appointment of ambassadors;<sup>125</sup> and (18) the permissibility of a line-item veto.<sup>126</sup>

Constitutional conventions may also partially determine the following aspects of the Judicial powers: (1) the scope of jurisdiction of lower federal courts; (2) the scope of appellate jurisdiction of the Supreme Court; (3) the number of Justices sitting on the Supreme Court; (4) the scope of review of Amendment ratifications; (5) the scope of review of internal congressional procedures and findings; (6) the extent to which state courts must provide a forum for federal constitutional claims; (7) the relationship between judges and political leaders; (8) the degree to which Congress can remove cases from Article III Courts to administrative agencies and to Article I Courts; (9) the extent of extrajudicial activities;<sup>127</sup> (10) case selection by the Supreme Court; (11) supervision of special prosecutors; (12) the role of Solicitor General; and (13) the obligation of governmental officials to obey judicial orders.<sup>128</sup>

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125. *Id.* at 160-62.

126. For a defense of the line-item veto, see J. Gregory Sidak & Thomas A. Smith, *Four Faces of the Item Veto: A Reply to Tribe and Kurland*, 84 NW. U. L. REV. 437 (1990). Professors Tribe and Kurland wrote a letter to Senator Kennedy, which he inserted into the Congressional Record, briefly stating why they believed a line-item veto was unconstitutional. 135 CONG. REC. S14,387 (daily ed. Oct. 31, 1989).

Aside from noting that the text of the Constitution authorizes the President to veto bills, but not to veto parts of bills, this article will not review the numerous arguments concerning the constitutionality of a line-item veto. It will only briefly discuss the contribution the idea of conventions can make to the debate. We have seen that formulating coherent, viable conventions as an alternative to judicial standards strengthens the argument that a given issue should not be resolved by the judiciary. Conversely, the lack of a viable convention supports meaningful judicial review. What convention could possibly limit the President's discretion in exercising a line-item veto? Congress' main weapon, the purse, would be significantly given to the Executive; the power of the purse includes the power to spend as well as the power not to spend. Congress can choose to give the President discretion over spending whenever it wishes; for years, it has allocated billions of discretionary dollars to the Pentagon. But Congress must be able to limit that discretion. Congressional negotiations with the administration and with the administration's party would otherwise become somewhat illusory. Legislation invariably requires numerous compromises which often involve other pieces of legislation. If a line-item veto existed, all deals would be contingent. The administration and its party could pretend to be giving something away, knowing they would later renege and veto the part of the bargain they did not like. Coalitions would be more difficult to form if legislators knew that their "add-ons" might be eliminated by the President.

127. See BRUCE ALLEN MURPHY, *THE BRANDEIS-FRANKFURTER CONNECTION* (1982).

128. This is the most paradoxical convention, because the Court obviously found the initial claim to be justiciable when it issued an order against the government official. Although noncompliance with a judicial order seems to present the purest legal issue, Michael Tigar described how presidential noncompliance might occur:

Granted that the power-wielder may disregard the Court's admonition in such a case as the Steel Seizure Case, but violation of an express judicial command may either provide an occasion for the political process to function by causing public censure of the official,



The following aspects of federalism are (or should be) also influenced by constitutional conventions: (1) the extent to which state courts must entertain federal constitutional claims; (2) the "political safeguards of federalism";<sup>129</sup> (3) the role of party politics in local appointments; (4) the scope of the "police power"; (5) the power of Congress to regulate state court jurisdiction; and (6) gerrymandering.

## V. ANALYSIS OF SELECTED AMERICAN CONSTITUTIONAL CONVENTIONS

There is not enough time or space in this article to develop specific conventions, replete with alternatives and arguments, for all the examples listed above. Perhaps not all of the prior issues should have a conventional component. This section shall focus on a few of the aforementioned examples to verify the article's propositions that American constitutional conventions exist and ought to exist. The arguments about particular, recommended conventions or mixtures of law and convention will be somewhat cursory, given the complexity of the issues, but this article is primarily interested in proving the value of the concept of conventions as a constitutional tool, not in defending or criticizing particular conventions. I am less interested in having the reader agree with me about any particular convention. I primarily want the reader to accept the basic concept of conventions. The vast task of cataloguing and evaluating American constitutional conventions awaits another day.

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or demonstrate that the political process is ineffective to redeem the constitutional promise of justice and must therefore be changed in fundamental ways.

Tigar, *supra* note 32, at 1149. Presidential and congressional compliance with Supreme Court opinions might be the most important convention of all, similar to the British convention that the Queen must agree with the recommendations of her Prime Minister. That fundamental convention has never been broken, the heart of the British constitutional structure.

129. The Supreme Court came close to proposing "unwritten rules" in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985). The Court held that since the states were sufficiently protected by the "political safeguards of federalism," they had no need for judicial protection under the Tenth Amendment. The Court emphasized the Constitution's "structural" protections, such as the electoral college and the rule that each state is to elect two Senators. *Id.* at 551. The Court could have also included the political rule that Congress should never use its power under the Supremacy Clause to dominate the states. Constitutional lawyers could help determine the precise contours of such a rule. Is "coercion" the equivalent of domination? Are conditional grants a form of coercion or domination? One would not expect agreement over the precise contours of such rules, any more than one should anticipate consensus over the content of legal constitutional rights. Nevertheless, the states might be better protected, gaining an additional political safeguard, if they could refer to a set of well-defined and reasoned constitutional rules that constrain congressional overreaching instead of relying upon an inevitably clumsy judicial application of the Tenth Amendment. The Court has recently reentered the field. *See New York v. United States*, 112 S.Ct. 2408 (1992); *Gregory v. Ashcroft*, 111 S. Ct. 2395 (1991).

A. *Disputes Between the Executive and the Senate Over the Interpretation of Treaties*

The recent debate over the meaning of the Anti-Ballistic Missile (ABM) Treaty raised issues that superficially appear amenable to judicial resolution. In 1987, the Senate Foreign Relations Committee and the Reagan Administration bitterly debated the proper interpretation of the Anti-Ballistic Missile Treaty of 1972.<sup>130</sup> The Reagan Administration claimed that the Treaty did not prevent the development of the Star Wars system, basing its argument upon secret discussions with the Soviets that had not been disclosed to the Senate when it originally affirmed the ABM Treaty. The Soviets had explicitly stated during the negotiations that they did not want the treaty to cover new technologies.<sup>131</sup> The Senate Committee rejoined that the Administration was bound by the express terms of the ABM Treaty, which stated that the two countries were "not to develop, test, or deploy ABM systems or components which are sea-based, air-based, space-based, or mobile land based."<sup>132</sup> Senator Biden noted that the Reagan Administration's position contradicted executive statements made at the time of ratification in 1972.<sup>133</sup> Both sides accused each other of acting improperly, even unconstitutionally.<sup>134</sup>

How should the Supreme Court have handled the issue if somebody

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130. Professor Koplow argued that unilateral executive reinterpretations are unconstitutional and violations of international law. David A. Koplow, *Constitutional Bait and Switch: Executive Reinterpretation of Arms Control Treaties*, 137 U. PA. L. REV. 1353 (1989). But Koplow also conceded that disputes between Congress and the President over the meaning of treaties probably raise nonjusticiable political questions. *Id.* at 1427-28. Thus his eight proposed standards that determine when a treaty has become entrenched into law, and his four final recommendations should be seen as proposed conventions, not recommended legal criteria. See also Michael J. Glennon, *Interpreting "Interpretation": The President, the Senate, and When Treaty Interpretation Becomes Treaty Making*, 20 U.C. DAVIS L. REV. 913 (1987).

The entire treaty process is rife with convention. For a touching account of President Washington's futile attempt to make the Senate into a "privy council," which would rubberstamp his treaties, see FORD, *supra* note 20, at 77-78. Ford's description provides another example of how the structural Constitution has radically deviated from the Framers' intentions. Convention influences the amount and form of senatorial advice given prior to entering into a treaty, the power of the Senate to amend a treaty, and the President's power to abrogate treaties. See *Goldwater v. Carter*, 444 U.S. 996 (1979).

131. Eugene V. Rostow, *The Reinterpretation Debate and Constitutional Law*, 137 U. PA. L. REV. 1451, 1459 (1989).

132. Treaty on the Limitation of Anti-Ballistic Missile Systems, May 26, 1972, U.S.-U.S.S.R., art. V, para.1, 23 U.S.T. 3435, 3441.

133. Joseph R. Biden, Jr. & John B. Ritch III, *The Treaty Power: Upholding a Constitutional Partnership*, 137 U. PA. L. REV. 1529, 1532 (1989).

134. See Koplow, *supra* note 130, at 1356-57, 1425-27. Rostow accused Koplow of creating an unconstitutional senatorial veto. Rostow, *supra* note 131, at 1455.

had sued? The Supreme Court might be tempted to intervene since the issue on one level concerns only the capacity of extrinsic evidence to modify a written document, a classic legal problem. The Court could competently create judicially manageable standards. But the Court should refuse to resolve the lawsuit. At least when the debate over a treaty's meaning arises between Congress and the President, the issue should be regulated by constitutional convention, not by constitutional law.<sup>135</sup> The Court may be technically "competent" to analyze the issue and create a remedy, but its intervention would, nevertheless, be inappropriate. Under the theory of conventions, the elected branches acted "legally" since they should not and would not be sanctioned by any Court and since they acted under color of law. But they (and ultimately the people they represent) must next decide if either branch nevertheless also acted "unconstitutionally" by violating constitutional norms that cannot or should not be judicially enforced. Some of the arguments may be legalist in form and rhetoric, but the determination of precise conventions and possible sanctions should remain political.

In fact, that controversy was resolved politically. The Reagan Administration retreated from unilaterally developing the Star Wars program when the Senate Committee stated that it must now have access to all secret statements concerning the then pending 1987 Nuclear Disarmament treaty, claiming that future administrations might incorporate those statements into the treaty. At the same time, the Senate did not force its interpretation of the ABM Treaty on the Executive by passing new restrictive legislation.<sup>136</sup> The Senate prevailed by linking the two

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135. The Supreme Court is not precluded from considering all issues involving treaties. The Court must insure that treaties, which have the force of law, are consistent with the rest of the Constitution, particularly the Bill of Rights. See David A. Koplow, *Arms Control Inspection: Constitutional Restrictions on Treaty Verification in the United States*, 63 N.Y.U. L. REV. 229, 326 (1988). A tougher case arises when the courts must decide if they can protect private parties who have been directly injured by Executive treaty re-interpretations. See *Rainbow Navigation, Inc. v. Department of Navy*, 686 F. Supp. 354 (D.D.C. 1988) (Navy could not preclude company from shipping to Iceland after Executive Branch officials told the Senate that the company would be protected under the relevant treaty). These examples demonstrate that the Court can and must review some Executive actions under a given constitutional power (implementing treaties), but cannot review other actions under that same section because those actions should be regulated by convention. In other words, the Court should hold that the Executive cannot use secret evidence to modify the terms of a treaty when that modification aggrieves particular individuals or undermines fundamental individual rights, but the Court should not resolve interbranch conflicts. It also demonstrates how the concept of conventions is more refined than the blunderbuss "political question" doctrine, which requires that the Court not reach the merits at all. See *U.S. Dept. of Commerce v. Montana*, 112 S.Ct. 1415 (1992).

136. See Michael R. Gordon, *Nunn says Record on the ABM Pact is Being Distorted*, N.Y. TIMES, Mar. 12, 1987, at A1.

treaties together, seeking information that the Administration did not want to release on the pending Treaty, and threatening the ratification of the pending Treaty. The Committee's request demonstrated that the two branches would not be able to work together effectively over time if previously undisclosed evidence could alter the terms of existing treaties. Distrust would permeate the ratification process, leading to deadlock. By requesting the existing documents, the Senate also showed it had sufficient power to force the executive to compromise.

In this writer's opinion, efficiency, self-interest, interbranch co-operation, fairness, openness, international reliability, and accountability are advanced by the emerging evidentiary convention against using undisclosed discussions to change the express terms of a treaty.<sup>137</sup> The Constitution will operate more effectively and more democratically if we

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137. The precise conventions remain unresolved. Abraham Sofaer, Legal Advisor to the State Department, conceded that the President was bound by express statements to the Senate, Abraham D. Sofaer, *Treaty Interpretation: A Comment*, 137 U. PA. L. REV. 1437, 1440 (1989), but concluded that the President must interpret any treaty in "good faith," *id.* at 1447. Because the Senate retains its power to interpret treaties, *id.* at 1450, disputes are likely. "A considerable element of judgment will always have to be exercised, and when such issues evoke intense feelings they will be resolved through the political process, rather than by application of neat legal criteria." *Id.* at 1447. Executive supporters may claim that the Senate has no power to interpret treaties, *see* Lawrence J. Block et al., *The Senate's Pie-in-the-Sky Treaty Interpretation: Power and the Quest for Legislative Supremacy*, 137 U. PA. L. REV. 1481, 1489-90 (1989), but the Senate will certainly ignore them. The Senate may even adopt Koplow's broad proposition that "[t]he Senate's view of treaty, whether explicit or implicit, is an integral part of the treaty, and the President cannot proceed to ratification on any other terms." Koplow, *supra* note 130, at 1405. But if the Senate takes that position, the President can also ignore it.

Such general propositions do not answer the "evidentiary" question of the admissibility of secret discussions. Sofaer agreed that the goal is to determine the Senate's "specific understanding and intent." Sofaer, *supra*, at 1443. That task becomes virtually impossible when the Senate failed to consider a particular issue because it was not told about it. Nor would future Senators ever be certain about what they are accepting, if they know there may be hidden understandings or disagreements which could affect the treaty's meaning.

Thus the proposed evidentiary convention proscribing the use of such evidence is desirable, but it should never be turned into a legal standard. Sometimes Presidents need great discretion in interpreting treaties. In 1793 President Washington remained neutral when France declared war against England, even though the United States had signed a Treaty of Perpetual Alliance with France. Rostow, *supra* note 131, at 1457. Even the text, clearly presented and understood, should whither before such grim realities. Additionally, constitutional interpretation should not be limited to original intent. Professor Trimble rejected any static legal approach to treaty interpretation. He applauded the resolution: "The process by which the dispute was resolved—a presidential proposal rejected by Congress—is constitutionally correct procedure for law-making, and the substantive resolute—testing of exotic systems in space is not permitted by the ABM Treaty—was clearly correct." Phillip R. Trimble, *The Constitutional Common Law of Treaty Interpretation: A Reply to the Formalists*, 137 U. PA. L. REV. 1461, 1463 (1989). But as the title of his article indicates, Trimble characterized the process as constitutional "common law-making." *Id.* at 1463. This article proposes that the process can be more accurately described as constitutional "convention-making."

become aware of the precise conventional, constitutional rule that was created.<sup>138</sup> On the other hand, the political system could develop a far less desirable convention. Perhaps a more deferential Senate will allow future Presidents to change the express terms of treaties whenever there is previously undisclosed evidence, or perhaps the Executive branch will eventually have complete discretion in its interpretation of treaties. Worried citizens should not run to the courts but should instead turn to the ballot box and to other forms of political pressure to correct such a distortion of the Constitution. American citizens will be more likely to seek a political solution if they are made aware that the two elected branches violated an important constitutional rule which the courts are incapable of protecting: The Executive cannot use secret evidence to modify the express terms of a treaty when it argues with the Senate over how to interpret a treaty. Perhaps the politicians will also be deterred from acting "unconstitutionally" if they know there is some consensus over such constitutional rules; they will not be able to predict the voters' reactions to any breaches.<sup>139</sup> Admittedly, the political conflict might remain partially unresolved, and the system might face a "deadlock" if neither of the elected branches backed down.<sup>140</sup> But sometimes political stalemate

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138. Adopting my proposed evidentiary convention does not answer the central question about who has the last word in interpreting treaties. Senator Biden claimed that "during the life of the treaty the Constitution permits . . . only that interpretation [as presented by the executive branch and understood by the Senate], unless the treaty is formally amended with the advice and consent of the Senate." *The ABM Treaty and the Constitution, Joint Hearings Before the Senate Foreign Relations Comm. and the Senate Judiciary Comm.*, 100th Cong., 1st Sess. 2, 116 (1987). The Reagan Administration countered with the Sofaer Doctrine, which stated that interpretations only became "entrenched" if they were "authoritatively shared with, and clearly intended, generally understood and relied upon by, the Senate at the time of its advice and consent to ratification." SENATE FOREIGN RELATIONS COMM., *THE INF TREATY*, S. EXEC. REP. NO. 15, 100th Cong., 2d Sess. 443 (1988).

Like Trimble, I am reluctant to commit myself to any final resolution, much less any legal solution. Precise constitutional conventions need to be developed. Trimble recommended the following: "No meaning of a treaty, contract or law is fixed forever, but contrary to Senator Helms, the President cannot unilaterally reinterpret a treaty. Formal Senate action is not necessary, but Senate acquiescence is." Trimble, *supra* note 137, at 1467. Trimble's conventions may make the most sense, but the courts should not intervene whenever either side has not been in compliance with them. As Senator Lugar pointed out, the Senate retains additional weapons, even if the Administration interprets a treaty in bad faith. 134 CONG. REC. S6771 (daily ed. May 26, 1988). Even the House of Representatives can use its powers, particularly its appropriations power, to influence treaty interpretations. Louis Fisher, *Congressional Participation in the Treaty Process*, 137 U.P.A. L. REV. 1511, 1519-22 (1989). Ultimately, the electorate has the last word. See Trimble, *supra* note 137, at 1475-76.

139. Professor Arnold argued that politicians should include within their decision-making process an estimation of voter reaction. R. DOUGLAS ARNOLD, *THE LOGIC OF CONGRESSIONAL ACTION* 7 (1990).

140. Ever wary of being ruled by "nine Platonic guardians" on the Supreme Court, Judge

is the proper resolution of a political conflict; the politicians will usually try to avoid such embarrassments and their accompanying political costs.

Whether one agrees with the recommended convention regulating the interpretation of treaties or not, note how the prior example demonstrates the value of developing precise constitutional conventions. We have become more aware of how the entire Constitution operates. The politicians have developed "unwritten" constitutional rules that regulate and distribute enormous amounts of constitutional power initially allocated to them by the text. These rules can be premised upon any combination of text, history, policy, precedent, and morality. We see more clearly the many purposes and values that the Constitution seeks to implement and how those purposes vary from section to section. So educated, we can create a set of constitutional rules that can better constrain unsavory, even unconstitutional behavior, or can at least warn us that some of our leaders are violating constitutional norms. Finally, the Court has an additional reason for not intervening in the prior dispute even though the issue, at least superficially, has many legal overtones.

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Learned Hand argued that because the Constitution did not explicitly authorize judicial review, the Supreme Court should only find a governmental act unconstitutional when there is "deadlock." Necessity forced the Supreme Court to decide a limited set of cases: "It was probable . . . that without some arbiter whose decision should be final the whole system would have collapsed . . . ." LEARNED HAND, *THE BILL OF RIGHTS* 29 (1964). Although he did not think the case was "ripe," Justice Powell followed a similar line in *Goldwater v. Carter*, 444 U.S. 996 (1979), arguing that the judiciary can eliminate multiple interpretations of the Constitution when the Congress and the Executive disagree. 444 U.S. at 1001-02 (Powell, J., concurring).

How does Hand's approach coexist with this article's proposition that the Supreme Court should not intervene when conventions can better solve the problem? Under this proposition, Judge Hand's "deadlock" theory is both too broad and too narrow. Sometimes the Court should not intervene even if the system is stymied. For instance, the Court should not try to resolve the dispute over what evidence can be used to modify treaties, even though that dispute may last for years, even decades. Eventually the people and the politicians must sort it out. On the other hand, the Court should often intervene even where there is no political quagmire. For example, the Court should prevent Congress from placing its own members or its subordinates within the executive, as it did in *Bowsher v. Synar*, 478 U.S. 714 (1986), and *Buckley v. Valeo*, 424 U.S. 1 (1976). Court intervention was proper even though no deadlock existed; the President was willing to go along with the existing statutes. Finally, the notion of deadlock does not address individual rights. Individuals are more likely to be threatened by concerted governmental action, not by governmental gridlock.

Hand then noted that the political question doctrine reinforces his interpretation by precluding judicial review of many constitutional issues. Judge Hand did not pull any punches, describing the political question doctrine as "a stench in the nostrils of strict constructionists" that gave the Court enormous discretion in providing review. HAND, *supra*, at 15. According to Hand, the political question doctrine proves that the Supreme Court is under no duty to decide all constitutional cases and controversies. *Id.*

The concept of conventions, however, does not answer Hand's threshold argument that the Supreme Court lacks textual constitutional authority for judicial review. Conventions would exist and ought to exist whether the Court has significant judicial review or not.

The Court would know that alternative rules and sanctions can be formulated to resolve the particular problem. In other words, the Supreme Court cannot effectively protect and implement the entire Constitution by itself.

**B. *Procedures and Standards Regulating Senatorial Advise and Consent of Presidential Nominees to the Supreme Court and Cabinet***

The Bork,<sup>141</sup> Souter, and Thomas nominations to the Supreme Court raised numerous questions about the extent to which a nominee must answer senatorial questions and about the standards that the Senate ought to apply in evaluating a nominee.<sup>142</sup> The entire process is and ought to be governed by convention. The Constitution does not require the nominee to appear in the Senate, much less to testify. The text does not constrain senatorial discretion in any way. This textual silence supports, but does not prove, the following interrelated conventions: (1) Senators can constitutionally ask the nominee any questions; (2) the aspirant can refuse to answer any question for any reason; (3) Senators can vote against a nominee for any reason, including answers given or not given; and (4) Senators should evaluate Supreme Court candidates more stringently than they do other executive or judicial nominees. Nevertheless, convention dictates that Senators should remain somewhat deferential to all the President's choices. The Senate would be breaching the more fundamental convention against single branch self-aggrandizement if they used their advise and consent power to preclude the Executive from exercising this essential power.

Precedent helps establish the convention that the Senate has great

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141. See, e.g., Symposium, *The Bork Nomination*, 9 CARDOZO L. REV. 1 (1987); BORK, *supra* note 22; Bruce A. Ackerman, *Transformative Appointments*, 101 HARV. L. REV. 1164 (1988); Stephen L. Carter, *The Confirmation Mess*, 101 HARV. L. REV. 1185 (1988). See also Stephen L. Wasby & Joel B. Grossman, *Judge Clement F. Haynsworth, Jr.: New Perspectives On His Nomination to the Supreme Court*, 1990 DUKE L.J. 74 (briefly discussing the defeated nominations of Judges Haynsworth, Carswell, and Parker to the Supreme Court); Joel B. Grossman & Stephen L. Wasby, *The Senate and Supreme Court Nominations: Some Reflections*, 1972 DUKE L.J. 557; Edward N. Beiser, *The Haynsworth Affair Reconsidered: The Significance of Conflicting Perceptions of the Judicial Role*, 23 VAND. L. REV. 263 (1970); Peter G. Fish, *Red Jacket Revisited: The Case that Unraveled John J. Parker's Supreme Court Appointment*, 5 LAW & HIST. REV. 51 (1987).

142. See Norman Vieira & Leonard E. Gross, *The Appointments Clause: Judge Bork and the Role of Ideology in Judicial Confirmations*, 11 J. LEGAL HIST. 311 (1990). Vieira and Gross, wary of applying ideological standards, based their argument upon precedent and policy: "The prospect of politicizing the process should be disturbing to everyone." *Id.* at 336. See also, TIMOTHY PHELPS & HELEN WINTERNITZ, *CAPITOL GAMES* 179 (1992).

latitude in probing constitutional jurisprudence, the nominees' views of prior cases, views on unresolved issues, character, politics, and prior non-judicial acts of any candidate.<sup>143</sup> The Senate affirmed Hugo Black's nomination even though he had been a member of the Ku Klux Klan. The Senate rejected Harold Carswell partially because he once expressed racist sentiments.<sup>144</sup> Judge Bork's eagerness to participate in the Senate Committee's gruelling televised analysis of his jurisprudence helped cause his rejection. When William Rehnquist was nominated to be Chief Justice, he had to explain arguments he made in favor of private segregation when he was a younger man.<sup>145</sup> The one major exception to this convention, an exception that also cannot be judicially enforced against the Senators, is that Senators should not inquire into the guilt or innocence of any particular person entangled in the criminal justice system or into any case that might be pending before the nominee. Such a question would violate due process, undercutting the litigant's right to an impartial judge.

Precedent alone, however, cannot validate these or any other conventions. There must also be a sufficient, continuing justification; otherwise, all conventions would be nothing more than descriptions. As discussed earlier, the process of justifying conventions utilizes the techniques of constitutional legal reasoning: text, history, precedent, and policy. The primary *raison d'être* for these conventions is that the Supreme Court is a political as well as a judicial institution; its life-tenured, unelected officials make decisions that affect some of the most important parts of our lives. A dismal hypothetical best confirms this point. Imagine that race relations continue to deteriorate in this country, and a large group of people assert that *Brown v. Board of Education*,<sup>146</sup> the school desegregation opinion, was wrongly decided. Senators should ask any

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143. In his assessment of his bitter defeat to become a member of the Court, Judge Bork stated: "Nor should the American people put up with a political campaign about nominees that resorts to untruths or to a confirmation process in which senators demand that the nominee promise specified results." BORK, *supra* note 22, at 10. Dishonesty transgresses the often violated convention of "fair play." But should the Senate adopt Bork's recommendation that the confirmation hearing "not consist of an attempt to argue the outcome of specific issues"? *Id.* at 301. Bork attempted to prove his point by quoting from the clumsy questioning by Senator Specter. *Id.* at 302-05. But alleged senatorial incompetence does not justify such a bright line. For example, Senators should be able to ask a nominee what he or she thinks about desegregation opinions like *Brown v. Board of Education*, 349 U.S. 294 (1955). The recent decades of divided government seem to have developed a substantive convention: the Senate will more closely scrutinize a Supreme Court nominee when the Senate is not controlled by the President's party.

144. Vieira & Gross, *supra* note 142, at 329.

145. PHELPS & WINTERNITZ, *supra* note 142, at 162.

146. 349 U.S. 294 (1955).



Supreme Court nominees if they would overrule *Brown*, and should then vote against any nominee who states they would reverse *Brown* or who refuses to answer the question. Certain cases and rights should be considered inviolable. The debate over abortion proves that there will be major disagreement over which rights warrant such legislative protection from judicial alteration. Of course, existence of a conventional power does not justify abuse of that discretion. The Senate should not turn confirmation hearings into elaborate political litmus tests nor put excessive pressure on future Justices to disclose their positions on difficult legal issues before those issues have been properly presented via the adversarial process. But the precise balance is for the political system; the voters will ultimately determine if the Senators have abused their discretion. Certainly there is no indication that many voters made subsequent voting decisions based upon the tumultuous Bork proceedings. Bork may have been a martyr but only amongst those who already believed.<sup>147</sup>

Any nominee can refuse to answer any question. Souter and Thomas acted both constitutionally and legally by refusing to disclose their views on the continuing viability of *Roe v. Wade*.<sup>148</sup> But they had no right to eat their cake too; the Senate could have refused to nominate them for that evasion. Yet there is nothing inherently wrong with being circumspect. Otherwise, the President would be pressured into nominating the innocuous and the noncommittal, characteristics of the mediocre. Each Senator must decide if the constitutional issue in question is so important that the nominee must respond in a certain way. The Thomas and Souter hearings showed that many citizens and many Senators did not feel that abortion rights deserved such legislative protection.

The Senate should apply more rigorous standards in evaluating Supreme Court nominees than other presidential nominees because of the unique nature of the job. As noted above, once nominated, these unelected people have extraordinary legal and political power. Cabinet officials, on the other hand, can only serve for up to four years before an election threatens their employment. Furthermore, the President should be allowed great latitude in picking his or her employees; the President is both responsible for the administration of the government and is expected to be partisan in that administration. One assumes partisanship will influence political positions, but one hopes for a broader perspective among those who are to sit on the Supreme Court. We thus have another

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147. Bork actively participated in a losing effort to unseat Senator DeConcini, who had voted against Bork. PHELPS & WINTERITZ, *supra* note 142, at 214-15.

148. 410 U.S. 113 (1973).

semi-paradox; because judicial politics should not be the equivalent of partisan party politics, politicians can take a closer look at the highest judicial nominees than at the highest political nominees.<sup>149</sup> Under this set of conventions, the Senate's rejection of President Bush's nomination of John Tower to be Secretary of Defense should be considered an exception to the rule.<sup>150</sup> Finally, the Senate need not so closely scrutinize judges on the lower federal courts because those judges do not have as much power as the Justices on the Supreme Court.<sup>151</sup> Consequently, the Senate did not violate any constitutional convention when it consented to President Reagan's nomination of Judge Bork to the powerful District of Columbia Court of Appeals but rejected Bork's subsequent nomination to the Supreme Court.

Creating precise conventions puts much of the legal and political literature on presidential nominations of judicial and executive officials into context, reducing the events and subsequent analysis to a series of rules that can constrain the politicians after the politicians and the electorate are aware of the rules and their constitutional significance. At the very least, such rules provide the wary amongst us with additional information about how constitutional power is really distributed and exercised. Conventions become tripwires that indicate that one branch or a politician within that branch may be overreaching. But does all of this even matter since it is unlikely that a defeated nominee would ever file suit? That query actually strengthens the overall argument in favor of including conventions in American constitutional analysis. The lack of litigation over a particular constitutional text or practice does not necessarily diminish the constitutional significance of that area. The lack of litigation only demonstrates that major constitutional powers are being

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149. The Senate may be developing a convention of more closely scrutinizing presidential appointments to regulatory agencies than to Cabinet positions. Members of "independent" regulatory agencies need to be less partisan than cabinet appointees, and are in power for more years. The Senate also critically evaluates assessments presidential appointments to independent regulatory agencies to change regulatory policy. See CHRISTOPHER H. FOREMAN, JR., *SIGNALS FROM THE HILL* 77-87 (1988).

150. Walter Karp argued that the Senate, controlled by Democrats, viciously undermined President Carter by refusing to accept his nomination of Theodore Sorensen to be chief of the Central Intelligence Agency. WALTER KARP, *LIBERTY UNDER SIEGE* 30-31 (1988). This breach of convention, of deference to the President, lends credence to Karp's basic thesis that the Democratic leadership was more concerned about destroying internal opposition, including Carter, than the Republican Party (particularly Ronald Reagan).

151. Sometimes the Senate will reject a presidential nominee to the Court of Appeals. Neil A. Lewis, *Committee Rejects Bush Nominee to Key Appellate Court in South*, N.Y. TIMES, June 12, 1991, at A1.

implemented outside the courtroom and need to be regulated by nonlegal means.

### C. *The Conduct of Military and Foreign Affairs*

Although it is virtually inconceivable that any defeated presidential nominee would bring his or her senatorial rejection to court, there is little doubt that military conflicts will continue to trigger litigation. Properly formulated conventions should play a major role in determining how and when that military power should be used, even though litigation may also sometimes be appropriate. Both Congress and the President have overlapping textual claims to regulate military force; all the issues cannot and should not be completely reduced to law, with full judicial review. To take the most compelling example, Congress and the courts should not and could not legally constrain how the President should react to a surprise nuclear attack.

The 1991 attack on Iraq, which generated several cases before its quick, bloody end,<sup>152</sup> serves as an effective example of how conventions can fit into the Constitution. Paul Rockwell, a free-lance writer, wrote a newspaper column in 1990, soon after President Bush sent the first two hundred thousand troops to Saudi Arabia, entitled *War by President is Unconstitutional*.<sup>153</sup> What did Rockwell mean by “unconstitutional”? Rockwell argued that during the Iraq-Kuwait crisis, President Bush unconstitutionally circumvented the Constitution’s textual requirement that “Congress shall have the power . . . to declare war.”<sup>154</sup> By exten-

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152. For instance, President Bush was sued over the Iraq conflict in *Dellums v. Bush*, 752 F.Supp. 1141 (D.D.C. 1990). The plaintiffs requested that the court enjoin the President from attacking Iraq until he secured specific congressional authorization, arguing that the President’s actions would otherwise be “unlawful.” *Id.* at 1144. The District Court denied the plaintiffs’ motion for summary judgment, holding that the controversy was not ripe for decision. *Id.* at 1149-52. But the Judge also stated that the Executive does not have unreviewable discretion to determine what military actions are or are not “war.” *Id.* at 1146. See also *Wallace v. Bush*, No. C-91-0264-VRW, 1991 U.S. Dist. LEXIS 1068 (N.D. Cal. Jan. 29, 1991); *Pietsch v. Bush*, 755 F. Supp. 62 (E.D.N.Y. 1991); *Ange v. Bush*, 752 F. Supp. 509 (D.D.C. 1990).

153. CLEV. PLAIN DEALER, Oct. 3, 1991, at 9-B. This is not a new argument. In 1919, Senator Borah made similar complaints about the American armed intervention into the Soviet Union after the First World War:

Mr. President, we are not at war with Russia; Congress has not declared war against the Russian government or the Russian people. The people of the United States do not desire to be at war with Russia . . . Whatever is being done in that country in the way of armed intervention is without constitutional authority.”

CHRISTOPHER HITCHENS, *BLOOD, CLASS, AND NOSTALGIA* 196 (1990).

154. CLEV. PLAIN DEALER, Oct. 3, 1991, at 9-B.

sively referring to *Youngstown Sheet & Tube Co. v. Sawyer*,<sup>155</sup> Rockwell contended that “[t]he authors of the Constitution deliberately outlawed presidential war,” and “[a]n Act of war is equivalent to an act of law . . . .” Rockwell implied that judicial relief should be available. Several months later, after President Bush doubled the forces in the Middle East to over four hundred thousand troops, but before he launched his attack, Speaker of the House Thomas Foley and Senator Majority Leader George Mitchell stated that the Bush Administration had “no legal authority” to attack without congressional consultation and authorization.<sup>156</sup> Was Mitchell suggesting he could have obtained an injunction that would have prevented Bush from fighting? Similar arguments have been raised about previous conflicts.<sup>157</sup>

The Supreme Court would almost certainly reject any argument that Bush’s attack against Iraq in 1991 was unconstitutional, just as it did not entertain similar challenges against the Vietnam War.<sup>158</sup> As much as I loathed the Vietnam War and as much as I disagreed with the use of force against Iraq at the time of the Gulf War, I believe the Court was correct not to intervene in Vietnam, if only because the Court could not have created a meaningful remedy. But simply labelling the congress-

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155. 343 U.S. 579 (1952).

156. Adam Clymer, *102d Congress Opens, Troubled on Gulf but Without a Consensus*, N.Y. TIMES, Jan. 4, 1991, at A1.

157. Professor Ely wrote two law review articles arguing that Presidents barely acted constitutionally in fighting in Vietnam, but acted unconstitutionally in secretly fighting in both Cambodia and Laos. See Ely, *Part I*, *supra* note 119; John Hart Ely, *The American War in Indochina, Part II: The Unconstitutionality of the War They Didn't Tell Us About*, 42 STAN. L. REV. 1093 (1990) [hereinafter Ely, *Part II*]. In both articles, Ely asserted that the President acted illegally. Ely, *Part I*, *supra* note 119, at 890, 916; Ely, *Part II*, *supra*, at 1116. What did Ely mean? A group of law professors unsuccessfully sought an injunction to prevent the war, joining a suit brought by members of Congress. *Dellums v. Bush*, 752 F.Supp. 1141 (D.D.C. 1990).

158. The Vietnam War spawned over seventy cases raising constitutional issues. See Robert P. Sugarman, *Judicial Decisions Concerning the Constitutionality of United States Military Activity in Indo-China: A Bibliography of Court Decisions*, 13 COLUM. J. TRANSNAT'L L. 470 (1974). See, e.g., *Atlee v. Laird*, 347 F. Supp. 689 (E.D. Pa. 1972) (3 judge court dismissed as nonjusticiable claims that the war was unconstitutional). The Supreme Court never reviewed any of the cases. It affirmed *Atlee* summarily, *sub nom.* *Atlee v. Richardson*, 411 U.S. 911 (1973). Justices Douglas, Brennan, and Stewart dissented, wishing to hear the *Atlee* case. *Id.* I believe the Court should have heard the case and dismissed it. But see Warren F. Schwartz & Wayne McCormack, *The Justiciability of Legal Objections to the American Military Effort in Vietnam*, 46 TEX. L. REV. 1033 (1968). In the course of criticizing the Court for failing to address the Vietnam issue, Professor Koh described the Court’s constitutional responsibilities in very broad terms: “[T]he role of judges is to define the rule of law by drawing the line between illegitimate exercises of political power and legitimate exercises of legal authority.” KOH, *supra* note 43, at 184. Koh thereby posed a false dichotomy between illegitimacy and legality; for better or for worse, the concept of conventions indicates that some political actions may be “illegitimate,” but are nevertheless legal.

sional refusal to declare war in Indochina a “political question” or “non-justiciable” excessively legitimatizes the two branches’ behavior. Both branches partially ignored the Framers’ intentions, clearly expressed in the text, that Congress actively participate in the decision to send troops into combat.<sup>159</sup>

The country should formulate an initial series of constitutional conventions that partially regulate the two branches’ shared power over the use of military force. Those, such as Rockwell, who are critical of the informal way this country enters wars, should contend that both the President and Congress breach a constitutional convention if they continue any war without a formal declaration of war when Congress has time to act. Thus the two branches violated the text, spirit, and intent of the Constitution when they fought the war in Iraq without ever formally declaring war. They acted “legally” since no court could or should have stopped them and because they acted under legal authority given them by the Constitution, but they also acted unconstitutionally by violating judicially unenforceable aspects of the Constitution. From a conventional perspective, the main problem with such a proposal is that the country has never acted that way. Indeed, the public seemed satisfied with the way the Gulf War decision was reached.

One can conceive of other conventions that should never be reduced to law or subject to judicial review. The President would breach a constitutional convention if he launched a surprise attack without consulting at least a few members of Congress (unless there was insufficient time). Professor Ely articulated another potential convention when he argued that “[s]ecret wars are prima facie unconstitutional, since they haven’t been authorized by Congress, let alone exposed to the scrutiny of the American public.”<sup>160</sup> Such wars may be odious, but it is hard to imagine

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159. Professor Ely described Congress’ reluctance to authorize or even fully acknowledge involvement in Indochina. Ely, *Part I, supra* note 119, at 911-22; Ely, *Part II, supra* note 157, at 1116-23.

160. Ely, *Part II, supra* note 157, at 1099. In this article, Ely suggested primarily political remedies, such as congressional censure of a President who violated his rule against secret rules. *Id.* at 1135. But Ely nonetheless remained a lawyer. He equated arguments of constitutionality with arguments of legality. *Id.* at 1116. He also remained wary of the political question doctrine, proposing that the Court should “remand” such issues back to Congress whenever it believed that Congress should do more or was being evasive. See John Hart Ely, *Suppose Congress Wanted A War Powers Act That Worked*, 88 COLUM. L. REV. 1379, 1410 (1988) [hereinafter Ely, *War Powers*]. Judicial remands without follow-up sanctions may only confuse the picture. The voters can also evaluate congressional evasion.

In his companion piece on the wars in Indochina, Ely argued that, aside from precedent, the Tonkin Gulf Resolution violated the nondelegation doctrine by giving the President too much discretion over the decision to engage in combat with the North Vietnamese. Ely, *Part I, supra* note

what the Supreme Court should do under the Constitution (at least in the absence of statutory standards) when such wars take place.

Those who believe that the proper convention is complete presidential discretion can reply that the many prior examples of undeclared war and Presidential authorization of force<sup>161</sup> demonstrate the existence of a broad, accepted convention: the President can fight whenever he wants. Admittedly, precedent is a major source of and justification for conventions, but it is not a conclusive source. There still has to be a *raison d'être*. Thus the compromise solution that the politicians created before the Iraq conflict should become a viable constitutional convention: If there is sufficient time and if there is little or no immediate threat to the lives of Americans by invoking the process, the President should not engage in significant armed conflict without first receiving formal approval from both branches of Congress. That convention does not solve all military problems, but it would be a good start.

But the inquiry is far from over. Congress can pass a statute, similar to the existing War Powers Resolution, requiring a joint resolution before the President can commit troops if there is time or requiring a resolution after troops have been committed in certain situations.<sup>162</sup> Congress can pass statutes similar to the Boland Amendment, which made it illegal for the Executive to support the Nicaraguan Contras for the purpose of overthrowing the Sandanista government.<sup>163</sup> Congress can also cut off funding, authorizing the Courts to enforce some or all of the statute. In other words, Congress can convert some existing conventions into law, including some of the ways the President uses military force. At that time, the

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119, at 894-97. He also asserted that the judiciary could enforce a "bright line test" requiring Congress to clearly authorize military action. *Id.* at 925. Yet Ely's article forcefully demonstrates that both political branches are extremely capable of speaking in varying degrees of clarity. In the absence of statutory authority, the judiciary should not enforce Ely's bright line. The people should.

Ely's eagerness to "legalize" these difficult problems resurfaced in his proposed changes of the War Powers Act. Ely, *War Powers, supra*, at 1385-1421. Ely proposed that Congress amend the War Powers Resolution so that the courts could intervene more effectively by simply starting the statutory "clock" that requires the President to pull out of a dangerous situation unless Congress concurs. *Id.* at 1417. This suggestion is far less troubling than Ely's invocation of the delegation doctrine. The Court would be enforcing the will of one elected branch.

161. America has used force in other countries 211 times, but Congress has declared war only five times. Marshall Ingwerson, *March Toward War Tests Authority of Congress*, CHRISTIAN SCI. MON., Jan. 7, 1991, at 1, 2.

162. Jules Lobel, *Emergency Power and the Decline of Liberalism*, 98 YALE L.J. 1385, 1429 (1989). Such a proposal arguably contains an unconstitutional legislative veto, thereby violating *I.N.S. v. Chadha*, 462 U.S. 919 (1983).

163. See Andrew W. Hayes, Note, *The Boland Amendments and Foreign Affairs Deference*, 88 COLUM. L. REV. 1534 (1988).

courts would become involved.<sup>164</sup>

#### D. *Congressional Power Over Federal Court Jurisdiction*

1. *Congressional Power to Limit Lower Federal Court Jurisdiction Under Article III.* Although we should apply the law-convention distinction to numerous constitutional issues, there is danger in trying to resolve all such issues completely. We are frequently uncertain of the mix of law and convention simply because many important questions of constitutional power have never been adjudicated. Sometimes it is better to retain such uncertainty. Politicians can then make both legal and conventional arguments against disturbing constitutional proposals. Two arguments are frequently better than one. One of the values of conventions, after all, is that they can prevent unconstitutional actions from ever occurring, preempting the need for judicial review.

The debate over congressional power to alter lower federal court jurisdiction and to limit Supreme Court appellate jurisdiction confirms the virtues of ambiguity. The text of the Constitution gives Congress vast powers. Article III, Section 1 states: "The judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." Article III, Section 2 is equally broad: "In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make." Do these clauses permit Congress to manipulate jurisdiction so lower federal courts and the Supreme Court are prohibited from hearing some, or even all, constitutional claims? Can Congress, for instance, pass a statute preventing all federal courts, including the Supreme Court, from reviewing a congressional statute outlawing the burning of the American flag? Has the constitutional text thus created a loophole whereby a mere majority of Congress (with Presidential assent) can virtually amend the Constitution by passing unconstitutional bills with special jurisdictional protections that can completely or partially preclude judicial review? Can Congress even pass a statute preventing state courts from hearing certain constitutional cases?

It may be needless to say, but no consensus has emerged to answer these difficult questions. Although the law-convention distinction cannot provide specific solutions, it can improve the debate. There are many

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164. Determining which conventions should or should not be convertible remains for another day. Professor Glennon has argued that both Congress and the courts should be more active in foreign affairs. MICHAEL GLENNON, *CONSTITUTIONAL DIPLOMACY* 30-33 (1990).

possible solutions, but consider four: (1) Congress is only restrained by convention from manipulating federal court jurisdiction<sup>165</sup> (with the exception of the Supreme Court's original jurisdiction);<sup>166</sup> (2) only convention constrains congressional definition of lower federal court jurisdiction, but constitutional claimants must have some access to the Supreme Court (if only through the state courts);<sup>167</sup> (3) Congress faces

165. Professor Wechsler concluded that "Congress would decide from time to time how far the federal judicial institution should be used within the limits of the federal judicial power; or, stated differently, how far judicial jurisdiction should be left to the state courts." Herbert Wechsler, *The Courts and the Constitution*, 65 COLUM. L. REV. 1001, 1005 (1965). Many commentators agree that Congress has plenary power over lower federal court jurisdiction. Even Professor Ratner, who has asserted that the Supreme Court must have significant appellate review to fulfill its "essential functions," conceded significant power to Congress. Leonard G. Ratner, *Majoritarian Constraints on Judicial Review: Congressional Control of Supreme Court Jurisdiction*, 27 VILL. L. REV. 929, 955 (1981-82).

Other commentators disagreed. Professor Eisenberg stated that lower federal courts must exist and must have broad constitutional jurisdiction because "[t]he national judiciary was intended, perhaps above all else, to be able to hear and do justice in all cases within its jurisdiction." Theodore Eisenberg, *Congressional Authority to Restrict Lower Court Jurisdiction*, 83 YALE L. J. 498, 506 (1973-74). Professor Amar has written that, at a minimum, all federal questions must eventually reach an Article III Court, if only via appellate review. Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205, 229-59 (1985) [hereinafter Amar, *Neo-Federalist View*]; Akhil Reed Amar, *Marbury, Section 13, and the Original Jurisdiction of the Supreme Court*, 56 U. CHI. L. REV. 443, 466 (1989) [hereinafter Amar, *Marbury*].

166. *Marbury* held that Congress could not expand the Supreme Court's original jurisdiction. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). Professor Amar has concluded that Congress can alter some of the Supreme Court's original jurisdiction. Amar, *Marbury*, *supra* note 165, at 478-488.

167. In his seminal article, Professor Hart asserted that constitutional claimants must have access to some court. Henry M. Hart, Jr., *The Power of Congress To Limit The Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1372 (1953). But later in the discussion, Hart seemed to hedge that general proposition:

Congress would need the executive arm to seize persons and property, if it were going to act on an important scale. And the executive arm could be checked by the courts unless Congress had repealed the general grants of jurisdiction. If both of them did get together, it wouldn't be long before the voters had something to say, would it?

*Id.* at 1397. Hart conceded: "Habeas corpus aside, I'd hesitate to say that Congress couldn't effect an unconstitutional withdrawal of jurisdiction . . . . The primary check on Congress is the political check — the votes of the people." *Id.* at 1398, 1399 (emphasis added). (Note that the added emphasis on "unconstitutional" reveals a potential convention.)

Hart's final fallback — the legal autonomy of the state courts — is somewhat constrained because state courts have little power over federal officials under existing caselaw. For instance, state courts cannot use habeas corpus to challenge confinements by federal officials. *Tarble's Case*, 80 U.S. (13 Wall.) 397 (1871). See also Martin H. Redish & John E. Muench, *Adjudications of Federal Causes of Action in State Court*, 75 MICH. L. REV. 311, 313-40 (1976). Hart proposed a legal standard, not a conventional one, to make such nightmares unlikely. Congress cannot simultaneously give a federal court jurisdiction over any claim and limit that court's ability to entertain all relevant constitutional issues. Hart, *supra*, at 1373. Hart's primary authority is *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871). See also Laurence Gene Sager, *Foreword: Constitutional Limitations on Congress' Au-*



conventional restraints in formulating lower federal court and Supreme Court appellate jurisdiction, except the Supreme Court can legally prevent Congress from initially limiting state court jurisdiction to hear constitutional claims *and* can require state courts to entertain such claims;<sup>168</sup>

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*thority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17, 27, 87 (1981). That legal standard should be part of any mix of law and convention.

Hart created a large pocket of Supreme Court appellate jurisdiction that seems immune from congressional regulation. "[T]he exceptions [clause] must not be such as will destroy the *essential* role of the Supreme Court in the constitutional plan." Hart, *supra*, at 1365 (emphasis added). Professor Ratner extended Professor Hart's argument that the Supreme Court must have appellate jurisdiction if it is to perform its "essential functions" in the Constitution. He maintained that the Supreme Court must retain appellate jurisdiction over state courts to insure constitutional uniformity, access to state courts, and the supremacy of the national Constitution over state interpretations. Ratner, *supra* note 165, at 935-36, 955. See also Leonard G. Ratner, *Congressional Power Over Appellate Jurisdiction of the Supreme Court*, 109 U. PA. L. REV. 157 (1960). Professor Wechsler was not convinced. Wechsler, *supra* note 165, at 1005.

Professor Sager, also relying on Hart, concluded that state courts retain power under the Supremacy Clause to enjoin federal officials if no adequate federal court remedies exist. Sager, *supra*, at 83. See also Martin H. Redish, *Constitutional Limitations on Congressional Power to Control Federal Jurisdiction: A Reaction to Professor Sager*, 77 NW. U. L. REV. 143, 157-61 (1982). Of course, we cannot predict how the different state courts would interpret the Supremacy Clause if they had to face such difficult problems, but the best guess would be "inconsistency." Such possibilities appear unlikely under Professor Sager's formulation, because he interpreted Article III, due process, and the Supremacy Clause as requiring the Supreme Court to decide virtually all constitutional issues, based upon the premise that all constitutional claimants must have "adequate relief" and must have access to some Article III court. Sager, *supra*. Sager also concluded that the Court should oppose congressional efforts to shift specific constitutional issues to state courts because such moves "create a political climate hostile to certain constitutional rights." *Id.* at 87. Although he agreed with Sager's policy perspective, Professor Redish concluded that Congress has plenary power to remove particular constitutional claims to state court. Redish, *supra*, at 144.

168. Professor Van Alstyne asserted that Congress has "plenary" power under the exceptions clause to modify the Supreme Court's appellate jurisdiction. William Van Alstyne, *A Critical Guide to Ex Parte McCordle*, 15 ARIZ. L. REV. 229, 260 (1973). He marshalled numerous Supreme Court opinions to support that argument. *Id.* at 254-63. But he then qualified that plenary power, stating that the power must conform to the rest of the Constitution, including the Bill of Rights. *Id.* at 263. Van Alstyne concluded that "[d]ue process does not require either a hearing or an appeal in the Supreme Court. It does require, however, at least one fair hearing in a judicial setting which, in light of the claim that is asserted, conforms to the Supreme Court's stated requisites of procedural due process." *Id.* at 268. Thus the Supreme Court apparently must retain some appellate jurisdiction to insure that neither the state courts nor Congress evades the fundamental obligation to provide "one fair hearing." Professor Bator disagreed, concluding that Congress could legally eradicate Supreme Court appellate jurisdiction, although such an act would violate the "spirit" of the Constitution. Paul M. Bator, *Congressional Power Over the Jurisdiction of the Federal Courts*, 27 VILL. L. REV. 1030, 1039-41 (1981-82). Bator was proposing a convention.

Professor Redish made a similar argument to Van Alstyne's, concluding that Congress could completely constrain Supreme Court appellate jurisdiction over a fundamental right "so long as some independent forum existed to protect that right." Martin H. Redish, *Congressional Power to Regulate Supreme Court Appellate Jurisdiction Over the Exceptions Clause: An Internal and External Examination*, 27 VILL. L. REV. 900, 918 n.73 (1981-82). Redish noted that due process may define "independence" as requiring either access to Article III lower courts or access to state courts with

(4) virtually the entire field is subject to meaningful judicial review, and the Supreme Court has the legal power to strike down any congressional attempt to impose jurisdictional limitations on the power of lower federal courts, state courts, and the Supreme Court to hear constitutional claims.<sup>169</sup>

This problem is so dauntingly complex that I am loathe to make a particular recommendation at this moment, lest the issues and the resulting arguments swamp and distort the rest of the article.<sup>170</sup> But the con-

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Article III tenure and pay protections. *Id.* at 915 n.61. For a more extended discussion, see Redish, *supra* note 167, at 161-66. But if the Supreme Court cannot review an issue because Congress has completely foreclosed appellate jurisdiction, including appellate jurisdiction to determine the independence of the lower court that heard the claim, who is to determine "independence"? Perhaps Redish is arguing that the Supreme Court retains minimal, constitutionally protected appellate jurisdiction to insure judicial "independence."

The Supreme Court has continued to pressure the state courts to assume their full constitutional responsibilities. *See Fedler v. Casey*, 487 U.S. 131 (1988). The Supreme Court edged toward the conclusion that the state courts must entertain all such cases, but it never had to reach that final conclusion, just as it never has had to consider a congressional statute limiting lower court jurisdiction over federal constitutional claims. If, on the other hand, the Court were to hold that state courts have no obligation to consider federal constitutional claims (perhaps only by the unlikely means of shutting down all state courts), then the Court should do one of two things. The Court should either create a narrow legal exception to any holding that Congress can limit federal court jurisdiction to cover that exception, or should hold that Congress cannot preclude constitutional claims from federal courts.

169. Raoul Berger asserted that Congress can only limit Supreme Court review of factual findings, not conclusions of law. *RAOUL BERGER, CONGRESS V. THE SUPREME COURT* 285-96 (1969). *See also Irving Brant, Appellate Jurisdiction: Congressional Abuse of the Exceptions Clause*, 53 OR. L. REV. 3 (1973) (discussing the misinterpretation of the phrase "both as to Law and Fact"); Henry J. Merry, *Scope of the Supreme Court's Appellate Jurisdiction: Historical Basis*, 47 MINN. L. REV. 53 (1962) (analyzing the purpose of the Exception Clause in the grant of appellate jurisdiction).

170. It would be absurd to suggest that this issue, which has generated some of the finest and the most complex law review articles ever written, can be solved in this brief section. I have only sought to demonstrate that the problem can be more easily grasped and better resolved by including the concept of constitutional conventions as part of the solution. On a more general level, the quandary shows why the Court needs to make subtle determinations about the proper mix of law and convention. That exercise is impossible if constitutional conventions are not fully articulated and defended when the cases appear before the Court. Because nobody can predict which of these issues might first appear on the Court's docket, it is vital that the Court have a broad perspective on the proper mix of law and convention covering the entire doctrinal area whenever it tackles such problems. Otherwise, an initial decision of either nonjusticiability or justiciability on a seemingly narrow question, such as the power of state courts over federal officials, could be awkward at best, catastrophic at worst.

We are, after all, dealing with a simultaneous equation of the most complex and unpredictable nature. The Court needs to interpret, at the least, Article III, due process, equal protection, habeas corpus, the Supremacy Clause, the implied doctrine of separation of powers, the power of Congress to create "legislative courts" under Article I, the Tenth Amendment, and diversity jurisdiction. One also has to consider the roles and possible responses of Congress, the Supreme Court, the lower federal courts, the state courts, the state legislatures, and the state constitutions. The issues include suspension of habeas corpus, federal removal power, federal immunity from state court powers, the

cept of conventions may provide a "common ground," a starting point in this inquiry. As diverse as their views are, virtually all constitutional scholars would agree that Congress would, *at the least*, violate a constitutional norm by precluding particular constitutional claims from either lower federal court jurisdiction or from Supreme Court appellate jurisdiction.<sup>171</sup> As Professor Bator put it, the Constitution's "spirit" would be offended if Congress discriminated against a particular category of constitutional claims.<sup>172</sup> Although Congress may well have the constitutional power to cripple the federal courts in this fashion, Congress would disrupt the constitutional balance. Once one political faction uses certain means that threaten judicial independence, other factions will be more willing to use those devices in the future. The long-term stability of the system, including the doctrine of separation of powers, is undermined by such unconventional tactics.

This hesitation to map out the precise mix of law and convention is another way of expressing the worth of uncertainty. Congress does not know if it has unlimited legal discretion to alter lower federal court and Supreme Court appellate jurisdiction;<sup>173</sup> it will hopefully continue its tradition of rejecting any such proposals.<sup>174</sup> Congressional traditionalists should contend that such constitutionally disruptive acts are "unconstitutional" because they break the particular convention proscribing their creation; they violate the more fundamental convention that one branch should not use its powers to cripple another branch; *and* they may well

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definition of "judicial independence," motive, non-discrimination by the states against constitutional claims, access to state courts, the possible existence of "essential functions," the role of general jurisdiction statutes, the power to issue coercive orders, and the policy needs for uniformity and federal supremacy.

171. Professor Rice has proposed that Congress use its jurisdictional powers to express disapproval of particular Supreme Court decisions. Charles E. Rice, *The Constitutional Basis for the Proposals in Congress Today*, 65 JUDICATURE 190, 196-97 (1981). If the power is indeed regulated only by convention, I prefer strong adherence to the existing convention. Congress should only use this weapon if the Court acts outrageously, as it did in *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856).

172. Bator, *supra* note 168, at 1039-41.

173. Congress clearly has great power. Congress has limited lower federal court jurisdiction over some claims which can raise constitutional issues. See 28 U.S.C. § 1341 (1988) (limiting district court jurisdiction in state tax cases); the Johnson Act, 28 U.S.C. § 1342 (1988) (limiting district court interference with orders made by state administrative agencies affecting public utility rates); and the statute that set a \$10,000 requirement for federal questions from 1875 to 1980, 28 U.S.C. § 1331 (1976), amended by Pub. L. No. 96-486 (1980). The First Judiciary Act of 1789, 1 Stat. 73 (1789), did not extend federal court jurisdiction to include claimants who successfully prevailed on their federal constitutional claims in state court. See PAUL BATOR ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 32-36 (2d ed. 1973).

174. For a list of such bills, see Sager, *supra* note 167, at 18 nn.3-4.

be struck down by the Supreme Court as also being illegal. Whatever the ultimate outcome (one we hope we never learn), we see that Congress has exercised considerable self-restraint for two centuries by not forcing these issues.<sup>175</sup> Such congressional self-discipline may not constitute a pure convention because some of these issues may eventually turn out to be judicially enforceable, at least in part, but Congress' record reveals another unwritten constitutional rule that ought to be acknowledged, defended, and applauded.

2. *Congressional Removal of Cases from Article III Jurisdiction Courts to Administrative Agencies, State Courts, or Article I Courts.* Constitutional conventions, like legal doctrine, vary in their importance, their specificity, and their technicality. Consequently, the need for traditional legal analysis fluctuates from convention to convention. Some constitutional issues need to be thrashed out by the body politic; others require technical legal attention. Subtle, profound issues arise whenever the Supreme Court determines which cases Congress can constitutionally transfer from Article III courts, whose judges have protected tenure and salary, to Article I "legislative" courts or to federal administrative agencies.<sup>176</sup> On first impression the issue may not seem very important. There are presently only four purely "legislative" courts: the territorial courts, the military courts, the courts of the District of Columbia, and the U.S. Tax Court.<sup>177</sup> That impression is misleading. The issue would

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175. Congress has not always followed this convention. For many years, Congress gave state courts final review over successful constitutional claims. See *supra* note 173.

176. Professor Redish correctly noted that no coherent distinction exists between Article I courts and administrative adjudications. Martin H. Redish, *Legislative Courts, Administrative Agencies, and the Northern Pipeline Decision*, 1983 DUKE L. J. 197, 201. Professor Fallon concurred. Richard H. Fallon, *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 915, 928 (1988).

177. Redish, *supra* note 176, at 199 n.18. Congress has also established legislative courts to hear Court of Claims issues, private land claims, and customs and patent appeals. Fallon, *supra* note 175, at 922.

Professor Geier explored how the Court might analyze the claim that Article I tax courts are unconstitutional. Deborah A. Geier, *The Tax Court, Article III and the Proposal Advanced by the Federal Courts Study Committee: A Study in Applied Constitutional Theory*, 76 CORNELL L. REV. 985 (1991). She noted that tax controversies are not "public rights," that amorphous collection of issues that all Justices believe can be resolved by administrative agencies. Taxes, after all, are not "benefits"; they are one of the government's major coercive tools. Drawing upon the cases and the academic writings, Geier discussed the factors that enter into the determination over the Tax Court's constitutionality: (1) does the issue involve criminal law? (2) is there a possibility of bringing the claim in state court? (3) is there appellate review to an Article III court? and/or (4) does the claimant have a waivable option to pursue the case in either an Article III court or an independent state court? Perhaps some of these factors should be made into permanent constitutional legal doctrine, but others should only become conventional constraints on Congress. *Id.*

become very disruptive if the Supreme Court were to hold that Congress must place all federal adjudications in either Article III courts or in state courts to achieve sufficient adjudicatory independence; federal administrative agencies would no longer resolve millions of claims.<sup>178</sup>

After deciding in *Northern Pipeline Const. Co. v. Marathon Pipe Line Co.*,<sup>179</sup> that bankruptcy judges must be Article III judges, the Supreme Court retreated to a balancing test in *Commodity Futures Trading Comm. v. Schor*,<sup>180</sup> upholding a federal administrative agency's jurisdiction to entertain state common law counterclaims. The Court's two attempts to create appropriate rules or standards—distinguishing “private rights” from “public rights” in *Northern Pipeline* and “balancing” in *Schor*—have been unsatisfactory.<sup>181</sup> *Northern Pipeline's* private-public distinction requires Article III judicial autonomy for a narrow set of rights (i.e., preexisting state common law rights), which do not need judicial independence as much as constitutional rights.<sup>182</sup> The Court's formalism appears to be protecting the wrong set of issues. Only subsequent decisions can explain *Schor's* amorphous balancing test, which allows Congress to remove cases from Article III courts unless Congress' scheme “impermissibly intrude[s] on the province of the judiciary.”<sup>183</sup> *Schor's* balancing test suffers from the diseases that afflict all balancing tests: indeterminacy, unpredictability, and malleability. Professor Fallon has argued that meaningful appellate review by an Article III court must be provided,<sup>184</sup> while Professor Redish has proposed that there must be judicial review by some “independent court,” either state or federal.<sup>185</sup> These academic solutions may entangle the “independent” courts in too many administrative matters.

A brief consideration of a nightmarish hypothetical can demonstrate how the law/convention dichotomy can help determine *Schor's* “province of the judiciary” (and shed more light on the prior section's discussion of congressional power to alter federal court jurisdiction). Imagine a congressional statute that transferred a category of criminal laws, which

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178. Fallon, *supra* note 176, at 928.

179. 458 U.S. 50 (1982).

180. 478 U.S. 833 (1986).

181. Redish, *supra* note 176, at 208-24.

182. Fallon, *supra* note 176, at 927.

183. 478 U.S. at 851-52.

184. Fallon, *supra* note 176, at 950. See also Amar, *Neo-Federalist View*, *supra* note 164.

185. Redish, *supra* note 176, at 227. Redish has asserted that the Supreme Court may require state judges to be tenured and to have salary protection to be constitutionally “independent.” See Redish, *supra* note 166.

authorized incarceration, to legislative courts supervised by the President, stating that those dependent courts had exclusive and final jurisdiction over all claims, including all constitutional challenges. The following discussion will be somewhat conclusory, but it is primarily offered to demonstrate how conventions can coexist with law in a very complex area.

The Supreme Court ought to make several determinations about the proper mix of law and convention. Let us assume that the Court agrees with such scholars as Herbert Wechsler that Congress has vast powers over federal court jurisdiction.<sup>186</sup> Convention primarily limits congressional use of Article III powers to alter lower federal court jurisdiction; Congress can remove any Article III case from the lower federal courts.<sup>187</sup> Congress also has vast discretion, limited primarily by convention, in limiting Supreme Court appellate jurisdiction. I believe Congress could not legally preclude all Supreme Court jurisdiction over all constitutional claims. In other words, the area is not completely regulated by convention. That assertion is premised upon a hierarchy of rights and interests. Although you may disagree with the precise ranking and with some of the distinctions,<sup>188</sup> the following list<sup>189</sup> can help us determine when Congress acts illegally, unconventionally, or appropriately: (1) the right to life is the greatest interest; the dead have little use for freedom of speech; (2) threats to individual physical liberty come next, as reflected in the Great Writ of Habeas Corpus; (3) criminal fines and criminal stigmatization need to be carefully monitored; (4) the individual needs protection from the government's other "coercive" powers, such as depriving individuals of property via taxation and civil penalties;<sup>190</sup> (5) the remaining constitutional rights that are not directly related to "coercion" also require great protection; (6) the Court will need to scrutinize certain "constitutional facts" that often effectively determine the content of constitutional rights; (7) claimants also raise important non-constitutional questions of federal statutory law, which "arise under" the Constitution; (8) legal inferences and questions of fact fre-

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186. Wechsler, *supra* note 165, at 1004-1008.

187. *But see* Amar, *Neo-Federalist View*, *supra* note 165 at 272. For a critical response, see William R. Casto, *An Orthodox View of the Two-Tier Analysis of Congressional Control Over Federal Jurisdiction*, 7 CONST. COMMENTARY 89 (1990).

188. I am not going to defend this ranking, except by pleading to the reader's intuition.

189. This list is largely derived from Professor Fallon's categories. *See* Fallon, *supra* note 176.

190. Professor Fallon wrote: "An equally entrenched and important line of cases depends on the premise that there must, at the very least, be judicial review of and effective remedies for coercive violations of constitutional rights." Fallon, *supra* note 176 at 955.

quently determine legal outcomes, but remain largely immune from appellate review; and (9) such "public rights" as governmental benefits can be important, even essential,<sup>191</sup> but warrant the least amount of legal protection.

If one accepts that hierarchy, or some close variant, then one might agree with the following legal rules, rules that do not violate the previously articulated conventions, yet provide the minimum of mandatory constitutional law. The Supreme Court has a "core" of permanent, judicially protected appellate jurisdiction that enables it to decide that Congress does not have the legal power to remove criminal cases from Article III courts to either administrative agencies or legislative courts, *unless* Congress also permits those defendants to remove their cases to state courts or provides appellate review by at least one Article III court.<sup>192</sup> Both Article III and procedural due process, which protects persons from the deprivation of life, liberty and property, provide individuals threatened by the government's criminal coercive power with the right to an "independent" adjudicator, to someone who is not directly under federal executive or legislative authority.<sup>193</sup> Requiring independent judicial review insures that the criminal defendant will eventually get significant constitutional protection since all Article III courts and all state courts are obligated by oaths to enforce the entire Constitution once

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191. See, e.g., *Goldberg v. Kelly*, 397 U.S. 254 (1970).

192. Professor Brown endorsed a similar legal standard: "There may be claims, such as constitutional issues, which require a judicial forum at some point." George D. Brown, *Article III as a Fundamental Value—The Demise of Northern Pipeline and Its Implications for Congressional Power*, 49 OHIO ST. L.J. 55, 66 (1988). This solution of requiring at least one "independent" court to have jurisdiction over "crucial" claims such as the right to be free from improper coercion is not completely consistent with legal precedent or existing practice. But as Professor Fallon has pointed out, it is probably impossible to create doctrine that can coexist with all the precedent since the cases are themselves inconsistent. Fallon, *supra* note 176, at 947. There are several troubling cases. For instance, the Supreme Court upheld the congressional power to create criminal legislative courts in *Palmore v. United States*, 411 U.S. 389 (1973). The short answer is that *Palmore* was wrongly decided. See *Redish*, *supra* note 176, at 224. The Supreme Court still retains appellate review over the District Courts. The Military Courts present an even greater problem because they can apply coercive sanctions, including the death penalty, without any direct Article III supervision. Military defendants, however, retain access to Article III courts via habeas corpus. Thus it may not be constitutionally necessary to require the Court of Military Appeals to be an Article III court as long as there is some access to the Supreme Court. See *Van Alstyne*, *supra* note 168, at 269 (arguing that *McCardle* can be narrowly read to permit congressional withdrawal of jurisdiction when traditional habeas corpus jurisdiction remains undisturbed). A more pitiful compromise is to conclude that military courts and military justice are *sui generis*, that their structures do not provide guidance one way or the other to the remaining parts of the Constitution. Finally, there is no right of appeal from the territorial court in American Samoa. Fallon, *supra* note 176, at 971-72. Profound constitutional debates should not be resolved by accommodating such trivial absurdities.

193. Due Process and Article III reinforce each other. Fallon, *supra* note 176, at 955 n.223.

they have jurisdiction, a second legal requirement that the Supreme Court must retain appellate jurisdiction to enforce.<sup>194</sup> In other words, the Supreme Court must have continuing appellate review to guarantee this modicum of due process, no matter what the congressional statute says about lower court federal jurisdiction or Supreme Court appellate review. Article III's "exceptions" clause cannot swallow these particular legal rules, which constitute the "essential judicial functions." I would then extend this legal doctrine to all constitutional claims.

This resolution is admittedly unsatisfying: Congress can technically comply with the requirement by authorizing only Supreme Court review, knowing that the Court cannot adequately supervise thousands of cases.<sup>195</sup> Nevertheless, foisting excessive amounts of judicial review on the Supreme Court may only violate constitutional convention, not constitutional law. The Court would be bogged down in litigation, but Congress would not have violated the text because one independent court would retain the last word on constitutional issues, the most the Supreme Court may legally be able to mandate. But we can and should complain if Congress functionally crippled constitutional rights by providing inadequate judicial review of constitutional claims by independent judicial bodies.

Professor Akhil Amar would probably bristle at these propositions. He has carefully parsed the constitutional text to reach the conclusion that Congress must provide for Article III supervision of all federal questions, constitutional and statutory.<sup>196</sup> I am reluctant to endorse Amar's position, if only because Congress has previously placed constitutional claims within the state court system for final resolution. His proposed doctrine, however, can easily be reformulated into valid conventions. Congress would breach a constitutional convention (1) whenever it places constitutional claims in state court for final resolution, or (2) whenever it places any other federal questions in state court with no right to appeal to any Article III court. Such bald transformations of proposed legal doctrine into conventional doctrine certainly do not refute Amar, but remember that my primary goal in this article is to demonstrate the usefulness of conventions as a constitutional concept.

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194. Thus the appellate court might hold that the administrative agencies cannot try criminal cases because the agencies do not provide juries and/or do not have the power to imprison anyone.

195. For instance, Professor Fallon asserted that "habeas corpus, which was intended as an ultimate constitutional safeguard, is not a constitutionally adequate substitute for the right to appeal." Fallon, *supra* note 176, at 971. As a matter of convention, he may be correct. As a matter of law, he is on much weaker grounds.

196. Amar, *Neo-Federalist View*, *supra* note 165.



This section's hypothetical also demonstrates how the law/convention distinction works better than the more absolutist nonjusticiability/justiciability distinction. If the Court were to find that Congress' power to regulate federal jurisdiction were nonjusticiable, it would probably never intervene in any situation, even when a criminal defendant was cut off from meaningful judicial review. On the other hand, if the Court determines that such federal jurisdiction issues are justiciable, it may exceed its appropriate authority, unless it has a clear conception of conventions to provide guidance through this complex field.

### E. *Congressional Sanctions*

Although Congress cannot directly enforce its statutes,<sup>197</sup> it has several sanctions that it can employ, sanctions that are almost completely regulated by convention: impeachment, censure, expulsion, and contempt. Lawyers need to be aware of these conventions to determine the true balance of power between the branches.

1. *Impeachment.* Impeachment is the most important interbranch sanction, allowing Congress to remove any executive or judicial official from office.<sup>198</sup> The Supreme Court should not be able to review the substantive grounds for impeachment even though the text of the Impeachment Clause is limited, making it appear to be an easy clause for the judiciary to interpret: "The President and all civil Officers of the United States shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors."<sup>199</sup>

Congress historically has interpreted that clause broadly, impeaching Judge Pickering for drunkenness and senility.<sup>200</sup> Congress considered impeaching Justice Chase for partisan reasons.<sup>201</sup> President Andrew Johnson was impeached by the House of Representatives, only to survive his trial in the Senate by one vote, for trying to fire Secretary of War Stanton, who arguably was protected by the Tenure of Office Act of 1867.<sup>202</sup> Yet the verdict of history has been that Johnson should not

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197. *Bowsher v. Synar*, 478 U.S. 714 (1986); *Buckley v. Valeo*, 424 U.S. 1 (1976).

198. See Michael L. Gerhardt, *The Constitutional Limits to Impeachment and Its Alternatives*, 68 TEX. L. REV. 1 (1989).

199. U.S. CONST. art. II, § 4. *But see* RAOUL BERGER, *IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS* 103-121 (1973).

200. BERGER, *supra* note 199, at 57 n.15.

201. See, e.g., STEPHEN B. PRESSER, *THE ORIGINAL MISUNDERSTANDING* (1973).

202. Many years later, the Supreme Court found the Act unconstitutional. See *Myers v. United States*, 272 U.S. 52 (1926). See also MICHAEL L. BENEDICT, *THE IMPEACHMENT AND TRIAL OF ANDREW JOHNSON* (1973).

have faced impeachment.<sup>203</sup> Overall, Congress slowly created a convention against using impeachment for exclusively political reasons. The Nixon impeachment process, however, had obvious political overtones. The House of Representatives found "clear and convincing evidence" for three impeachment articles against President Nixon: (1) covering up the Watergate burglary, (2) misusing his executive power and the power of such agencies as the Internal Revenue Service; and (3) failing to comply with subpoenas from the House Judiciary Committee. None of these alleged transgressions are self-evidently "High Crimes" or "Misdemeanors," yet all three offenses, particularly the refusal to comply with the House subpoena, are flagrant breaches of convention. If Nixon could have used executive privilege to stymie an impeachment investigation and then prevailed on the argument that a frustrated investigation is not itself an impeachable offense, Congress would no longer be able to effectively apply its impeachment power. Conventions thus expand the constitutional text beyond any narrow, legalistic reading. Some legal academics agree. Professor Tribe has described impeachable offenses as those which "involve serious abuse of official power,"<sup>204</sup> while Professor Ely had "little doubt" that "a serious and willful violation of the separation of powers should count as a 'high crime or misdemeanor. . . .'"<sup>205</sup>

The Supreme Court should not evaluate either the proof or the procedures that Congress adopts during its impeachment proceedings. For example, federal district court Judge Hastings unsuccessfully argued that Congress should not impeach him for bribery because a jury had already found him not guilty in a criminal proceeding; he was thereby protected by the constitutional ban against double jeopardy.<sup>206</sup> The Supreme Court recently decided to hear Judge Walter Nixon's claim that the impeachment proceedings against him were void because the full Senate did not vote. The Court should not get embroiled in this ostensibly legal debate. It need not consider the probable congressional retort that juries

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203. BERGER, *supra* note 199, at 252-296.

204. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 291 (2d ed. 1988).

205. Ely, *Part II, supra* note 157, at 1133. Raoul Berger concurs. BERGER, *supra* note 199, at 53-102.

206. William J. Eaton, *Senate Convicts Judge, Strips Him of Office*, L.A. TIMES, Oct. 21, 1989, at A1. Both Judge Hastings and Judge Nixon filed lawsuits contesting the impeachment procedures. *Hastings v. United States Senate, Impeachment Trial Comm.*, 716 F. Supp. 38 (D.D.C.), *aff'd*, 887 F.2d 332 (D.C. Cir. 1989); *Nixon v. United States*, 744 F. Supp. 9 (D.D.C. 1990), *aff'd*, 938 F.2d 239 (D.C. Cir. 1991), *cert. granted*, 112 S.Ct. 1158 (1992). The courts found their claims to be nonjusticiable. *Hastings*, 716 F.Supp. at 43; *Nixon*, 744 F.Supp. at 14. For a contrary view, see Michael B. Miller, *The Justiciability of Legislative Rules and the "Political" Political Question Doctrine*, 78 CAL. L. REV. 1341, 1374 (1990).

apply a higher standard of proof in criminal proceedings than Congress does in impeachment proceedings. Only Congress can determine what burden of proof it should apply, and the members of Congress are under no legal obligation to tell the rest of us the standard they used.<sup>207</sup> The impeachment sanction is different than the criminal sanction, and Congress is effectively constrained only by convention.

Judge Hastings also criticized Congress because most of his impeachment trial was to be conducted by twelve senators, not by the full Senate.<sup>208</sup> Once again Hastings raised a conventional issue. Conventions should be developed to determine the grounds for impeachment, the standards of proof, and the procedures. Nor should we forget that Congress, like the other two branches, is bound by the fundamental conventions against excessive concentration of power and tyrannical treatment of individuals. More precise procedural and substantive conventional standards for impeachments would give all of us more warnings that Congress might be exceeding its legitimate authority. At some point, the citizenry as well as the Court must demand that the elected branches comply with constitutional norms. There is little outrage over the Judges' impeachments.

It will be easier for the Court to rule against claimants like Walter Nixon if the Court is aware of the vast extent and precise nature of constitutional conventions, and if it is able to put Nixon's claim in constitutional context. The Court should not consider judicial abstinence to be either unusual or inappropriate. Both the general theory of conventions and the existence of actual conventions that regulate impeachments undercut Nixon's claim for a judicial reversal of his impeachment. His only appeal should be to the court of public opinion.

2. *Congressional Self-Behavior.* Although the Supreme Court held in *Powell v. McCormack*<sup>209</sup> that it can review congressional decisions not to admit an elected member into Congress, the Court has never considered a case where Congress used its textual power to expel a member who had previously been admitted. The expulsion power should not be subject to judicial review (with one narrow exception, discussed below), even though a majority of more than two-thirds could abuse it to elimi-

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207. "The standard of proof is decided by each senator rather than the customary courtroom requirement of guilt 'beyond a reasonable doubt.'" Eaton, *supra* note 206, at A1. Only five other federal judges had been impeached before Hastings. *Id.*

208. Ruth Marcus, *Senate Removes Hastings; U.S. Judge Convicted of Extortion Plan, Despite Jury Acquittal*, WASH. POST, Oct. 21, 1989, at A1.

209. 395 U.S. 486 (1969).

nate all opposition. As in England, the majority's relationship with the opposition is and should be governed primarily by convention. Certainly the text gives broad power to the legislative branches: "Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behavior, and, with the Concurrence of two thirds, expel a Member."<sup>210</sup> The Court should only be able to reverse any expulsion that was not supported by a two-thirds vote. Judicial enforcement of that textual requirement assures that a smaller majority cannot seize this extraordinary power; that any expulsion reflects widespread national support; and that the expulsion will usually reflect some bipartisan support because the majority party will normally not have enough votes, particularly in an era of weak party discipline. The rest of the text — the other procedures and grounds for expulsion — should be determined by convention.

The judiciary should not second-guess lesser internal congressional sanctions. Speaker of the House Jim Wright should not be able to turn to the courts for being forced to give up his powerful position, even though the process was more political than legal.<sup>211</sup> Representative Lukens, convicted of a sexual crime, should not prevail in court after he was forced either to resign to preserve his pension or to face the likelihood of expulsion.<sup>212</sup> Senators Glenn and McCain may have had a legitimate complaint of unfair treatment when the Senate Judiciary Committee refused to accept the special prosecutor's finding that there was no probable cause that they had acted improperly on behalf of Charles H. Keating, Jr.'s failed Lincoln Savings and Loan Association.<sup>213</sup> Columnist and ex-Congressman Otis Pike concluded, "That isn't high ethics, that's low politics."<sup>214</sup> Pike is actually pointing out a breach of the constitutional convention of "fair play." The solution is not to legalize "fair play," but to make it a more powerful constraint on congressional action. Pike should have concluded that the Committee acted unconstitutionally by violating the document's political norms. The jaded public might become less tolerant of such shenanigans if it saw how such behavior undermines the Constitution itself. The committee's final resolution — recommending full senatorial censure of the ill and retiring Senator Cranston while wristlapping the four senators who were remaining in

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210. U. S. CONST. art. I, § 5, cl. 2.

211. See JOHN M. BARRY, *THE AMBITION AND THE POWER* 687-750 (1989).

212. *Lukens Submits Resignation From House*, L.A. TIMES, Oct. 25, 1990, at A18.

213. Helen Dewar, *Ethics Panel Delays Action on 'Keating Five' Until After Election*, WASH. POST, Sept. 24, 1990, at A1.

214. Otis Pike, *Ethics Bog in the Senate*, CLEV. PLAIN DEALER, Oct. 29, 1990, at 7-B.

office<sup>215</sup> — may have revealed that ancient, darker standard: protect your own lest they turn upon you.<sup>216</sup>

3. *Criminalization of Executive Behavior.* A classic American response to problems is to pass a law which makes Americans feel more secure but which often fails to remedy the problem. If the irritating behavior is unpopular enough, pass a criminal law. Because Congress has control of this extraordinarily powerful impulse, it can radically alter relations with the other branches, particularly when powers overlap. This “trump” gives Congress the theoretical power to dominate both foreign affairs and the distribution of funds, two powers it shares with the President. The most important recent example is the Boland Amendment, which prohibited any member of the Executive branch from providing unauthorized funds to the Contras in Nicaragua, and the statute which made it a crime to trade in arms with Iran.<sup>217</sup> These statutes, along with subsequent perjuries to Congress by executive officials who violated the statutes, provided the legal foundation for the Iran-Contra Affair.

The congressional ability to criminalize executive action may answer the perpetual debate over who ultimately controls foreign policy, the President or Congress. For example, Congress could pass a law making it a crime for any executive official or military officer to enter El Salvador or Nicaragua unless those countries have directly attacked the United States. The courts should enforce that law. This is another example of the subtle nature of American constitutional conventions. The courts cannot review much of the sharing of foreign affairs powers in the absence of congressional statute, but may be able to do so after Congress has converted its conventional power into law.

This article proposes that criminalization of legislative-executive relations should be a last resort. The sharing of foreign affairs ought to be primarily controlled by convention, not by criminal law. The initial, essential conventions are executive honesty with Congress and congressional willingness to maintain secrecy. When the Executive fails to be open with Congress, Congress can employ its contempt powers, another power primarily defined by convention. If the Executive disregards a

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215. Helen Dewar, *Panel Finds 'Credible Evidence' Cranston Violated Ethics Rules; No Further Action Sought Against 4 Other Senators in Keating Case*, WASH. POST, Feb. 28, 1991, at A12. Although a case was pending against Senator D'Amato, only 10 senators have been censured by the Senate, and only 15 have been expelled. *Id.*

216. In a subsequent article, I shall consider the question of whether or not a venal pattern of behavior can become a “convention.”

217. See Hayes, *supra* note 163. See also KOH, *supra* note 43, at 52.

statutory constraint, Congress can also cut off funding, publicize the lawlessness, and argue that the Executive is acting unconstitutionally. Of course, if executive officials have violated ordinary criminal laws, such as they did in Watergate, those laws apply.

Such platitudes do not solve the recent conflict between Congress and the Presidency. Perhaps Congress was justified in passing the Boland Amendment, given the consistent breach of the convention of honest disclosure by officials like CIA Director Casey,<sup>218</sup> but such statutes should be quickly repealed and should be rarely recreated.<sup>219</sup> Perhaps the rhetoric of conventions can help move the country back from its preoccupation with legal confrontations and solutions. Given the perpetual changes in foreign affairs, the mix of congressional and presidential powers cannot and should not be overly constrained by law. For example, Congress may gain more foreign affairs power now that the Cold War and the threat of instant nuclear war appear to be receding memories. The political constitution should be allowed to adapt to this fundamental change in the foreign policy climate without excessive interference from the legal Constitution. Both Congress and the courts should refrain from generating too much law, whether it be statutory or constitutional.

Congress has also given itself the related criminal law power to regulate the Executive by requesting that the Attorney General appoint special prosecutors whenever the Attorney General finds "probable cause" of criminal behavior. In a prior article that also compared the British and American Constitutions,<sup>220</sup> I argued that the Supreme Court should have found the special prosecutor statute unconstitutional in *Morrison v. Olson*.<sup>221</sup> This is not the place to repeat such arguments.<sup>222</sup> Notice instead how the concept of constitutional conventions can partially rescue that dubious decision. One way to reduce the likelihood of congressional abuse of its new prosecutorial power would be to create a convention limiting congressional invocation unless there was minimum bipartisan support or unless two-thirds of Congress supported such a move. Throwing someone in jail, after all, is far more threatening than impeach-

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218. BOB WOODWARD, VEIL (1987).

219. Clark Clifford disagreed: "I urged that teeth be put into the law in a way that everyone could understand: criminal penalties for 'knowing and willful' violation of the law." CLARK CLIFFORD & RICHARD HOLBROOKE, COUNSEL TO THE PRESIDENT 171 (1991).

220. Wilson, *supra* note 28.

221. 487 U.S. 654 (1988).

222. In addition to Justice Scalia's dissent in *Morrison*, 487 U.S. at 697 (Scalia, J., dissenting), see Stephen L. Carter, *The Independent Counsel Mess*, 102 HARV. L. REV. 105 (1988), and Wilson, *supra* note 28, at 165-75.

ing them, which jeopardizes their pension and reputation. Congress has become a participant in the murky area of prosecutorial discretion. Scholars and political leaders should create explicit nonjusticiable standards and procedures to limit that discretion so that the electorate will be warned that Congress might be overreaching. Admittedly the courts could not enforce such conventions, but at least the populace would have some way to evaluate the exercise of this novel power.

## VI. THE RELATIONSHIP OF THE CONCEPT OF CONVENTIONS TO THE JUDICIAL DOCTRINE OF NONJUSTICIABILITY

The doctrine of nonjusticiability interacts in two ways with conventions. First, the Supreme Court can improve its existing justiciability analysis by including the concept of conventions. Second, the Court should retain the notion of conventions to determine its scope of judicial review, even if it eliminated or did not apply the controversial doctrine of nonjusticiability.

This section suffers from the ambivalence that invariably afflicts a new approach to old legal doctrine. On the one hand, the section wishes to show that the concept of conventions easily coexists with the political question doctrine so the Supreme Court will start using the concept. On the other hand, it partially undermines the political question doctrine by introducing a significantly different perspective.

### A. *The Concept of Conventions Improves Existing Nonjusticiability Analysis*

The Supreme Court might resolve this article's previous illustrations of conventions by holding that they all raised "political questions" that fit under the six *Baker v. Carr*<sup>223</sup> criteria:

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 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.<sup>224</sup>

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223. 369 U.S. 186 (1962).

224. *Id.* at 217.

Justice Brennan, never renowned for his judicial restraint, expressed all six tests in grudging terms. Because the Court has a duty initially to interpret the entire Constitution (if only to determine when to withdraw), it will rarely conclude that any part of the constitutional text exclusively commits an issue to another branch. Often the issue can best be resolved by a mix of law and convention, not completely by either convention or by law. Judges can almost always devise "judicial standards" to satisfy the second test, given the broad discretion inherent in equity. How often will it be "impossible" for the Court to act without making a policy decision that "clearly" involves nonjudicial discretion under the third standard? How is the Court to determine, by itself, "lack of respect" for another branch under the fourth test, since the other branch can usually best determine if it is being treated with lack of respect? How often will a thoughtful Court find, under the fifth requirement, an "unusual need" for "unquestioning adherence" to a "political decision" "already made"? Nor is the final guideline any broader. Because the Supreme Court normally<sup>225</sup> has the last word after finding justiciability, there is little potential embarrassment of "multifarious pronouncements." As Professor Ely noted, the modern Court assumes that all elected officials will comply with its orders.<sup>226</sup>

Subsequent decisions have confirmed the doctrine's narrowness; never have so many tests generated so few results.<sup>227</sup> The political question doctrine's seemingly minor contribution to constitutional law has encouraged some scholars to argue for its elimination.<sup>228</sup> The Supreme Court has never explained why it chose and limited itself to these six particular formulations, six doctrines in search of a theme. Overall, the six standards are "court focused," reflecting the Court's worries about itself, about its relationship with the other branches. Under these tests,

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225. If the Court defers to another branch, that branch effectively has the last word.

226. Ely, *War Powers*, *supra* note 160, at 1410.

227. The major cases concerning the doctrine are *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849), *Coleman v. Miller*, 307 U.S. 433 (1939), *Colegrove v. Green*, 328 U.S. 549 (1946), *Baker v. Carr*, 369 U.S. 186 (1962), *Powell v. McCormack*, 395 U.S. 486 (1969), and *Goldwater v. Carter*, 444 U.S. 996 (1979). Professor McCormack then narrowed that group: "*Baker* and *Powell* rejected application of the doctrine; in *Colegrove* and *Carter*, the political question doctrine rationale commanded only a plurality of the Court. The original political question doctrine cases, *Luther v. Borden* and *Coleman v. Miller*, thus stand as the only clear applications of the doctrine." McCormack, *supra* note 30, at 615. Professor Scharpf, on the other hand, included far more cases under his analysis. Fritz W. Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 *YALE L.J.* 517 (1966).

228. Critics of the political question doctrine include Professors Henkin, Redish, McCormack, and Tigar. See Henkin, *supra* note 33; Redish, *supra* note 35; McCormack, *supra* note 30; Tigar, *supra* note 32.



the Court is tempted to rush into fields once it is satisfied it can "competently" create standards, determine facts, and create remedies, even though it should nevertheless abstain from intervening because the issue is more fit for conventional resolution. Nevertheless, the Court is correct in concluding that it should not have the last word on all constitutional disputes. If the political question did not exist, something like it would have to be invented.

The concept of textual constitutional conventions provides a link between the six *Baker* hurdles, which exist somewhat in isolation from each other. The judiciary ought not resolve many constitutional disputes simply because such disputes should be resolved by the formation and enforcement of conventions. Thus the concept of conventions, at the least, enables the Court to spot nonjusticiable issues more accurately and to keep out of other areas even if it does find the issue to be technically "justiciable." More importantly, it strengthens the underlying notion of judicial restraint. Just as a plaintiff is more likely to obtain an injunction if he or she can offer the court a viable remedy, a defendant is more likely to prevail if he or she can suggest an attractive alternative, which in these cases would be to propose conventional resolutions.

Conventional analysis should not be subsumed into the *Baker* tests; the Court should withdraw from conventional disputes whether or not the issues meet any of the *Baker* standards. The six *Baker* tests, by themselves, fail to capture the need for judicial abstinence as powerfully as the concept of conventions in combination with those *Baker* criteria.<sup>229</sup> Conventions generate a broader policy analysis than the six broad and amorphous tests that Justice Brennan formulated in *Baker v. Carr*. Conventional analysis forces us to analyze each section of the Constitution to determine the need for conventions and to propose each convention's particular form. This article has attempted to show, through specific examples, how the Court and the body politic can make better decisions once they decide that some constitutional problems should be resolved politically. We have also seen that the Court's refusal to rule in favor of the plaintiff should not always terminate the constitutional debate.

The concept of constitutional conventions influences the inquiry into the proper scope of judicial review by bolstering the argument that sometimes the Supreme Court cannot adequately protect parts of the Constitution, even when unconstitutional behavior exists.<sup>230</sup> The con-

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229. Political question and standing decisions are not rare, isolated precedents, but are legitimate judicial acknowledgments of conventional aspects of the American Constitution.

230. Professor Mulhern used both positive and normative arguments to justify the political

cept allows us to see more clearly which constitutional issues should be left to the political arena, and how those issues should be resolved after the Court has ruled against the plaintiff. If judges and lawyers are more aware of the political Constitution's norms, they can make better decisions about the scope of the legal constitution. In other words, the *Baker* tests fail to describe adequately the Constitution because they focus on the Court's limitations, not on the powers and responsibilities of the elected branches.

**B. *The Concept of Conventions is Severable from the Doctrine of Nonjusticiability***

The political question doctrine is plagued by almost metaphysical dilemmas. For instance, how can a court decide not to decide a constitutional case without first deciding how to interpret the Constitution to determine when not to decide? In other words, how is the Court to decide which part of a textual passage it will consider and which it will

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question doctrine, Mulhern, *supra* note 24, just as this article has alternated between positive and normative justifications for constitutional conventions. By combining the political question issues with high levels of judicial deference to congressional regulation of economic and social legislation under the "rationality" standard, *id.* at 129-34, and congressional regulation of the states under the Commerce Clause, *id.* at 150-52, Mulhern created a vast field of non-judicial constitutional interpretation. "An interpretation that fits our tradition must acknowledge that courts share responsibility for interpreting the Constitution with the political branches of government." *Id.* at 101.

Although he refused to embrace Professor Choper's argument that the Court should not resolve any structural issues and should only protect individual rights, *id.* at 169, Mulhern adopted a similar, but slightly less rigid stance. According to Mulhern, the courts have a special "sphere within which [they] consider themselves responsible for constitutional interpretation. Protecting oppressed individuals from abuses of government power is the core of that sphere." *Id.* at 164. At the same time, the Court should generally abstain from resolving separation of powers and federalism issues. *Id.* at 165. Mulhern concluded that most interventions, such as *Chadha* and *Bowsher*, were clumsy. *Id.* at 172-74. When they did not assert themselves, as in *Garcia*, the system flourished: "The continued vitality of the states as governmental entities provides the most compelling evidence that the political branches of the government do not routinely trample constitutional values." *Id.* at 159.

Although this article and Mulhern's article obviously reinforce each other, the principle of conventions leads to different conclusions. Mulhern's distinction between structure and process raises problems. Although this article has focused on structure, primarily because conventions best explain constitutional structures, it has not drawn a bright line between structure and process. First, we have seen several examples of how individual rights and structural problems are often commingled. In *United States v. Nixon*, 418 U.S. 683 (1974), after all, criminal defendants asserted a right to the tapes. *Morrison v. Olson*, 487 U.S. 654 (1988), the special prosecutor case, affected the lives of individual executive officials as well as the doctrine of separation of powers. Furthermore, the Court should sometimes intervene in structural cases. For an example, one need go no further than *Marbury v. Madison*, 5 U.S. 137 (1803) (which also had an individual rights aspect). By focusing on which parts of the structural constitution the political branches can best enforce, conventions better explain why there should be a high degree of judicial restraint in such "political cases" than Mulhern's distinction between structure and rights, or his blending nonjusticiability with deference.

not?<sup>231</sup> Isn't the Court deciding a case or interpreting the Constitution whenever it applies a six prong test?

The doctrine of nonjusticiability also can suffer from overbreadth. It operates on the assumption that the entire issue is not fit for judicial resolution, immunizing entire sections of the Constitution from any judicial review and generating potentially awkward or even absurd results.<sup>232</sup> For example, let us reconsider the question of the power of Congress to expel its members. This article argued that the Congress can expel any Congressman or Congresswoman for any reason; that aspect of the constitutional text should be regulated by convention. It is also likely that the Supreme Court would find the issue nonjusticiable. Consequently, the House of Representatives could legally expel ex-Ku Klux Klan leader and Nazi sympathizer David Duke for his past actions and his past beliefs if Duke were to win a seat to the House. Such a politically motivated expulsion would violate an existing constitutional norm/convention but would not constitute grounds for judicial involvement. Congress would have acted unconstitutionally by expelling someone for partisan, political reasons. So far, the doctrine of conventions and the political question doctrine would probably overlap. However, imagine that the House of Representatives also proposed to chop off Duke's arm as part of its expulsion penalty. Such a sanction would exceed the "outer perimeter" of congressional expulsion authority, and would violate the Eighth Amendment (at the very least). The Supreme Court should prevent such unconstitutional and illegal behavior. Application of the nonjusticiability doctrine would be muddy, at best, since that doctrine arguably precludes the Court from considering any claims arising under nonjusticiable text. The concept of conventions helps to determine more precisely when the Court should stay out of a constitutional conflict and when it should intervene.

One might try to preserve the justiciability doctrine by arguing that it is a metaphor for an extraordinarily high level of judicial restraint that can be set aside in extreme circumstances.<sup>233</sup> But that response reinforces the academic criticism that the nonjusticiability doctrine only obfuscates constitutional doctrine, failing to add anything to the more

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231. See *New York v. United States*, 112 S.Ct. 2408, 2433 (1992).

232. The Supreme Court may be retreating from such an all-or-nothing approach. *Id.*

233. A doctrine of extreme deference can easily coexist with the concept of conventions. The Court would defer on virtually all issues that involved conventions, but would retain the power to intervene if legal violations occurred at the "outer perimeters" of power.

straightforward conclusion that the government acted within its legal powers. I do not, however, want to get too embroiled in this debate.

Ultimately, it may not matter too much what legal doctrine the Court chooses when it decides that a particular issue should be resolved by convention rather than by law. The primary point is that the Court should almost always stay away from certain constitutional problems. The concept of conventions locates those issues without committing the Court to complete judicial abdication. It is a valid and useful concept, whether or not one accepts the more contentious doctrine of nonjusticiability. How might the concept of conventions coexist with the political question doctrine? If the Court were to incorporate conventions into its thinking, it might well conclude that some conventions arise under the issues covered by the political question doctrine, but other conventions occur in areas that are "justiciable."<sup>234</sup> Thus, influenced by the concept of conventions, it might dismiss Judge Nixon's claim as a "political question," or the Court might hold that he should lose, even though the issue is justiciable, because the issue of impeachment ought to be almost exclusively regulated by convention and thus be subject to a highly deferential scope of review.

### C. *Applying the Concept of Conventions to Recent Supreme Court Opinions Involving the Political Question Doctrine*

This part shall apply the concept of conventions to three recent Supreme Court cases that raised "political question" issues.

1. *United States v. Munoz-Flores*.<sup>235</sup> Twice in 1990, the United States Supreme Court awkwardly grappled with the longstanding problem of determining which constitutional disputes are nonreviewable "political questions."<sup>236</sup> In *United States v. Munoz-Flores*, the Court unanimously held that a criminal defendant could challenge the Victims

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234. For instance, the Court held that parents of black children had no "standing" to challenge the Reagan Administration's refusal to enforce equal protection in *Allen v. Wright*, 468 U.S. 737 (1984). There can be no doubt that equal protection claims are justiciable. I would argue that the Reagan Administration breached a constitutional convention by not faithfully executing the laws. We have already seen that the Court will sometimes become involved in conventional issues, although it never can consider political questions. The Court must determine which conventional powers can be implied, and which conventional powers can be "converted." Finally, it can obtain judicial review over some issues after Congress has "converted" them by statute. What was previously conventional has become legal. It is far more difficult to imagine how Congress can convert the nonjusticiable into the justiciable.

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

236. Chief Justice Marshall set up the basic distinction in *Marbury v. Madison*, 5 U.S. (1

of Crime Act, a federal statute that imposes special assessments on convicted defendants to fund programs that compensate and assist crime victims, on the ground that the Act violated the Origination Clause, which requires that all bills raising revenues be initiated in the House of Representatives.<sup>237</sup> Justice Marshall's majority opinion found that the claim was not a nonjusticiable "political question" under any of the six alternative criteria established in *Baker v. Carr*.<sup>238</sup> He then concluded that the challenger should lose on the merits because the "primary purpose" of the Act was not to raise revenues, but to generate funds to compensate victims of crime.<sup>239</sup> Three Justices did not agree with Marshall's standard for determining what facts would be necessary to satisfy the Origination Clause requirement. In separate concurrences, Justice Stevens concluded that any violation of the Origination Clause would be cured by proper presentation to the President,<sup>240</sup> while Justice Scalia stated that a bill satisfies the requirement once it has been designated "H.J. Res.," an abbreviation for "House Joint Resolution," that affirms that the bill commenced in the House.<sup>241</sup>

The British system not only provides us with the basic law-convention distinction, but also indicates how *Munoz* should have been decided.<sup>242</sup> The doctrine of parliamentary sovereignty does not preclude the British courts from reviewing everything that emerges from Westminster, the seat of Parliament. In *Stockdale v. Hansard*,<sup>243</sup> the House of Lords held that a House of Commons resolution, stating that parliamen-

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Cranch) 137 (1803). "Questions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court." *Id.* at 170.

237. "All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills." U.S. CONST. art. I, § 7.

238. 369 U.S. 186 (1962).

239. 495 U.S. at 399.

240. *Id.* at 403.

241. *Id.* at 409.

242. I am not suggesting that most specific English conventions should be transplanted to America. The English mixture of law and convention is radically different than the American solution. One cannot crudely lift one part of a complex, interrelated system and superimpose it on a radically different system. Changing any single part of a constitution subtly alters other parts. But comparative law is not primarily an inquiry into technical legal similarities and differences. One studies other legal systems for their own sakes and to learn more about one's own culture. Professor Haskins believed that comparative law enabled us to perceive underlying similarities in legal systems which may express uniformities in human behavior. The English example reveals the widespread existence of similar American constitutional conventions and the need to adapt the English concept of conventions to America's different structure. Although specific English solutions can be illuminating, Americans need not adopt any particular English conventions. They only need to incorporate the underlying concept of conventions.

243. [1839] 9 A. & E. 1.

tary reports were protected by the parliamentary privilege from defamation actions, was not law because it was not passed by the "King in Parliament": the House of Commons, the House of Lords, and the Crown. Thus the English courts have a constitutional "rule of recognition"<sup>244</sup> that determines when Parliament has passed a "law" that the Courts can enforce. Under this narrow scope of review, the English Courts will be satisfied if they are presented with a Queen's Printer's copy of a statute. For revenue bills, the Speaker of the House must certify that a bill complied with existing laws as it passed through the Parliament. Thus, to take an extreme situation, the judges could not reverse the Speaker's dishonest representation that the House of Lords had agreed to a Bill when they had not. The British courts must trust that the Speaker of the House has abided by the conventions of honesty and impartiality.

Because America has a written Constitution, the Supreme Court need not invent a judicially enforceable "rule of recognition." The Constitution sets forth the basic procedures for federal law formation. Consequently, the Court was on firm ground in *I.N.S. v. Chadha*,<sup>245</sup> when it held that both the House and Senate need to participate in any law-making and that Congress cannot make laws without presenting them to the President, who can exercise veto power.<sup>246</sup> We want formal rules to determine what is "law." Thus, the *Munoz* Court correctly determined that all revenue bills must originate in the House of Representatives; the Court must legally protect that basic "rule of recognition." But the Court erred by formulating a probing "primary purpose" test to determine when bills originate in the House of Representatives. The test is too vague, too broad, and even too narrow (given its apparent aspirations). For instance, it doesn't address two recent flagrant violations of the "spirit" of the clause. In 1968 and in 1982, the Senate superimposed major tax bills on minor existing House legislation.<sup>247</sup> The House only considered the bills in conference and in its final vote.<sup>248</sup> The "primary

244. H.L.A. HART, *THE CONCEPT OF LAW* 97 (1961).

245. 462 U.S. 919 (1983).

246. *Chadha* was not beautifully reasoned. Academics have been critical of Burger's formalism. See e.g., Peter L. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions - A Foolish Inconsistency?*, 72 *CORNELL L. REV.* 488, 497 (1987).

247. R. DOUGLAS ARNOLD, *THE LOGIC OF CONGRESSIONAL ACTION* 164-65, 185 (1990). Such evasions are nothing new: "The tariff act of 1883 really originated in the Senate, where it was added to a small internal revenue reduction bill which came over from the House, and the new bill with some changes was accepted by the House." FORD, *supra* note 20, at 244.

248. For an interesting episode demonstrating the House's capacity to enforce the Origination Clause, see T.R. REID, *CONGRESSIONAL ODYSSEY* 69-71 (1980).

purpose" of the final bill was taxation, but the taxation part of the bill did not originate in the House. How should the Court analyze those two laws or other legislative circumventions? Either it will apply its vague "primary purpose" test to invalidate such legislation, thereby becoming entangled in subtle legislative tactics, or else it will dilute the test so that applications will appear to be random. Because such legislative maneuvers are inevitable and because the legislature will constantly create new means to outflank the Court, the Court should have adopted Justice Scalia's solution; complete deference to the House Speaker's certification that the bill originated in the House. The Speaker is bound by the convention of honesty, and the Court should rarely examine the internal dynamics of Congress. This "formalistic" approach resembles the British solution.

Although Justice Scalia's resolution echoes the English approach, neither society should simplistically lift constitutional outcomes from one country and force them into the other country's constitution, whether those solutions be legal or political. Too many differing, unknown collateral effects exist, caused by the significantly different cultures and constitutions. Still, *Munoz* demonstrates why the Court should consider conventions when formulating constitutional law. The House of Representatives ought to develop its own set of constitutional conventions to protect its powers under the Origination Clause and should not look to the Supreme Court for meaningful assistance. Once the Speaker has certified that the bill began in the House, the House has "waived" any rights and powers. The Court should affirm the legislation. Such judicial withdrawal does not mean that constitutional law will disappear; the Supreme Court needs to protect the basic "rule of recognition." Sometimes the Court will need to act aggressively, as it did in *Chadha*, but at other times it should respond with more restraint, leaving effective enforcement of a particular clause to the appropriate elected branch.

Note how application of conventions leads to a better result than using the "political question doctrine." If the origination issue were completely nonjusticiable, the Court should not intervene even if the Speaker of the House failed to certify the challenged bill as having emerged from the House. The "rule of recognition" would partially break down. Yet the Court should not aggressively intervene even if the issue is technically "justiciable." The Court should leave to Congress the final constitutional resolution of most origination issues, because conventions provide the best means for protecting the House of Representative's prerogatives.

2. *Rutan v. Republican Party of Illinois*.<sup>249</sup> In *Rutan v. Republican Party of Illinois*, decided the same year as *Munoz*, the Supreme Court ruled that various Illinois and Republican party officials violated the First Amendment rights of low-level state officials by refusing to hire, promote, recall, or transfer them because of their party affiliation and/or support. In his dissent, joined by three others, Justice Scalia concluded: "The appropriate 'mix' of party-based employment is a political question if there ever was one, and we should give it back to the voters of the various political units to decide, through civil-service legislation crafted to suit the time and place, which mix is best."<sup>250</sup> The majority opinion did not respond, but Justice Stevens tersely replied in a footnote to his concurrence: "Despite Justice SCALIA's imprecise use of the term . . . the legal issue presented in this litigation is plainly not a 'political question.'"<sup>251</sup> Such summary analysis adds uneasiness to the inevitable complexity surrounding the proper scope of judicial review over such constitutional disputes.

Even if current political question doctrine is clumsy, did the *Rutan* Supreme Court err in holding that low-level state officials have a First Amendment right not to be discriminated against in terms of transfers and promotions because of party affiliation and/or support? Should the Court have stayed out, stating that the mix of patronage and civil service in state and federal government should be left in flux or resolved by convention/statutory law? Notice that the concept of conventions cannot answer these questions. It operates at such a high level of abstraction that it only can help frame the questions and answers. Certain factors favor political rather than legal solutions in *Rutan*: federalism, the values of party politics,<sup>252</sup> party structure, experimentation, a of developing viable judicial standards. But *Rutan* presents a different situation than most of the other disputes that we have considered because the challenged practice also adversely affects the fundamental, individual constitutional right of free exercise of political speech. Conventional resolutions are most appropriate when the Court is reviewing intergovernmental relations; conventions are less legitimate responses when the Court is considering majoritarian threats to fundamental, individual rights. Quite honestly, I am uncertain of the proper result. The alternative of conven-

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249. 110 S.Ct. 2729 (1990).

250. *Id.* at 2758 (Scalia, J., dissenting).

251. *Id.* at 2740 n.1 (Stevens, J., concurring).

252. For a powerful defense of party politics, see FORD, *supra* note 20, at 294-333. Ford considered patronage to be the core strength of parties. *Id.* at 171.



tions is one reason for that hesitation, blocking my instinctive urge to protect those who wish to remain apolitical. The better solution may be to condemn the elected party leaders for breaching an emerging constitutional convention against excessive partisanship influencing state employment. Notice also how *Rutan* undermines the distinction between individual rights cases and structural cases. Not only does structure protect individual rights and individual rights strengthen structure, but also the two sometimes directly overlap.

3. *Davis v. Bandemer*.<sup>253</sup> As disturbing as the prior cases were, either in rhetoric or result, they remain far less troublesome than the Court's effort to correct gerrymandering abuses in *Davis v. Bandemer*. The Court held that federal courts could review state gerrymandering whenever the gerrymandering "is arranged in a manner that will consistently degrade a voter's or a group of voters' influence on the political process as a whole."<sup>254</sup> *Davis* does not have as firm a footing as *Rutan*, which protected a fundamental individual right. In *Davis*, the Court held that members of minority parties within a state could challenge state reapportionments that "consistently degraded" their vote through gerrymandering. First, no individual has been deprived of his or her vote, or of an equal weight for his or her vote. Second, the leading minority party is more the beneficiary of the opinion than any individual.<sup>255</sup> Third, judicial standards of unconstitutional behavior and judicial remedies will be very difficult to formulate. The problem should be left to convention: State citizens should criticize their leaders for acting "unconstitutionally but legally" when they engage in excessive gerrymandering. The Court should have abstained, perhaps with a comment that the country ought to develop a convention against excessive gerrymandering.

Recent political developments in England confirm this conclusion. During the 1980s, the Liberal Party and the Social Democratic Party won very few seats during parliamentary elections even though they won a large percentage of the vote.<sup>256</sup> These centrists tended to come in second to Labour in Labour areas and second to Conservatives in Conservative constituencies. The "first past the post" system, awarding the seat to the candidate who wins the most votes in a given district, favors a two

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253. 478 U.S. 109 (1986).

254. *Id.* at 132.

255. The problem may also be overrated. See, e.g., GARY C. JACOBSON, *THE ELECTORAL ORIGINS OF DIVIDED GOVERNMENT* 94 (1990). ("Despite its nefarious reputation, gerrymandering has had surprisingly little systematic impact on congressional elections in the postwar period.")

256. These parties have since merged into the Social and Liberal Democrat Party.

party system. The Liberals and Social Democrats have argued for "proportional representation," which would give them a percentage of MPs based upon their nationwide showing. One can easily argue that the "first past the post" system in America discriminates so effectively against third parties that they barely exist. Many voters, including this one, might vote for a third party if proportional representation existed. Defendants of the status quo will reply that the two party system forces political factions to make accommodations before they go to the electorate. If extremists could have their own seats, they would not join the two parties. Imagine a Religious Fundamentalist Party.

This is not the place to resolve that debate, but only to point out that all electoral structures are inherently biased against certain parties and interests, and that the Court should withdraw from that arena once it has guaranteed that individuals have roughly equal votes under *Reynolds v. Sims*.<sup>257</sup> *Reynolds*, after all, can be distinguished because it protects an individual right, is relatively "neutral," and is easy to enforce. The Supreme Court could have certainly held in *Davis* that the gerrymandering problem raised a nonjusticiable political question under at least one of the six *Baker* criteria. But developing precise conventions may make such a holding more likely by demonstrating how the political constitution can develop rules and norms to correct the problem without judicial intervention. The concept of conventions more completely explains and defends the very narrow scope of judicial review over many constitutional actions than does the more conclusory doctrine of nonjusticiability.<sup>258</sup>

## VII. CULTURAL, POLITICAL, ACADEMIC AND LEGALISTIC CRITIQUES OF THE CONCEPT OF CONSTITUTIONAL CONVENTIONS

### A. *Cultural and Political Criticisms*

Should America adopt a mode of constitutional thought from England, a country that has been in a relative state of decline for a century?<sup>259</sup> The most obvious response is that the British Constitution,

257. 377 U.S. 533 (1964).

258. At the least, the Court should consider including conventions as a device to help it determine how to apply the existing *Baker* criteria: the Court should not intervene if the particular issue can best be resolved by the formulation of appropriate conventions. Obviously, the first step in applying this conclusory test is for the Court to become aware of this major alternative methodology for regulating constitutional behavior and protecting constitutional values.

259. Certain English constitutional conventions arguably contributed to its social, economic,

much less its constitutional conventions, was not a major cause of England's deterioration in power. But even if one assumes that the British Constitution has been a factor in Britain's deterioration, that assumption does not invalidate the fact that the American Constitution, like all other constitutions that regulate complex societies, is riddled with unwritten conventions. The previous section's lengthy inventory best justifies the concept of American constitutional conventions. American constitutional conventions exist in large number, therefore they ought to be recognized. Constitutional conventions are so numerous and important that lawyers and politicians would make better decisions if they were aware of the conventions' existence.

Such positivism, of course, does not unequivocally generate the normative conclusion that all conventions are desirable, either in number or in specific content. Perhaps we could reduce all existing American conventions into reviewable law. But even if the Supreme Court could review some or all of these issues, it would be bedeviled by enormous competency problems. For instance, what judicial standard could it apply when the Senate refuses to confirm the nomination of someone to the Supreme Court? The real constitutional question concerns the appropriate combination of law and convention, not the existence of conventions.

Just as England may need more constitutional law and fewer constitutional conventions in order to flourish, America may need more conventions and less law. The concept of conventions allows both England and America to adapt without making formal, rigid changes in structure. The concept also allows the entire citizenry to participate more fully in

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and political problems. The rigidly adversarial party system in the United Kingdom conceivably generates too much instability because the winning party has unlimited power. Nobody can make long-term plans because a victorious Socialist Labour Party will implement significantly different policies than the Conservatives. Philip Norton has concluded that the members of Parliament should not be as bound by the convention of party discipline; if they had more autonomy, both they and the opposition would have more power, forcing the government to compromise. PHILLIP NORTON, *THE CONSTITUTION IN FLUX* (1982). The complaint that the Prime Minister has too much conventional power may be equally compelling. But such attacks on the British Constitution are really aimed at specific conventions, not at the concept of conventions. Part of the solution may be to metamorphose certain British conventions into law, but one may also need to change the content of other conventions. For example, the Prime Minister might be better controlled by a convention requiring concurrence by two-thirds of the Cabinet before he or she can fire another member of the Cabinet than by a statute mandating the same standard.

We should be wary of ascribing too much responsibility for national decline to the specific constitutional structures in most liberal-democratic regimes. The real difficulties are more often found in the country's culture and its leadership, not in the particular constitutional structure. For example, more American problems are caused by parents who never read their children a book or who spank their children too often than by the voters' right to elect a legislator for an unlimited number of terms.

the development of their constitution. Conventions are often better than legal doctrine at fulfilling such constitutional values as accountability, fair play, efficiency, separation of powers, and flexibility.

A related cultural criticism is that the English idea of constitutional conventions won't survive the trip across the Atlantic Ocean. Most scholars, including myself, rely upon "culture" and "tradition" to explain the anomaly that British and American citizens have similar personal rights and obligations even though they live under radically different constitutional systems.<sup>260</sup> For instance, most American liberals would resist the English solution of eliminating constitutional judicial review over all legislation, claiming that England is not as big, diverse, or as dangerous as the United States. The relatively homogeneous English are immersed in history, culture, and tradition, while Americans are still creating a historical tradition, largely premised on law. American lawyers can easily invent horror stories, many of which would probably come true: Imagine what would happen in (pick your least favorite part of the country) if there were no First Amendment.

This article's initial defense does not change; the American Constitution is already infused with constitutional conventions. But more affirmative replies also exist. Perhaps the best way to create a more communitarian, ethical society is to rely more upon conventions and less upon law. Law has been a dominant cultural force in America.<sup>261</sup> The existing cultural conflict and squalor may indicate that it is time to move on. Liberals spent the decades since World War II using the law to implement their agenda; perhaps they now need to spend more time and

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260. Wilson, *supra* note 28, at 158-60.

261. One will have to be very careful in drawing the precise lines between conventions and law. For instance Professor Henkin correctly stated that Congress can pass laws altering existing treaties because treaties and statutes are of equal weight. Louis Henkin, *Lexical Priority or "Political Question": A Response*, 101 HARV. L. REV. 524, 531 (1987). Henkin rejected Professor Westen's claim that the issue should be considered nonjusticiable. See Peter Westen, *The Place of Foreign Treaties in the Courts of the United States: A Reply to Louis Henkin*, 101 HARV. L. REV. 511 (1987).

The English system provides guidance. Under English law, a treaty does not become domestic law until it is confirmed by Parliament whenever (1) the treaty's terms require such confirmation, (2) the treaty affects the rights of British citizens, see *The Parliament Belge*, 4 P.D. 129, 154 (1879), or (3) the treaty changes English laws or expenditures, *Att.-Gen. for Canada v. Att.-Gen. for Ontario*, 1973 App. Cas. 326. Furthermore, any prior law or treaty converted into law can be altered by subsequent law under the doctrine of parliamentary sovereignty, which prohibits any Parliament from binding its successors. See MUNRO, *STUDIES*, *supra* note 43, at 86-87. This combination of structure and doctrine indicates that treaties should not be considered "higher" than statutory law, and that the legislative branches should be able to amend them. This system also undercuts Westen's claim that legitimating congressional alterations of treaties somehow indicates America is "lawless and disrespectful . . . toward international law." Westen, *supra*, at 512. At the least, America is not the only country to allow such modifications.

energy developing a political ethic that would be attractive to their fellow citizens.<sup>262</sup> Admittedly, our culture may have gone beyond the stage where it can respond to any shared ethical perspective, but if so, the culture is probably doomed. We must continue to create a morality premised upon compassion and common sense. A chance remains that the country can regather itself to generate a political morality that is firm but not self-righteous, tolerant but not indifferent.

One can make more particularized complaints about the British experience. In the United Kingdom, the Prime Minister is the chief beneficiary of constitutional conventions. The already dominant Presidency may become excessively powerful if America were to incorporate the principle of conventions. Christopher Hitchens observed:

“Much like Britain’s ‘unwritten constitution’ . . . the [special relationship between England and America] provided an uncheckable, untestable charter for the freedom of action of an unelected class. There were always those in the United States — Henry Kissinger not the least of them — who looked with vicarious envy on this power untrammelled by legislative or legal restraint . . . .”<sup>263</sup>

Certainly the Thatcher Administration’s record of significantly eroding civil liberties makes most American liberals feel uneasy. The most infamous example was her government’s ultimately futile attempts to enjoin the republication of *Spycatcher* in England.<sup>264</sup> Her administration also systematically centralized power at the expense of local governments; her desire to weaken Labour local authorities led to the disastrous poll tax.<sup>265</sup> Perhaps the best remedy is to constrain the British government with a written constitution, not to create or to enlarge an unwritten constitution in America.

Precise definitions of conventions, however, can frequently provide a better check on executive abuse of power than passing new laws or

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262. “The great liberal victories . . . were won largely in the courts, not in Congress, in the state legislatures, or at the polls. Instead of seeking to create a popular consensus behind these reforms, liberals pursued their objections by indirect methods, fearing that popular attitudes remained unreconstructed.” CHRISTOPHER LASCH, *THE TRUE AND ONLY HEAVEN* 37 (1991). Lasch does not mention that many liberal organizations such as the American Civil Liberties Union have always been woefully underfunded, making litigation the most attractive alternative, at least over the intermediate run. One often needs to advertise to change consciousness in this country, and that cannot be done without money.

263. HITCHINS, *supra* note 153, at 318.

264. See K.D. EWING & C.A. GEARTY, *FREEDOM UNDER THATCHER: CIVIL LIBERTIES IN MODERN BRITAIN* 152-69 (1990); CHAPMAN PINCHER, *THE SPYCATCHER AFFAIR* (1987).

265. Bagehot, *supra* note 11.

amending the Constitution.<sup>266</sup> For instance, the Gulf War provides a precedent for a new convention requiring the President to consult with Congress and to obtain a joint resolution permitting the use of force (unless there are compelling reasons not to do so). That convention, uncertain as it is, will constrain the President more than any law that must be dangerously rigid, filled with loopholes, or vulnerable to being ignored. Such important conventions would probably change as the country's adversaries change, but convention's flexibility is a virtue in itself. Ultimately the public decides, initially through the polls and more finally through the ballot box, whether or not the President or Congress undermined the Constitution when they decide how and when to go to war. At least the public has an additional way of evaluating presidential and congressional behavior. One cannot and should not expect the Court to solve by itself most of the problems caused by shared executive-congressional power over military force.

The concept of conventions, which reinforces the powers of the elected branches, can also be condemned for being too cheerful.<sup>267</sup> After Congress had so much trouble creating a budget in 1990, and after Congress has been so lazy and corrupt in its handling of the Savings and Loan disaster, how can it be trusted to develop, much less enforce, constitutional conventions? Such understandable cynicism should not obscure long-term triumphs. Congress already has created major constitutional conventions. Congress has not narrowed federal court jurisdiction over constitutional claims<sup>268</sup> and has resisted any efforts to create more than nine openings on the Supreme Court. Even a Senate that has frequently been controlled by the party in opposition to the President has not strangled presidential nominations to the Supreme Court. Both

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266. Because they both constrain political power and determine political morality, conventions can be as effective as statutes in warning a country of impending abuse of power or even tyranny. For example, ex-Prime Minister Thatcher temporarily lost significant political power in 1987 because of her administration's handling of the Westland Affair, an internal battle in the Cabinet over whether the Westland Helicopter Company should be sold to Americans or Europeans. HUGO YOUNG, *ONE OF US* 435-57 (1989). Thatcher was not just criticized on the merits of the Westland episode; she and her supporters were also attacked for acting unconstitutionally by leaking a Memorandum by the Solicitor General, for evasion before Parliament, and for not letting the Westland issue be fully debated in the Cabinet. *Id.* at 453.

267. This article's increased reliance on morality instead of on law does not necessarily signify hope. The shift to ethical solutions also reflects anxiety about the society and about the Court. Frankly, I am unable to determine how much this growing commitment to judicial restraint is a function of a deeper understanding of constitutional jurisprudence and a growing appreciation for judicial restraint, and how much is a result of the current conservative make-up of the Supreme Court.

268. See Sager, *supra* note 167, at 18 nn.3-5, 19 n.6.

Congress and the Executive may become even more responsible if the citizenry were to hold them accountable to a precisely defined constitutional morality.

Acknowledging the widespread existence of conventions improves judicial separation-of-powers analysis. The Supreme Court has frequently grounded its separation-of-powers decisions upon the Framers' fear of tyranny. Citing *The Federalist No. 22*, the *Chadha* Court claimed that its decision battled tyranny: "We should create in reality that very tyranny which the adversaries of the Constitution either are, or affect to be, solicitous to avert."<sup>269</sup> But conventional analysis reveals that law alone cannot protect us from tyranny, a conclusion that weakens the frequently used legal argument that a case must be decided in a certain way to prevent tyranny. For instance, Congress need not fiddle with legislative vetoes if it seeks to dominate the other branches. A tyrannical majority of more than two-thirds in Congress could radically destabilize the Constitution through a ruthless combination of expulsions, impeachments, jurisdiction limitations, court packings<sup>270</sup> and criminalizations, little of which the Court could stop under the proposed theory of conventions or any probable definition of the political question doctrine. The President, who would have been the Speaker of the House before a couple of impeachments, and the Congress can join together to pack the Court whenever they want.<sup>271</sup> Only the state legislatures, which must participate in the amendment process, could legally stand in the way of tyranny, since a true tyrant or evil faction would need to amend the Constitution to eliminate elections.

That conclusion, interestingly enough, brings us back to Dicey, who wrote that the true "legislative sovereign" in the United States is the

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269. THE FEDERALIST No. 22, at 135 (Alexander Hamilton) (H. Lodge ed., 1888), quoted in *I.N.S. v. Chadha*, 462 U.S. 919, 949 (1983).

270. Congress could pack the Court by impeaching the President and the Vice President, thereby giving itself the power to select a President. U.S. CONST. art. II, § 1, cl. 6.

271. Congress sets statutory limits on the number of Supreme Court Justices and even on the number of Representatives in the House. 28 U.S.C. § 1 (1988); 2 U.S.C. §§ 2a-2c (1988). Such laws as these reveal a form of constitutional convention that I have not studied in this article. Some constitutional issues — such as the number of Justices or Representatives — must be resolved by statute. The resulting statutory solutions are not pure conventions because they are justiciable; the Court should prevent Congress and the President from adding new Justices in the absence of statutory authorization. But there is an unwritten, nonjusticiable constitutional rule, a "post-statutory convention," that prevents Congress from altering such statutes. The Court could not stop Congress from passing and implementing a law increasing the number of Justices. Thus, this important constitutional power is regulated by justiciable statutory law, yet that statutory numerical unit is regulated by a judicially unenforceable constitutional convention.

supermajority needed to pass constitutional amendments.<sup>272</sup> That group constitutes both the greatest threat and the greatest protector of our rights and liberties; it is a political force unconstrained by law, bound only by a broader set of cultural values. At some point, the public retains the legal power to eradicate the existing legal structure. But by then constitutional conventions would have served one of their most important functions; Congress' flagrant violations of existing constitutional conventions would have warned the public that the Constitution was being undermined. The voters and state legislators would then have to decide whether or not to concur with such a tragedy.<sup>273</sup>

This unlikely supermajoritarian nightmare does not require the Supreme Court to withdraw from all separation-of-powers issues. Tyranny can develop incrementally through changes in the legal system as well as in the political system. Legislative or executive dominance at the margin may or may not be a prelude to legislative or executive tyranny, but the Court will be less sensitive to subtle shifts in power if it only considers the formal, legal Constitution. Furthermore, the Constitution serves more functions than just preventing tyranny. By drawing more attention to America's vast "unwritten constitution," the doctrine of conventions enables the Court to make more accurate assessments of the actual balance of power between the different parts of government. It enables the Court and the body politic to determine the best set of political and legal rules to implement any given constitutional text.

The Court needs to scrutinize many nontextual changes, such as legislative vetoes and such innovations as special prosecutors. It should not create any arbitrary distinction between individual rights and structure because structure can protect individual freedom as much as rights. The special prosecutor case, after all, involved both separation of powers and individual due process issues. The Justices should not formulate their doctrine in a vacuum; they should be aware of widespread breaches of the conventional constitution and should battle a branch that is edging toward oppression or even tyranny. Although the Court could not technically enforce breaches of convention (since the issue would no longer be conventional), it could become less deferential to an aggressive branch. Breaches of constitutional convention serve as harbingers of tyranny to the Court as well as to the public. Indeed, the Court may have recently been unconsciously reacting in such a way when it upheld the

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272. DICEY, *supra* note 1, at 148-49.

273. See U.S. CONST. art. V (authorizing constitutional amendments).



Special Prosecutor statute in *Morrison v. Olson*.<sup>274</sup> If the Presidency had not been stained by its recent dismal record of criminality and constitutional arrogance, the Court might have found the statute unconstitutional.

Conventional analysis influences other constitutional debates. Because Congress and the President retain large amounts of unreviewable discretion, as expressed by the doctrine of conventions, Professor Raoul Berger's fears of an "Imperial Judiciary" are exaggerated.<sup>275</sup> The Supreme Court has far less power than many lawyers believe. Conventions prevent Congress and the President from packing the Court, narrowing lower court jurisdiction, or disobeying the Court. Conventions also demonstrate that the Constitution may not be "vanishing," as Professor Chemerinsky feared,<sup>276</sup> but may only be moving from the Court to the elected branches. Such a shift in constitutional power may not be as nightmarish as congressional critics fear. As the prior discussion of Article III jurisdiction indicates, Congress has frequently acted responsibly.<sup>277</sup>

The concept of conventions also undermines the claim that the Constitution is merely a battleground between interest groups, contested by "homo politicus," a political creature of pure self-interest. The theory of conventions suggests that the Constitution is not completely amoral. Like most moralities, constitutional morality partially consists of immediate self-interest. However, conventions of honesty, toleration of oppo-

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274. 487 U.S. 654 (1988).

275. See Raoul Berger, *Paul Brest's Brief for an Imperial Judiciary*, 40 MD. L. REV. 1 (1981); RAOUL BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* (1977).

276. Erwin Chemerinsky, *The Supreme Court, 1988 Term - Foreword: The Vanishing Constitution*, 103 HARV. L. REV. 43 (1989) (asserting that the Rehnquist Court has allowed a "majoritarian paradigm" to dominate constitutional law).

277. There is no consensus over the quality of congressional constitutional interpretation. For example, Louis Fisher has asserted "that Congress can perform an essential, broad, and ongoing role in shaping the meaning of the Constitution." Louis Fisher, *Constitutional Interpretation by Members of Congress*, 63 N.C. L. REV. 707, 708 (1985). Whereas, Judge Mikva has a far darker view, stating that Congress is not designed for constitutional interpretation, and therefore deference should be accorded to the judiciary. Abner J. Mikva, *How Well Does Congress Support and Defend the Constitution?*, 61 N.C. L. REV. 587 (1983). See also Owen M. Fiss, *The Supreme Court, 1978 Term - Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 9-10 (1979). Paul Brest has been more ambivalent, asserting that Congress has demonstrated untrustworthy practices in constitutional interpretation. But Brest does not foreclose the possibility of the development of legislative procedures that would allow for competent interpretation. Paul Brest, *Congress as Constitutional Decisionmaker and Its Power to Counter Judicial Doctrine*, 21 GA. L. REV. 57 (1986). See also Paul Brest, *The Thirty-First Cleveland-Marshall Fund Lecture - Constitutional Citizenship*, 34 CLEV. ST. L. REV. 175 (1986) (urging increased participation of citizens and legislatures in constitutional decision-making).

sition, and self-restraint indicate a richer moral universe.<sup>278</sup> Conventions should be crafted at such a level of generality that they do not discriminate against non-tyrannical political factions. If conventions achieve that degree of non-partisanship, they have elements of "neutrality"<sup>279</sup> and of

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278. Perhaps some of these values can be found in "republicanism." See Frank I. Michelman, *The Supreme Court, 1985 Term - Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4 (1986); James Gray Pope, *Republican Moments: The Role of Direct Popular Power in the American Constitutional Order*, 139 U. PA. L. REV. 287 (1990). But "republicanism," like all other "isms," makes me sufficiently nervous. As Michelman noted, republicanism has its odious side. Michelman, *supra*, at 19-24. For instance, Larry Tise has described the proslavery movement as "proslavery republicanism." LARRY E. TISE, *PROSLAVERY* 347-62 (1987).

279. Conventions can be somewhat neutral and somewhat principled. Professor Wechsler rejected Judge Learned Hand's argument that the Supreme Court has significant discretion in reviewing constitutional claims. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 3-7 (1959). Wechsler asserted that the Court has a nondiscretionary judicial "duty to decide the litigated case and to decide it in accordance with the law . . ." *Id.* at 6. Wechsler also argued that the Court should intervene when a remedy can be formulated for an interest that needs protection. *Id.* But he dramatically qualified those propositions, stating that the Court should not resolve issues when the "Constitution has committed to another agency of government the autonomous determination of the issue raised . . ." *Id.* at 8. His examples of "political questions" included the seating and expulsion of members of Congress, the Republican Guarantee Clause, the interpretation of the Impeachment Clause, gerrymandering, and military issues. *Id.* at 8-9. Quoting Justice Frankfurter, Wechsler conceded that a "very thin line" existed between those cases which are so "political" that the Court cannot intervene and those cases which the Court must decide even though the cases contain "political" values. *Id.* at 7 (quoting Felix Frankfurter, *John Marshall and the Judicial Function, Address Before the Harvard Law School Conference on "Government Under Law"*, 69 HARV. L. REV. 217, 227-28 (1955)).

A fully developed catalogue of conventions, containing adequate descriptions and normative assessments, can help make the thin line a little thicker, and a little brighter, focusing on political remedies as well as on judicial remedies. The concept of conventions might or might not be consistent with Wechsler's approach. While conceding the difficulty of the problem, Wechsler also narrowed the scope of the inquiry: "Difficult as it may be to make [the judgment about political questions] wisely, whatever factors may be rightly weighed in situations where the answer is not clear, what is involved is in itself an act of constitutional interpretation, to be made and judged by standards that should govern the interpretive process generally." *Id.* at 9. Although the comment superficially seems to embrace the usefulness of conventions, Wechsler argued elsewhere in the same article that the Court is to base its decisions upon "the language of the Constitution, of history and precedent." *Id.* at 17. Since the formulation of constitutional conventions includes considerations of policy and morality, Wechsler might consider conventions inappropriate. See *id.* Furthermore, conventions may also exist outside the scope of the political question doctrine.

Wechsler's article is more renowned for his argument that the Court must apply neutral principles to those cases it must adjudicate. "[T]he main constituent of the judicial process is precisely that it must be genuinely principled, resting with respect to every step that is involved in reaching judgment on analysis and reasons quite transcending the immediate result that is to be achieved." *Id.* at 15. Just as the notion of conventions helps explain the precise contours of judicial restraint over some politically charged disputes, so constitutional legal analysis assist us in determining the forms of the conventions. Wechsler's "neutral principles" can help formulate appropriate conventions. Conventions should transcend immediate partisan interests. They should be created and defended to allow different ideological factions function within the constitutional framework, thereby avoiding the temptation of excessive "result orientation." Consider two examples. The citizenry

“principle.”<sup>280</sup> As a result, the concept is ultimately more valuable to politicians and citizens than to judges. The citizenry can allege that politicians are acting “unconstitutionally but legally” when interpreting treaties, evaluating Supreme Court nominees, expelling members from Congress, requesting Special Prosecutors, and so forth. Ambitious politicians like Richard Nixon and House Speaker Jim Wright might have been less aggressive if they had been more aware of the values conventions serve and of the power with which conventions can be enforced.

The most troubling allegation that can be made against conventions is that they will permit tyranny to flourish. Opponents can quote William Pitt’s aphorism: “Where laws end, tyranny begins.”<sup>281</sup> Shrewd, evil

should complain whenever any party breaks the conventions that regulate how the congressional majority treats the opposition. The voters should be wary of a Senate that rejects too many presidential nominations.

280. Professor Bickel both accepted and modified Professor Wechsler’s concept of “neutral principles.” Bickel agreed that the Supreme Court was the forum of principle in our society, but he concluded that the Court should not push those principles to their logical extremes. Alexander M. Bickel, *The Supreme Court 1960 Term, Foreword: The Passive Virtues*, 75 HARV. L. REV. 40, 41, 50 (1961). The Court needs to compromise prudently with the political world of expediency. *Id.* at 50. Consequently, the Court is not under a duty to intervene every time a case is fit and every time a remedy is conceivable. *Id.* at 44. Bickel thus defended the techniques of withholding ultimate constitutional adjudication, including the political question doctrine. He also accepted compromises in substantive law, such as the Court’s caution in pressing school desegregation by establishing the “all deliberate speed” standard. *Id.* at 40, 50. Professor Scharpf criticized Bickel for commingling the political question doctrine with such other passive devices as standing, ripeness, and denial of certiorari. Scharpf, *supra* note 227, at 535-38. To put Scharpf’s argument in Bickel’s own terms, the political question doctrine does not simply “withhold ultimate constitutional adjudication”; the Court makes a final decision that it does not have the last word. Bickel, *supra*, at 40. Nothing has been delayed or withheld.

Bickel concluded that the political question doctrine reflects this tension between expediency and principle: “There is something different about it, in kind, not in degree, from the general ‘interpretive process’; something greatly more flexible, something of prudence, not construction and not principle.” Bickel, *supra*, at 46. This article’s listing and discussion of constitutional conventions demonstrates that Bickel was correct in arguing that the line between convention and law will be so hard to draw that it will appear unprincipled. Certainly no single principle can explain all the conventions since each clause of the text serves so many different principles and values. But conventional analysis undermines Bickel’s distinction between judicial principle and political expediency, which he claimed was at the heart of judicial review. Bickel noted that the Court will be reluctant to intervene when an issue has “to yield more often and more substantially to expediency than to principle.” *Id.* at 75. Conventions indicate that principle can influence political action as well as law.

Conventional analysis also alters Bickel’s formulation that the Court’s finding of nonjusticiability implies that the politicians acted “not unconstitutionally.” The Court may find that the politicians acted “legally,” since it can do nothing. But such a holding should not end the debate; the rest of us still have to decide if the politicians nevertheless acted “unconstitutionally.” Consequently, a judicial determination of nonjusticiability and/or of a breach of convention does not generate as much legitimacy as other judicial findings of constitutionality, and should be retained for that very reason.

281. As quoted in Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537, 2542 (1991).

politicians can prevent the Supreme Court from fulfilling its basic duty to prevent tyranny, thereby undercutting the primary purpose of the Constitution.<sup>282</sup> This argument cannot be lightly dismissed; there is always ground for anxiety, even fear. I certainly can't predict if this conceptual stone should have remained unturned, but I am relying on some residual American optimism, hoping that the country can still create a viable, humane political morality. Pessimism is also served; it is better to be aware of how tyranny can arise within the Constitution than to pretend that legal doctrine alone can provide sufficient protection. Finally, the concept of conventions gives the country three opportunities to stop unconstitutional action. First, a properly formed "convention" can prevent an action from ever taking place. Second, the Supreme Court may not consider a particular issue to be "conventional" and may strike it down. Third, the citizenry can continue to clamor for enforcement of the convention, even if the Court chooses not to intervene.

Just as the risks are high, so are the rewards. The concept of conventions demonstrates that much of the American Constitution is fluid and flexible. A time may come when the country decides to change significantly, to weed out much of the existing corruption, oppression, and decay. Constitutional conventions provide a roadmap of how significant change can be accomplished without destroying the Constitution's basic structure, purposes, and norms.

### B. *Legalistic Reservations*

Aside from cultural and political concerns about the impact of conventions on existing and future distributions of power and on constitutional doctrine, one can also criticize the idea of constitutional conventions for more technical, legalistic reasons. Does the doctrine of

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282. In the course of evaluating *United States v. Richardson*, 418 U.S. 166 (1974), holding that the plaintiffs raised a nonjusticiable claim when they sought a public accounting of CIA spending, Professor McCormack anticipated this article's methodology and stated some of its risks: "Although it is possible for a member of Congress to argue that a particular secret use of funds is unconstitutional, nobody is likely to take the argument very seriously if the Court has already declared the provision to be nonenforceable." McCormack, *supra* note 30, at 599. But such an argument can be raised against any new form of constitutional rhetoric; we don't know how well it will work unless it is tried. Conventions provide a vehicle for making such arguments seriously and effectively. On a more prosaic level, conventions may be the only practical technique available to prevent certain constitutional abuses, because the Court probably will continue to refuse to adjudicate many such issues, relying on a variety of doctrines. In other words, even if the Court adopted Henkin's doctrine of "equitable discretion" and jettisoned the political question doctrine, we would still need to develop constitutional conventions to give the Court more guidance in how to exercise its discretion and to check elected politicians who will frequently be legally immunized by that discretion.

conventions add anything new to the constitutional debate? I could hardly be the first person to notice something so important and widespread. We have seen that Dicey mentioned American constitutional conventions in 1885.<sup>283</sup> Woodrow Wilson discussed conventions in his study of Congress.<sup>284</sup> Legal debate rarely depends upon complete novelty; feminist jurisprudence did not discover compassion and empathy.<sup>285</sup> Lawyers mainly argue over the proper weight to give to different doctrines, feelings, and concepts. Law review articles often alert the legal community to values and arguments of which it may have not been aware, may have forgotten, or may have minimized. Constitutional conventions (or some other phrase) are not as important a part of the American constitutional consciousness as they should be.

Justice Frankfurter repeatedly referred to "custom" in his decisions,<sup>286</sup> and Justice Scalia has frequently invoked "tradition,"<sup>287</sup> but these legal doctrines are in a different universe than conventions. Courts enforce customs and traditions. Also, as we have seen, a convention can be created out of one episode or even out of the recommendations of a constitutional theorist; one does not simply contemplate the past. Tradition also does not offer as much guidance in applying the political question doctrine as the doctrine of conventions. Custom and tradition emphasize precedent, while the doctrine of conventions considers many forms of argument, by seeking its *raison d'être* in precedent, text, policy, morality, character, and history. The words "custom" and "tradition" are more positivistic than the word "convention," which contains an ethical component. Finally, there is not yet a fully articulated tradition in this country that a violation of a constitutional norm can take place, yet the Supreme Court can do nothing about it. There is no tradition of

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283. DICEY, *supra* note 1.

284. WOODROW WILSON, *CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES* (1908). See also CHRISTOPHER G. TIEDEMAN, *THE UNWRITTEN CONSTITUTION OF THE UNITED STATES* (1890); 1 JAMES BRYCE, *AMERICAN COMMONWEALTH*, 391-407 (3d ed. 1895); HERBERT W. HORWILL, *THE USAGES OF THE AMERICAN CONSTITUTION* (1925). Dicey's editor, Professor E.C.S. Wade, noted: "It may be asserted without much exaggeration that the conventional element in the constitution of the United States is as large as in the English Constitution." DICEY, *supra* note 1, at 28 n.1.

285. Carol Gilligan has argued that gender heavily influences morality. CAROL GILLIGAN, *IN A DIFFERENT VOICE* (1982). See also Lynne N. Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574 (1987); Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1 (1988).

286. KOH, *supra* note 43, at 70. See also Michael J. Glennon, *The Use of Custom in Resolving Separation of Powers Disputes*, 64 B.U. L. REV. 109 (1984).

287. See David J. Luban, *Legal Traditionalism*, 43 STAN. L. REV. 1035, 1038 (1991).

developing a precise set of judicially unenforceable powers, rules, and sanctions to make the Constitution more effective.

The idea of conventions should not be reduced to a question of "policy." That word suffers from its own set of ambiguities. The theme of conventions more directly links constitutional political rules with the constitutional text and with constitutional morality than with "policy analysis." "Convention" is a more expansive, less technocratic concept than "policy." It implies morality and continuity, not just cost-benefit analysis or crude consequentialism. Finally, by providing a larger perspective on the Constitution, conventions free us from a largely judicial conception of the Constitution, which is largely concerned with and constrained by "judicial competence."<sup>288</sup>

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288. Professor Scharpf concluded that much of the debate between Hand, Wechsler and Bickel over the political question doctrine was misleading: "In my understanding of the political question, the doctrine cannot be regarded as a test for the validity of the competing theories of judicial review. . . ." Scharpf, *supra* note 227, at 597. Instead of trying to ground his theory of nonjusticiability in such abstract concerns as the existence of a judicial duty to hear all constitutional claims, Scharpf concluded that most of the cases could be explained in terms of judicial competence: (1) difficulties of judicial access to information, (2) deference over international disputes, and (3) reluctance to interfere with another branch's specific responsibilities when the issue raises concerns "beyond the Court's reach." *Id.* at 587. Without committing himself to any theory of judicial review, Scharpf concluded that the amendment process should be nonjusticiable; at some point the Court must allow the people to change the Constitution and to reverse its decisions. *Id.* at 589. Scharpf's careful presentation of caselaw showed that the usual reasons given for the political question doctrine do not really explain how the Court has actually applied the doctrine. The Court has frequently tried to resolve contentious issues, *id.* at 549-55, and issues that present difficulties in formulating legal standards, *id.* at 555-66. Indeed, Scharpf concluded that the scope of the political question doctrine is primarily limited to international affairs. *Id.* at 596.

Conventional analysis differs from functional analysis by focusing on the powers and responsibilities of the rest of the government, instead of on the judiciary's capacities and limitations. Because conventions regulate both important and relatively trivial constitutional questions under different parts of the text, they create a pressure for a more *ad hoc*, less principled interpretation of the political constitution, and thus of any doctrine of judicial restraint. The Court might have the technical skill to solve certain constitutional problems, such as the admissibility of secret treaty negotiations into treaty interpretation or the grounds for an impeachable offense, but it should not intervene in such situations. The best solution is conventional. The complex universe of conventions also undermines any grand theory of judicial review; the Court needs to assess each textual provision on its own terms, determining the peculiar mix of values that the text fulfills. Professor Wechsler would probably be troubled by the *ad hoc* nature of constitutional conventions: "*ad hoc* evaluation is, as it has always been, the deepest problem of our constitutionalism, not only with respect to the judgments of the courts but also in the wider realm in which conflicting constitutional positions have played a part in our politics." Wechsler, *supra* note 279, at 12. It could be that large parts of our Constitution are and ought to be *ad hoc* battlegrounds of warring principles and beliefs, particularly those parts that should be governed by conventions. There may be a unifying theory for all the conventions, but it will be harder to locate than a unified theory of constitutional adjudication. Finally, by taking us beyond the existing cases to hypotheticals that admittedly will probably never be litigated, conventional analysis shows that significant judicial restraint under the political question doctrine (or some equivalent) is not a narrow one, but is a crucial aspect of our constitutional

The doctrine of conventions is arguably too complex. Dicey's distinction is relatively easy to apply in England since the British constitution consists of a few significant statutes, common law, and convention. Parliament can easily turn any conventions or any common law doctrine into a statute. The American system, premised upon a written text and significantly separated powers, is more cumbersome. Congress, unlike Parliament, cannot convert all conventions into law. The Supreme Court cannot effectively review conventions, but it can sometimes reverse congressional overreaching into Executive conventional power; it can also consider Executive actions regulated by congressional conversions of conventional power into statutes. While almost all the British conventions can be reduced to the underlying goal of political accountability, a logical derivative of the British Constitution's majoritarian premise, American conventions serve a variety of purposes because they help implement the diverse goals reflected by relevant parts of the text. Thus, they will reflect the multiple, conflicting purposes of the American Constitution: democracy, separation of powers, protection of minority rights, anti-majoritarianism, effectiveness, the general welfare, and the prevention of tyranny. The short answer, which is not completely reassuring, is that development of constitutional conventions will be no more complicated than development of constitutional law. We need to define the proper mix of law and convention for each clause, and to debate what types of argument are appropriate to determine that mixture. This article only begins that inquiry.

Do constitutional conventions create unnecessary obfuscation? That query almost assumes that the *Baker* criteria provide sufficient clarity and self-justification. Conventions offer a fuller, clearer description of the Constitution than the existing political question doctrine. One way or the other, the Court has to decide when it should not intervene, and conventions help the Court establish the proper scope of review. Conventions force us to confront the mixture of law and politics that make up the Constitution, while the *Baker* tests tend to separate that basic problem into six discrete legalistic categories. The *Baker* standards look at the Court's responsibilities; conventions help us determine the other branches' obligations. The phrase "constitutional convention" does not mandate a specific resolution of any particular constitutional dispute,<sup>289</sup>

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structure. We can miss much of the Constitution if we only focus on the caselaw and on the issues that are likely to be litigated in the future.

289. Any rhetorical concept that operates at a high level of generality will fail to generate specific results. Nevertheless, the Court's decision over which forms of argument it will consider radi-

the concept provides us with an additional mode of discourse, emphasizing political remedies.

A related complaint is that conventions suffer from malleable circularity.<sup>290</sup> But any general legal concept that is incapable of mandating particular results is always vulnerable to malleability and potential circularity. For instance, why would I be willing to tolerate the risk of congressional overreaching in impeachment, but would oppose the line-item veto because I am wary of presidential abuse? Why am I satisfied with the conventions that regulate impeachments but find no satisfactory conventions that can effectively control the line-item veto?<sup>291</sup> After all, Congress retains more weapons to battle a President using the line-item veto than does a President who is threatened by a partisan impeachment proceeding. State governors have used line-item vetoes without triggering disaster. I have to concede that my formulation of specific conventions reflects my underlying biases, apprehensions, and reactions to recent political realities, such as extraordinary presidential power combined with periodic outrageous presidential abuses of that power (not to mention congressional muddling). This article has not been a purely neutral application of abstract principles of government. Nor should it have been. If one accepts the proposition that political assumptions permeate the law, one shouldn't be surprised to learn that political beliefs will even more thoroughly determine the specific conventional rules which regulate political behavior. Much of the constitution will change, as it should, as all of us learn from experience.

Just as the last question in a legal case is the remedy, so the final problem concerning conventions is determining the appropriate sanction. Conventional sanctions vary dramatically in their impact, their fre-

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cally influences outcomes. Spurred by Justice Scalia, the Court has recently revived the "tradition" argument. In 1989 and 1990, the Justices used the word "tradition" in thirty cases concerning the United States Constitution. For specific examples, see *Powers v. Ohio*, 111 S.Ct. 1364 (1991), *Rutan v. Republican Party of Illinois*, 110 S. Ct. 2729, 2748 (1990) (Scalia, J., dissenting), and *Burnham v. Superior Court of California*, 495 U.S. 604 (1990).

290. This article's exploration of conventions can be attacked for being too passive; hardly a single Supreme Court decision would be disturbed if the Court adopted all of the article's recommendations. The concept may nevertheless have significant legal value because we do not know what issues the Court will face in the future. It can also influence political behavior outside the courtroom.

291. One can explain the distinction between line item vetoes and impeachment by invoking constitutional text: the Constitution entrusts Congress with the impeachment power and with the power of finance. But all constitutional lawyers know that the text is just the beginning, even if some wish otherwise. The legal academy should share some of its experience about evaluating constitutional rhetoric with the politicians, historians, and political scientists who have been most involved with the political constitution.



quency, and their application. Such politically charged weapons as impeachment, censure, forced resignation, and prosecutorial discretion will not always be used appropriately, much less "neutrally." Voter reaction to breaches of convention will always be hard to predict, in terms of either intensity or duration. The voters will probably forgive or forget most violations of conventions which occur early in a politician's term. Although these criticisms have power, they create the false impression that the legal system can handle these particular problems. The reality is that the judiciary never has considered and never will consider many constitutional decisions and disputes. Under existing rhetoric, politicians remain largely immune from constitutional criticism so long as they do not violate any laws. Conventions offer an additional constitutional constraint on political actions, although they will often be weak.

### C. *Potential Academic Criticisms of the Doctrine of Conventions*

Even if one separates the doctrine of conventions from nonjusticiability, many lawyers will remain uncomfortable with the doctrine's implications. This section shall apply some of the scholarly arguments made against the political question doctrine to the concept of conventions.

Professor Redish attacked the political question doctrine for fostering lawlessness.<sup>292</sup> Redish's argument posits that lawlessness is always undesirable, perhaps because he believed that such behavior is then completely unregulated. Redish's dualism forces the Court to choose between law and anarchy. But there is and ought to be an ethical component to any decent society; some issues ought to be resolved non-legally. The principle of conventions demonstrates how such an ethical constitutional system functions. The scholars, politicians, and public can self-consciously develop explicit standards to limit political discretion.

Redish also feared that the political question doctrine reinforces inappropriate judicial deference at the expense of individual rights. He noted that the *Korematsu*<sup>293</sup> decision, which upheld the internment of Japanese-Americans during World War II, approached the status of a political question decision because the plaintiffs had "effectively no review."<sup>294</sup> By focusing on structure instead of individual rights, this article has avoided some of the specific problems that Redish raised. The doctrine of conventions does not require the judiciary to accept govern-

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292. Redish, *supra* note 35.

293. *Korematsu v. United States*, 323 U.S. 214 (1944).

294. Redish, *supra* note 35, at 1037.

mental deprivations of individual liberty. On the other hand, this article has not attempted to draw a bright line between structure and rights because government structure directly and indirectly affects individual rights.

There is no doubt that some abuses will occur and that courts will be unable to rectify the situation. For instance, President Reagan pardoned, without studying the trial record, FBI officials W. Mark Felt and Edward Miller, who were convicted in 1978 for ordering the burglaries of the Weather Underground.<sup>295</sup> At most, President Reagan arguably violated a convention by pardoning these men. This example may be too easy; few scholars would give either Congress or the courts power to review pardons. But the example demonstrates that many constitutional abuses, such as gerrymandering or the conduct of secret armed conflict, remain or ought to remain immune from judicial review (particularly in the absence of permissible congressional statutory regulation). The greater the number of conventions, the greater the opportunity for abuse of whatever discretion the conventions authorize. There are costs associated with the conventional perspective, but there are greater costs in ignoring or jettisoning the notion of conventions.

Although Redish did not discuss the pardon issue, he conceded that the Court must vary its degree of deference to other branches depending upon the issue raised.<sup>296</sup> But he nevertheless concluded that "the Court must draw the final constitutional calculus."<sup>297</sup> Why must the Court always have the last word on all constitutional disputes? Part of the answer lies in the first sentence of Redish's article: "The so-called 'political question' doctrine postulates that there exist certain issues of constitutional law that are *more effectively resolved* by the political branches of government and are therefore inappropriate for judicial resolution."<sup>298</sup> The concept of conventions reinforces that postulate, which Redish rejected, by showing how the political branches can and ought to resolve certain constitutional problems more effectively than the judiciary.

Professor Henkin concluded that the political question doctrine is "an unnecessary, deceptive packaging of several established doctrines . . ."<sup>299</sup> When he was a law professor, Michael Tigar stated that there is

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295. KENNETH O'REILLY, HOOVER AND THE UN-AMERICANS 291 (1983).

296. Redish, *supra* note 35, at 1048.

297. *Id.* at 1060.

298. *Id.* at 1031 (emphasis added).

299. Louis Henkin, *Is There a "Political Question" Doctrine?*, 85 YALE L. J. 597 (1976).

“no such thing” as the political question doctrine.<sup>300</sup> Professor McCormack labelled nonjusticiability a “myth”: “This Article contends there is no such thing as justiciability, except for the narrow requirement that courts handle only judicial proceedings.”<sup>301</sup> All three authors then hedged their initial attacks. Even though Henkin believed judicial review was always appropriate, even in impeachment cases,<sup>302</sup> he proposed that the Court should sometimes exercise its equitable discretion to refuse to settle some of the more difficult issues.<sup>303</sup> Tigar suggested that the Court should decide all cases using the doctrine of deference and evidentiary devices to reflect the degree of autonomy the other branches should have.<sup>304</sup> As we shall see, McCormack vacillated over the question of finality.<sup>305</sup>

Because these scholars provided the Court with alternative doctrinal devices to support the government, one might conclude that the debate is only over doctrinal semantics or doctrinal aesthetics. Who cares what doctrine the Court uses so long as it makes the proper decisions on the merits? But if the Court were to take the scholars’ advice, it could excessively legitimate many issues. Judicial manipulation of deference, burdens of proof, and equitable discretion can stack the decks against a

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300. Tigar, *supra* note 32, at 1135.

301. McCormack, *supra* note 30, at 595. McCormack agreed with Henkin that the doctrine only obfuscates issues. *Id.* at 633.

302. Henkin did not simply reformulate the caselaw into exercises of judicial deference, which he called “ordinary respect.” Henkin, *supra* note 33, at 601. He tried to weed out all hypothetical examples. Thus, Henkin maintained that the courts should consider such issues as the constitutionality of the Vietnam War, *id.* at 623-24, the process of impeachment, *id.* at 604 n.24, 605 n.26, the implementation of constitutional amendments, *id.* at 613-14, and even the “Republican Guarantee” clause, *id.* at 607-08. Henkin concluded his review of the cases by stating: “The leading cases of the past were or could have been decided, I believe, without forswearing judicial review or indulging other extraordinary self-effacement by the courts, whether from principle or prudence.” *Id.* at 617.

303. *Id.* at 624.

304. Tigar, *supra* note 32, at 1171. Tigar commenced his attack on the political question doctrine with “the general principle that a federal forum must be generally available for the decision of any federal claim,” *id.* at 1151-52, particularly when a case involves personal liberty, *id.* at 1179. He then dismissed the political question standards set forth by Professor Wechsler and Professor Bickel as being too general and Justice Brennan’s *Baker v. Carr* tests because they are necessary but not sufficient grounds for making a determination of nonjusticiability. *Id.* at 1153-55. Tigar also criticized those formulations because they did not reflect earlier precedent. *Id.* at 1155-63. Tigar reformulated the cases as examples of judicial deference, not judicial surrender, to the other branches when those branches are acting within their “spheres of competence.” *Id.* at 1173. Tigar’s complaint that there is no easily identifiable unifying thread, theory, or distinction to the political question doctrine does not invalidate the related doctrine of conventions. We are trying to determine the “rules of the game” in the political world to help us understand how that world coexists with its judicial cousin.

305. See *infra* text accompanying notes 307-09.

plaintiff as effectively, but even more obscurely, than holding that the Court cannot decide the claim because it is nonjusticiable or conventional. The plaintiff can still take his or her allegation of unconstitutionality to the body politic. By rejecting the idea that "some constitutional requirements are entrusted exclusively and finally to the political branches of the government for 'self-monitoring,'"<sup>306</sup> Henkin forces the Court to decide virtually all constitutional disputes. The Court will still frequently rule in favor of the government, perhaps relying upon Henkin's "equitable discretion." However, such holdings give too much legitimacy to many constitutional conflicts. The Court should have the option of notifying the constitutional community that it did not have the last word on a given constitutional dispute and that the political part of that community needs to develop additional constitutional standards to effectively safeguard certain constitutional values. It is better to acknowledge the inevitability and even desirability of a significant degree of "self-monitoring" than to assert that "self-monitoring" does not or should not exist.

Much of the debate comes back to deciding which constitutional actor ought to have the last word. McCormack, at least in the earlier part of his article, favored judicial finality: "Once having assumed the *Marbury* burden of following the law, for the Supreme Court to leave both interpretation and enforcement to the political branches is to attempt to read the provision out of the governing law and make it a mere exhortation."<sup>307</sup> That premise led McCormack to criticize the Rehnquist Court for shifting constitutional claims to Congress: "If the Rehnquist Court wishes to make the political branches more involved in interpreting and enforcing the Constitution, then it should disclaim the role of ultimate arbiter which the Court has held for almost 200 years."<sup>308</sup> Yet at the end of his article, McCormack equivocated, "[w]hen the Court holds that it is up to another branch to decide the meaning of a constitutional term, it has exercised judicial review . . . . The Court has not refused to decide 'the issue'; it has decided the issue by holding that another branch has final authority."<sup>309</sup>

The concept of conventions demonstrates more clearly than the existing political question doctrine or than these critics that many constitutional disputes cannot be adequately resolved by the judiciary. The

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306. Henkin, *supra* note 33, at 599.

307. McCormack, *supra* note 30, at 599.

308. *Id.*

309. *Id.* at 634.

Court will not make and, in fact, should not always formulate the final constitutional decision, the final exercise of discretion, the final set of constitutional rules, or the appropriate sanction. Nonjusticiability may be a "myth," but we need to invent something like it to express a very high level of judicial restraint, simply because we cannot function without it. Conventions support ambiguous judicial endings. Sometimes the constitutional debate should not end when the Court has ruled against a plaintiff, but rather, should just be starting. By trying to eliminate any notion of nonjusticiability or of a high degree of restraint, scholars force the Court to choose between two options: the Court must either proscribe the challenged activity as illegal and unconstitutional or hold that the defendants completely and legitimately acted within their constitutional authority. There is not a third opportunity of leaving a cloud over the government's actions. That cloud can best be created by articulating a theory of conventions, notifying the rest of the country that important parts of many constitutional debates remain for it to resolve.

In short, a theory of conventions requires the American legal community to let go of much of its beloved Constitution (or at least of its constitutional caselaw). Many great constitutional struggles do not and should not take place inside the judiciary's empire. The resulting constitutional universe is less certain, less predictable, less rule-bound, less controllable, less theoretical, and in some ways, more dangerous than the constitutional world that most law students and law professors study. But if these somewhat disturbing conclusions are true, as this article has sought to establish, then we should acknowledge those truths. We should more self-consciously develop rules to control by non-legal means the power that the politicians inevitably have. The concept of conventions simultaneously increases anxiety and offers a partial palliative for that dread.

Finally the body politic has to make a difficult distinction when determining violations of conventions and sanctions for such violations. When has a politician acted "unconstitutionally" by "breaching" a convention, and when has a politician merely modified a convention or created a new convention? These questions reflect a basic tension between the core values conventions serve. Conventions signify constraints on political action, yet they also permit constitutional change. There can never be a simple answer to this dilemma. And this constitutional dispute, like so many others, must ultimately be decided in the court of public opinion. The public will decide if the politician has validly asserted the defense that he or she is merely creating a new convention or

that the politician is guilty of undermining the Constitution. Technical issues, such as the scope of Article III, will probably be monitored by more informed members of the public. More fundamental issues, such as President Nixon's not providing information to the House Committee investigating his impeachment, will be determined by the citizenry.<sup>310</sup> Thus public opinion alters the actual structure of the Constitution; the public, informed and relatively uninformed, interact with the politicians to create and enforce particular constitutional conventions. The public, of course, also affects political behavior more immediately through elections, polls, monetary support, and other avenues.

### VIII. CONCLUSION

America is wobbling, torn by a callous court,<sup>311</sup> a bitter and self-indulgent electorate, special interest group dominance, class and racial conflict, a superficial but seemingly impregnable Congress, and an isolated, frequently arrogant Presidency. It is tempting to find solutions through more laws, more Supreme Court decisions, or new constitutional amendments. Critics may dismiss this article's alternative of developing constitutional conventions as quaint at best, or as an inappropriate form of argument in America, at worst. They may argue that the British are a people of convention and tradition, but this country remains a polyglot, a frontier society. In a land of "wheeler dealers," the idea of "political morality" is a dangerously naive oxymoron. Only the sharp edge of the law, preferably permanent constitutional or criminal law, can keep politicians in line.

Such a grim rejoinder may be a bit of a caricature, but it can be partially met on its own grounds. Too much law can empower politicians as much as too little law; we need a proper mix of law and convention, not one or the other. The problem of the proper blend can be restated to reflect other basic questions. What is the appropriate combination of law and virtue?<sup>312</sup> What is the most felicitous mixture of law and politics? What is the role of culture in constitutional law? The concept of conventions cannot precisely answer such profound queries, but

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310. *Impeachment of Richard M. Nixon, President of the United States*, House Calendar #426, House of Rep., 93rd Cong., 2d Sess., art. III, reprinted in FROM: THE PRESIDENT 619 (B. Oudes, ed. 1989).

311. See James Wilson, *Reconstructing Section Five of The Fourteenth Amendment to Assist Impoverished Children*, 38 CLEV. ST. L. REV. 391 (1990).

312. Christopher Lasch has evaluated several definitions of "virtue." CHRISTOPHER LASCH, THE TRUE AND ONLY HEAVEN 59, 175, 233, 250, 274, 373 (1991). See also ALASDAIR MACINTYRE, AFTER VIRTUE (2d ed. 1984).

simply enables us to frame the issues by combining two alternative approaches for constraining power, law and morality. It reminds us that law is not enough. Particular laws and structures can be less important than either the people who work within those systems<sup>313</sup> or the overall culture. The concept of conventions also reveals the constitutional morality that most of us have in common.<sup>314</sup>

The Constitution must be continually enforced by the political branches and the people, as well as by the courts. If we are caught in a Manichean world of having to choose between law and anarchy/despotism, we have reduced the possibility of developing a humane society. We would no longer be relying upon the virtues of either our politicians or our citizenry to strengthen our Constitution. Too much law can be as dangerous as too little law. Such truisms do not simply reflect themes of political empowerment and responsibility. Because politicians can theoretically change conventions at any time, conventions provide much of the needed flexibility within the American Constitution. For better or for worse, the Constitution periodically transforms itself in response to shifts in public opinion.<sup>315</sup> In short, all constitutional societies should create the best blend of law and convention to control and define their constitutional branches, instead of relying exclusively on either technique.

Little harm can come from having American constitutional lawyers and judges think more often and more analytically about the rules and standards that arise under the political side of the Constitution, coexisting with the legal, judicially enforceable part of the Constitution. The legalistic impulse often has the noble goal of systematically attempting to organize a set of rules and standards to control aggression. But that impulse can become compulsive and self-centered, entering into arenas where it does not belong. Not all behavior, not even all governmental behavior, can or should be controlled by the courts. The concept of conventions offers an alternative approach that should appeal to lawyers: the orderly development of a series of rules, based upon text, history, precedent, policy, and morality, that can better define the Constitution and better protect all of us from tyranny than exclusive reliance upon the

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313. Bagehot observed: "But generally the laws of a nation suit its life; special adaptations of them are but subordinate; the administration and conduct of that life is the matter which presses most." BAGEHOT, *supra* note 57, at 153.

314. Constitutional adjudication inevitably generates winners and losers. Formation of proper constitutional conventions can solidify the body politic.

315. See A.V. DICEY, *LAW AND PUBLIC OPINION IN ENGLAND* (1905). For the court's most recent perspective, see *Planned Parenthood of Southeastern Pa. v. Casey*, 112 S.Ct. 2791 (1992).

Supreme Court. In other words, the notion of conventions suggests the following resolution of the law-politics dichotomy: all legal questions are political, but some political questions should not be legal.