

ARTICLES

Political Questions and the Ultra Vires Conundrum

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This Article advances a novel theory of the political question doctrine by locating its foundations in a conundrum about ultra vires action, exemplified by the ancient question: Who will guard the guardians? The political question doctrine marks some questions as ultra vires the judicial power, or beyond the jurisdiction of courts to resolve. Correspondingly, designation of a question as political typically identifies it as lying within the jurisdiction of a nonjudicial institution to settle. Even after denominating a question as political, however, courts retain a responsibility to check actions by other institutions that overreach those institutions' authority and thus are themselves ultra vires. The need for the judiciary to press to the outer limits of its jurisdiction to rein in ultra vires action by other institutions renders political question rulings less categorical, and also less distinct from merits decisions, than both judges and commentators have often imagined. The inescapable role of the courts in identifying ultra vires action by other branches also highlights the possibility of ultra vires action by the courts themselves.

The paired risks of ultra vires action by the courts and ultra vires action by other branches if the courts could not assert jurisdiction to restrain them—both made vivid by the political question doctrine—define what this Article calls the ultra vires conundrum. The ultra vires conundrum, in turn, gives rise to what we might think of as ultimate political questions: What happens if courts err in their determination of the outer bounds of their own power? If the courts act ultra vires, do their decisions bind conscientious officials of other branches? And if not, who gets to decide when judicial action is ultra vires?

Besides formulating the ultra vires conundrum and answering the questions that define its core, this Article solves a number of more traditional, interrelated puzzles about the political question doctrine that appear in a new light once the ultra vires conundrum lies exposed. It also traces previously unexplored connections between political questions and the ideal of the rule of law.

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INTRODUCTION

The political question doctrine—which affirms that some constitutional questions lie beyond judicial jurisdiction to resolve, and can in some instances be settled authoritatively by other branches—occupies an odd status. Although such a doctrine indisputably exists, debate abounds concerning its nature and foundations.¹ As an additional basis for puzzlement, the Supreme Court almost never invokes the political question doctrine.

¹ See Parts II–III. Some commentators deny that it should exist at all. See, for example, Martin H. Redish, *Judicial Review and the “Political Question”*, 79 Nw U L Rev 1031, 1059–60 (1985); Louis Henkin, *Is There a “Political Question” Doctrine?*, 85 Yale L J 597, 622 (1976) (arguing that “[t]he ‘political question’ doctrine . . . is an unnecessary,

The Court's most recent deployment of the political question concept in *Rucho v Common Cause*²—to hold challenges to partisan gerrymanders nonjusticiable³—was therefore unusual as well as controversial. In 2004, Justice Antonin Scalia's plurality opinion in *Vieth v Jubelirer*⁴ had prefigured *Rucho* by concluding that political gerrymanders present political questions due to an absence of judicially manageable standards for determining when partisan advantage seeking goes "too far."⁵ But Justice Scalia could not muster a majority either on that occasion or in a subsequent gerrymandering case.⁶

If one puts *Vieth* aside, only twice since the 1930s had the Supreme Court ordered the dismissal of a case on political question grounds prior to *Rucho*. In *Gilligan v Morgan*,⁷ which held that a suit for injunctive relief against National Guard officials presented a political question, the Court reasoned that Article I grants Congress "the responsibility for organizing, arming, and disciplining the Militia . . . with certain responsibilities being reserved to the respective States."⁸ In light of Article I's delegation of authority to Congress and the president's powers as commander in chief, the Court ruled that it would be inappropriate for the judiciary to intrude in ongoing, discretionary decisions about training and choice of weaponry.⁹ In *Nixon v United States*,¹⁰ the Court concluded that Article I, § 3, clause 6, which provides in part that "[t]he Senate shall have the sole Power to try all Impeachments,"¹¹ gives the Senate judicially unreviewable

deceptive packaging of several established doctrines" that sometimes appropriately deny relief, including denial of remedies "for want of equity").

² 139 S Ct 2484 (2019).

³ *Id.* at 2508.

⁴ 541 US 267 (2004).

⁵ *Id.* at 296 (Scalia) (plurality). Prior to *Vieth*, in a concurrence joined by Chief Justice Warren Burger and Justice William Rehnquist, Justice Sandra Day O'Connor had argued that challenges to political gerrymanders presented political questions. See *Davis v Bandemer*, 478 US 109, 144 (1986) (O'Connor concurring in the judgment).

⁶ See *League of United Latin American Citizens v Perry*, 548 US 399, 511 (2006) (Scalia concurring in the judgment in part and dissenting in part). In a more recent case, the Court avoided the question whether challenges to partisan gerrymanders present political questions by holding that the plaintiffs had failed to establish standing. *Gill v Whitford*, 138 S Ct 1916, 1933–34 (2018).

⁷ 413 US 1 (1973).

⁸ *Id.* at 6.

⁹ *Id.* at 7–11.

¹⁰ 506 US 224 (1993).

¹¹ US Const Art I, § 3, cl 6.

authority to determine the procedural requisites of an impeachment trial.¹² The Court was fortified in this conclusion, it said, by an absence of judicially manageable standards for resolving impeachment disputes.¹³

Rucho was different. Unlike in *Gilligan* and *Nixon*, the Court found no constitutional commitment of authority to another branch with which judicial involvement might interfere. In especially sharp contrast with *Nixon*, in which the Court ruled that the Constitution charges the Senate, rather than the courts, with interpreting the Impeachment Trial Clause, *Rucho* did not point to any other institution to which the Constitution commits responsibility to enforce the Equal Protection Clause or the First Amendment, the two provisions on which the challengers principally relied. Instead, the Court based its ruling entirely on the absence of judicially manageable standards “for deciding how much partisan dominance is too much.”¹⁴

This Article advances a novel theory of the political question doctrine. It seeks to reframe thinking about political questions by demonstrating that a single, inescapable conundrum—which prior scholarship has failed to diagnose—both explains the political question doctrine and haunts Supreme Court decisions about whether to apply it in most of the modern cases. The conundrum, which may be endemic to judicial review within a constitutional democracy, involves the threat or phenomenon of ultra vires action—or action that exceeds the outer bounds of lawful authority—by any constitutionally empowered and limited institution, including but not restricted to the judiciary. The ultra vires conundrum may be less visible in *Rucho* than in cases such as *Nixon* in which the issue turns on whether the Constitution assigns responsibility for resolving a constitutional dispute to a branch other than the judiciary. Even in *Rucho*, however, it forms a crucial part of the background.

¹² *Nixon*, 506 US at 226.

¹³ *Id.* at 228–29:

As the discussion that follows makes clear, the concept of a textual commitment to a coordinate political department is not completely separate from the concept of a lack of judicially discoverable and manageable standards for resolving it; the lack of judicially manageable standards may strengthen the conclusion that there is a textually demonstrable commitment to a coordinate branch.

¹⁴ *Rucho*, 139 S Ct at 2498, quoting *League of United Latin American Citizens*, 548 US at 420 (Kennedy) (Kennedy writing only for himself in this portion of the opinion).

The conundrum, in a nutshell, is this: The political question doctrine marks some questions as ultra vires, or beyond the jurisdiction of courts to resolve. Even after denominating a question as political, however, courts typically retain a responsibility to check actions by other institutions that overreach the outer limits of those institutions' authority. As a result, denomination of a question as a political question marks a less categorical commitment to judicial nonintervention than many and perhaps most commentators have imagined. Furthermore, the less-than-categorical effect of political question rulings invites the question: What happens if courts, in claiming to identify ultra vires action by other branches, err in their determination of the outer bounds of their own power? If the courts act ultra vires, do their decisions bind conscientious officials of other branches? And if not, who gets to decide when judicial action is ultra vires? In this Article, I argue that these questions loom in the background when the Supreme Court purports to determine the outer limits of the judicial power to decide constitutional questions authoritatively.

Even when the Supreme Court decides exceedingly contentious constitutional questions—in *Citizens United v Federal Election Commission*¹⁵ or *Roe v Wade*,¹⁶ for example—we ordinarily take it for granted that the Court's ruling should, and indeed must, be authoritative; it is the function of the courts "to say what the law is."¹⁷ To express the point in terminology introduced by Professor H.L.A. Hart, the rule of recognition in our legal system almost invariably requires both citizens and nonjudicial officials to accept judicial determinations.¹⁸ But that ordinary assumption depends on the premise that the court resolving a question acted within its jurisdiction.¹⁹

In the case of a serious claim that a judicial ruling was ultra vires, different questions would present themselves. A judicial ruling that was ultra vires—for example, one determining that the Senate's conviction of an impeached president was constitutionally invalid, if we take *Nixon's* holding as a fixed point—

¹⁵ 558 US 310 (2010).

¹⁶ 410 US 113 (1973).

¹⁷ *Marbury v Madison*, 5 US (1 Cranch) 137, 177 (1803).

¹⁸ See H.L.A. Hart, *The Concept of Law* 94–95, 100–10, 116, 256 (Clarendon 2d ed 1994) (discussing the nature and functions of the rule or rules of recognition).

¹⁹ See William Baude, *The Judgment Power*, 96 Georgetown L J 1807, 1862 (2008) (arguing that the judicial power to bind the president applies only when a court is acting within its jurisdiction).

would, in Professor Charles Black's resonant phrase, have no "title to be[] obeyed."²⁰ And when a serious claim is made that a judicial ruling is *ultra vires*, the question thus necessarily emerges: Who gets to decide, authoritatively, whether the Supreme Court, in ruling that a question is not a political question and in purporting to settle it on the merits, has exceeded the jurisdiction-based limits of its claim to obedience? In my view, no analysis of the judicially defined political question doctrine could be satisfying without exploring its relationship to the ultimate political questions of whether *ultra vires* judicial decisions would deserve to be obeyed and, if not, of who would and should determine whether judicial decisions are *ultra vires*.

Formulating the *ultra vires* conundrum inaugurates, but does not complete, this Article's reconceptualizing agenda. After laying out the *ultra vires* conundrum, this Article goes on to solve a number of more traditional, interrelated puzzles about the political question doctrine that appear in a new light once that conundrum lies exposed.

The first involves whether the political question doctrine is jurisdictional. The modern Supreme Court says recurrently that the political question doctrine expresses Article III's limitation of the judicial power to the resolution of cases and issues fit for judicial decision.²¹ But reflection on the *ultra vires* conundrum and on the details of sometimes-overlooked Supreme Court rulings establishes that the identification of a question as political frequently does not entail that the Court lacks subject matter jurisdiction. Perhaps more typically, identification of a question as political requires judicial acceptance of the ruling of another branch as authoritative, as long as the ruling is not *ultra vires*.

²⁰ Charles L. Black Jr, *Impeachment: A Handbook* 61–62 (Yale 1974).

²¹ See, for example, *Rucho*, 139 S Ct at 2494 (asserting that before deciding a question of constitutional law, a court must ascertain that "the question is presented in a 'case' or 'controversy' that is, in James Madison's words, 'of a Judiciary Nature'"), quoting *DaimlerChrysler Corp v Cuno*, 547 US 332, 342 (2006); *Zivotofsky v Clinton*, 566 US 189, 195 (2012) (asserting that a court "lacks the authority to decide [a] dispute" involving a political question); *DaimlerChrysler Corp*, 547 US at 352 (tracing the political question doctrine to "Article III's 'case' or 'controversy' language"); *Gilligan*, 413 US at 9 (asserting that federal courts "have no jurisdiction" over "nonjusticiable political question[s]") (emphasis omitted), quoting *Morgan v Rhodes*, 456 F2d 608, 619 (6th Cir 1972) (Celebrezze dissenting); *Powell v McCormack*, 395 US 486, 518 (1969) ("[F]ederal courts will not adjudicate political questions."). See also Tara Leigh Grove, *The Lost History of the Political Question Doctrine*, 90 NYU L Rev 1908, 1948–50 (2015) (emphasizing the jurisdictional character of the modern political question doctrine).

Insofar as *Rucho* marks an exception to this norm, it is only a partial exception.

A second traditional puzzle concerns the bases on which courts properly identify political questions. I defend a pluralist approach that subsumes a variety of theories that others have viewed as mutually exclusive. In particular, I explain how prudential reasoning can occur within—rather than as an alternative to—analysis focused on the rights of the parties to a lawsuit and the constitutional powers and obligations of the judicial branch.

A third question follows from the answer to the second: If multiple grounds support invocation of the political question doctrine, why does the Supreme Court apply it so seldom? The answer, I argue, has to do with the nature of modern constitutional law and, in particular, with the wide range of factors that today affect constitutional adjudication on the merits. The political question doctrine has shrunk almost to nothing in the Supreme Court²² because the kinds of considerations that bear on political question determinations are frequently inseparable from the considerations that bear on merits rulings. Seen in the context of a myriad of other judicial decisions—including those in which the Supreme Court established the one-person, one-vote principle—*Rucho* is the exception that proves the rule.

If merits and political question reasoning overlap to such a great extent, a fourth question arises: Why does the Supreme Court preserve a political question doctrine at all? My answer holds that the political question doctrine endures because the Court, understandably and appropriately, wants to maintain a mechanism with which to signal as adamantly as possible that neither other branches, nor litigants, nor the public can look to the judiciary to resolve a question that the Court believes ill-suited for judicial decision. Nevertheless, from the perspective of

²² The doctrine appears to have a greater importance in the lower courts. See J. Peter Mulhern, *In Defense of the Political Question Doctrine*, 137 U Pa L Rev 97, 107 nn 26–27 (1988) (discussing its application to the constitutionality of the wars in Vietnam and Nicaragua); Stephen I. Vladeck, *The New National Security Canon*, 61 Am U L Rev 1295, 1325 (2012) (discussing its application in national security cases); Rachel E. Barkow, *More Supreme than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 Colum L Rev 237, 267 n 158 (2002). A partial explanation for the disparity may be that the lower courts, unlike the Supreme Court, cannot simply deny certiorari as a means of avoiding the need to resolve questions that they think they ought not to resolve. See, for example, *Lexmark International, Inc v Static Control Components, Inc*, 572 US 118, 126 (2014) (affirming “that ‘a federal court’s obligation to hear and decide’ cases within its jurisdiction ‘is virtually unflagging’”) (quotation marks omitted), quoting *Sprint Communications, Inc v Jacobs*, 571 US 69, 77 (2013).

the Court, the signal sent by political question rulings comes at a cost. The justices dislike acknowledging that some of their decisions, were they to make them, would be ultra vires and thus of questionable legal authority.

With the connection of the Supreme Court's administration of the political question doctrine to the ultra vires conundrum thus laid bare, this Article turns to its third major aim: to explore how our system would and ought to respond to the questions arising from claims by one of the political branches that the judiciary has acted ultra vires. In a showdown, would and should the Court's certification that it had properly exercised its jurisdiction necessarily prevail? Whether a court has so drastically overstepped is, I shall argue, the ultimate species of political question—one that officials of other branches and, in the final accounting, the citizens of the United States must decide for themselves.²³

The Article comprises five Parts. Part I elaborates the ultra vires conundrum. With the ultra vires conundrum exposed, Part II maps some varieties of political questions and discusses the diverse senses in which they are jurisdictional. Even in cases presenting political questions, Part II argues, the courts remain available to identify and check ultra vires action by other branches if it should occur. Part III reviews traditional theories of the political question doctrine and argues that none is individually adequate. A pluralist account is needed. With Part III having recognized multiple doctrinal foundations for judicial invocation of the political question doctrine, Part IV raises and answers the question why, as an empirical matter, the Supreme Court applies the doctrine to so few cases. Its response emphasizes the ultra vires conundrum and the Supreme Court's reluctance to issue reminders that some imaginable rulings on the merits of constitutional disputes would overstep the limits of judicial power. Part V discusses appropriate responses to the ultra vires conundrum, including in cases of possible ultra vires action by the judicial branch. It argues that whether judicial action is ultra vires and therefore undeserving of obedience constitutes the ultimate political question and proposes normative guidelines for addressing that question if it should ever arise.

²³ See, for example, *Coleman v Miller*, 307 US 433, 459 (1939) (Black concurring) (arguing that Congress's power over the process of constitutional amendment is "exclusive" and Congress would be "under no duty to accept the pronouncements upon that exclusive power by this Court").

I. THE ULTRA VIRES CONUNDRUM

At the root of the political question doctrine and furnishing the background to most of its applications is an enduring problem of constitutional governance. The ultra vires conundrum unfolds in three layers. At the surface level, when the Supreme Court rules that an issue is a political question, it designates that issue as beyond the jurisdiction of the courts to decide authoritatively.²⁴ In other words, the Court determines that a judicial resolution on the merits—for example, a ruling that the Senate had or had not provided the kind of trial that the Constitution requires in the *Nixon* case or that North Carolina had relied too much on partisan considerations in designing voting districts in *Rucho*—would be ultra vires, or beyond the scope of judicial power under Article III.²⁵

The second layer of the ultra vires conundrum appears with special vividness in *Nixon* and other cases involving “textually demonstrable commitment[s]” of constitutional issues to institutions other than the judiciary.²⁶ It emerges if we now consider the possibility of ultra vires action, not by the courts, but by the non-judicial institution with authority to resolve an issue. Jurisdiction to decide an issue typically and perhaps always includes the authority to commit mistakes.²⁷ It signifies a power that can be exercised either correctly or incorrectly, at least within bounds.²⁸ But there is a limit: recognition of jurisdiction in a nonjudicial branch to interpret the Constitution does not vitiate the possibility of ultra vires action by that other branch in the purported exercise of its jurisdiction.²⁹ Ultra vires action—which blurs along a spectrum with mere error in the exercise of jurisdiction—defines a practically, if not conceptually, necessary limit on the political question doctrine.

²⁴ See note 21 and accompanying text.

²⁵ For another example, see *Steel Co v Citizens for a Better Environment*, 523 US 83, 101–02 (1998) (characterizing judicial action in the absence of subject matter jurisdiction as “ultra vires”).

²⁶ See *Nixon*, 506 US at 228–29.

²⁷ See, for example, *Estep v United States*, 327 US 114, 122–23 (1946).

²⁸ See, for example, *In re Yamashita*, 327 US 1, 8 (1946); *Ng Fung Ho v White*, 259 US 276, 284 (1922).

²⁹ See *Baker v Carr*, 369 US 186, 217 (1962) (stressing that the courts “will not stand impotent before an obvious instance of a manifestly unauthorized exercise of power”); Louis Michael Seidman, *The Secret Life of the Political Question Doctrine*, 37 *John Marshall L Rev* 441, 456 (2004) (“[I]f [another branch’s] interpretive authority is not to be completely unbounded, the Court still must have final authority to decide whether the political branches are acting within an appropriate category.”).

Among cases decided to date, perhaps the clearest example of the Supreme Court's policing of the outer boundaries of another branch's otherwise exclusive authority to interpret the Constitution involves the Guarantee Clause.³⁰ In *Luther v Borden*³¹ and again in *Pacific States Telephone and Telegraph Co v Oregon*,³² the Court affirmed that disputes under the Guarantee Clause pose political questions.³³ Notwithstanding those decisions, *Coyle v Smith*³⁴ invalidated a federal statute that forbade Oklahoma to move its state capital. In *Coyle*, the Court reasoned that even though the Guarantee Clause conferred a broad scope of judicially unreviewable jurisdiction on Congress, Congress overreached the bounds of its authority when it sought to condition a state's admission to the Union on terms that would deprive it of equal status with other states.³⁵

The same logic would apply to disputes under other provisions that the Supreme Court has identified as conferring judicially unreviewable authority on other branches.³⁶ For example,

³⁰ US Const Art IV, § 4 ("The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.").

³¹ 48 US (7 How) 1 (1849).

³² 223 US 118 (1912).

³³ See *Luther*, 48 US (7 How) at 42; *Pacific States*, 223 US at 150.

³⁴ 221 US 559 (1911).

³⁵ *Id* at 567–68 (citations omitted):

The argument that Congress derives from the duty of "guaranteeing to each State in this Union a republican form of government," power to impose restrictions upon a new State which deprives it of equality with other members of the Union, has no merit. It may imply the duty of such new State to provide itself with such state government, and impose upon Congress the duty of seeing that such form is not changed to one anti-republican, but it obviously does not confer power to admit a new State which shall be any less a State than those which compose the Union.

³⁶ Commentators have made the same point about other constitutional provisions that give rise to political questions. For example, the Supreme Court has held that whether a constitutional amendment has been validly ratified is a political question, committed by the Constitution for resolution by Congress. See *Coleman v Miller*, 307 US 433, 455–56 (1939). Accepting the Court's ruling, Professor Laurence Tribe maintains—through the device of a rhetorical question—that *Coleman's* holding could not plausibly extend to plainly ultra vires action:

Could anyone really believe, for example, that a court would feel bound to treat the [E]qual [R]ights [A]mendment (ERA) as part of the Constitution if Congress determined that the thirty-five states that had ratified the amendment as of July 1, 1982, constituted the "three fourths" of fifty required by [A]rticle V?

Laurence H. Tribe, Comment, *A Constitution We Are Amending: In Defense of a Restrained Judicial Role*, 97 Harv L Rev 433, 433 (1983).

imagine that the Senate, following *Nixon*, adopted the position that its power to “try” impeachments included the authority to sentence impeached officials to hard labor or to seize their assets as a punishment for high crimes and misdemeanors—in flat contravention of Article I, § 3, clause 7, which provides that “Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States.”³⁷ It seems intuitive that the Senate would not merely err, but exceed its jurisdiction, if, at the conclusion of an impeachment trial, it purported to impose a punishment beyond removal from office.³⁸

A similar but more limited conclusion emerges from reflection on *Rucho*, the only case so far in which the Supreme Court has characterized a claim of individual constitutional rights as presenting a political question solely due to the absence of judicially manageable standards. Despite the majority’s emphatic determination that whether, and if so when, partisan gerrymanders violate the Constitution is a political question, the unreviewable discretion of state authorities is bounded by judicially manageable standards that forbid gerrymanders that violate one-person, one-vote principles.³⁹ To put the point in more conceptual terms, although cases finding a lack of judicially manageable standards acknowledge an absence of enforceable limits on legislative discretion along one dimension, other judicially enforceable limits on legislative power may remain.

In sum, a ruling by the Supreme Court that exercises of authority by another branch under a particular constitutional provision give rise to political questions does not establish that courts could never entertain challenges to the other branch’s assertions of purported authority. Rather, the Court’s denomination of a question as political typically establishes only that the judicial branch has no role in reviewing the action of another branch either within bounded limits or along a dimension where judicially enforceable limits are singularly lacking.

Recognition of the need for judicial policing of the bounds of other branches’ jurisdiction to resolve political questions exposes the third and most fundamental layer of the ultra vires problem. The irresolvable conundrum of the political question doctrine

³⁷ US Const Art I, § 3, cl 7.

³⁸ See note 29.

³⁹ *Reynolds v Sims*, 377 US 533, 557–58 (1964).

arises because the Supreme Court, in labeling a question as a political question, acknowledges and symbolizes limits on *its* jurisdiction by affirming that for it to attempt to resolve a particular question on the merits would be ultra vires.⁴⁰ Yet the Court—which is a fallible institution—sometimes must risk engaging in ultra vires action in order to stop ultra vires action by other branches.

As I explain more fully below, the possibility of ultra vires judicial action is real. So is the question of how other institutions should respond to what they believe to be ultra vires judicial action—an issue that I take up in Part V. For now, it is enough to draw two provisional conclusions about the implications of the ultra vires problem for traditional understandings of the political question doctrine. First, political question rulings are less absolute and categorical than is often imagined. Although eschewing jurisdiction to correct mere errors by other branches in political question cases, courts typically retain jurisdiction to police the outer boundaries of other institutions' authority if other institutions should stray ultra vires. Second, recognition that the reach and limits of the Supreme Court's jurisdiction interact with other branches' jurisdiction, and that other institutions are capable of ultra vires action in cases that the courts have characterized as presenting political questions, imbues the political question doctrine with a myriad of complexities that I explore in subsequent parts.

II. THE POLITICAL QUESTION DOCTRINE: CONCEPTUAL FOUNDATIONS

Among the mysteries surrounding the political question doctrine is whether it is jurisdictional and, if so, what the term “jurisdictional” imports. The Supreme Court recurrently describes the political question doctrine as jurisdictional.⁴¹ In doing so, moreover, it appears to contemplate that the existence of a political question implies an absence of subject matter jurisdiction that requires the dismissal of a suit or claim as immediately and categorically as would a determination that the plaintiff lacks

⁴⁰ See *Steel Co.*, 523 US at 101–02 (concluding that the purported exercise of judicial power beyond the bounds of Article III “is, by very definition, for a court to act ultra vires”).

⁴¹ See note 21 and accompanying text.

standing or that a dispute is moot.⁴² By contrast, a few commentators have insisted that the political question doctrine is not jurisdictional at all.⁴³

Viewed in light of the ultra vires conundrum, the question whether the political question doctrine is jurisdictional assumes a new intricacy. The ultra vires conundrum, which arises from competing claims of jurisdiction to resolve issues authoritatively, highlights the possibility that not every identification of a question as political necessarily signals an absence of judicial subject matter jurisdiction. Sometimes identification of a political question marks a limit on subject matter jurisdiction over a lawsuit and requires dismissal without further action or inquiry. Other times, however, a court, recognizing that an issue lies within the jurisdiction of another branch to decide, might accept the other branch's decision as a basis for either granting or denying relief on the merits. A still-valuable reminder of the multifariousness of the political question doctrine comes from its canonical formulation in *Baker v Carr*:⁴⁴

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

⁴² See, for example, *Massachusetts v EPA*, 549 US 497, 516 (2007) (affirming “familiar learning that no justiciable ‘controversy’ exists when parties seek adjudication of a political question”).

⁴³ See John Harrison, *The Political Question Doctrines*, 67 Am U L Rev 457, 460, 481 (2017) (arguing that the political question doctrine is not jurisdictional and that it has always consisted of two strains: a set of scenarios in which another branch's application of law to fact is final and a rule against “[r]emedies that would direct political discretion”). See also Henkin, 85 Yale L J at 600–01 (cited in note 1) (arguing that many cases labeled as finding political questions instead uphold governmental action on the merits or deny equitable remedies).

⁴⁴ 369 US 186 (1962).

Unless one of these formulations is inextricable from the case at bar, there should be no dismissal for non-justiciability on the ground of a political question's presence.⁴⁵

More recent cases—including *Nixon*, *Zivotofsky v Clinton*,⁴⁶ and *Rucho*—seem to focus almost exclusively on just two of the *Baker* criteria: textually demonstrable commitments to other branches and a lack of judicially manageable standards.⁴⁷ But no subsequent case purports to revise *Baker* in any respect.

In correcting misconceptions that have grown up around the Supreme Court's insistence that political question determinations are jurisdictional, this Part emphasizes two related points. First, there are diverse kinds of political questions, of which I single out three: political questions arising from other branches' decisions not involving constitutional interpretation, constitutional questions committed to nonjudicial branches, and constitutional questions for which courts cannot identify judicially manageable standards. Second, the jurisdictional label has different implications in different kinds of cases.

A. Political Questions Arising from Other Branches' Decisions Not Involving Constitutional Interpretation

In the modern Supreme Court's preoccupation with political questions that both involve constitutional interpretation and require the dismissal of claims to relief as beyond the jurisdiction of courts to entertain, the justices appear to have lost sight of a more old-fashioned category. Political questions in the old-fashioned sense typically arise as courts resolve disputed, subconstitutional claims to relief on the merits and accord finality to the determinations of another branch.⁴⁸ An example comes from *Williams v Suffolk Insurance Co.*⁴⁹ Liability under an insurance contract arguably depended on whether the Falkland Islands came within the sovereign jurisdiction of Argentina.⁵⁰ In pronouncing that the status of the Falkland Islands was a political question, the Court signified only that it must accept the executive's negative decision

⁴⁵ Id at 217.

⁴⁶ 566 US 189 (2012).

⁴⁷ See *Nixon*, 506 US at 228; *Zivotofsky*, 566 US at 195; *Rucho*, 139 S Ct at 2494.

⁴⁸ See Harrison, 67 Am U L Rev at 460 (cited in note 43).

⁴⁹ 38 US (13 Pet) 415 (1839).

⁵⁰ Id at 417.

as conclusive.⁵¹ The Court lacked jurisdiction, in the sense of authority, to decide for itself a question on which the political branches had already spoken. Nevertheless, the Court retained subject matter jurisdiction over the plaintiff's claim to relief.⁵²

*Kennett v Chambers*⁵³ furnishes another example of a political question ruling that did not involve a constitutional issue and did not signify an absence of subject matter jurisdiction. The dispute again involved a contract, the enforceability of which depended on whether Texas was at relevant times an independent state or a rebellious Mexican province.⁵⁴ The Supreme Court ruled that Texas's status was a political question and that until the executive branch recognized Texas as an independent state, "the judicial tribunals of the country were bound to consider" that it remained part of Mexico, a country with which the United States had diplomatic relations.⁵⁵ Based on that determination, the Court found that the contract was void and unenforceable but not that the dispute was beyond the jurisdiction of the Court to resolve.⁵⁶

If a jurisdictional bar applies in the category of cases presenting subconstitutional issues that nonjudicial departments are empowered to decide authoritatively, it involves jurisdiction to make independent determinations of particular issues, not jurisdiction over the parties or the subject matter of a dispute, the absence of which would preclude any judicial decision on the merits.⁵⁷

B. Constitutional Questions Committed to Other Branches

Most modern political question disputes have turned on whether the Constitution entrusts the resolution of constitutional questions to an institution other than the judiciary, typically through a textually demonstrable commitment of decision-making authority. *Nixon* exemplifies this possibility.⁵⁸ No one disputed

⁵¹ See id at 420.

⁵² Id at 422.

⁵³ 55 US (14 How) 38 (1852).

⁵⁴ Id at 41.

⁵⁵ Id at 50–51.

⁵⁶ Id at 52.

⁵⁷ See Harrison, 67 Am U L Rev at 486 (cited in note 43) (distinguishing subject matter jurisdiction and jurisdiction over the parties from authority to make independent determinations of issues resolved by other institutions).

⁵⁸ See Mark Tushnet, *Law and Prudence in the Law of Justiciability: The Transformation and Disappearance of the Political Question Doctrine*, 80 NC L Rev 1203, 1210 (2002) (explaining the *Nixon* Court's conclusion that "the word 'Try' in the Impeachment Trial Clause does not provide an identifiable textual limit on the authority which is committed to the Senate") (citation omitted).

that the Senate could not validly convict Chief Judge Walter Nixon and remove him from office without “try[ing]” him.⁵⁹ But in response to a complaint that the Senate had failed to conduct the type of trial that the Constitution requires, the Supreme Court determined that Article I, § 3, clause 6 represented a “textually demonstrable commitment” of authority to the Senate to determine the scope of the Senate’s obligations.⁶⁰ According to the Court, the Senate had implicitly determined that its procedures met the constitutional requirement, and its determination was dispositive, even if possibly erroneous.⁶¹

Although *Nixon* is widely read as holding that the Supreme Court lacked subject matter jurisdiction,⁶² one could quarrel with this characterization, as Professor John Harrison notably has.⁶³ Harrison begins with a point that seems indisputably correct. Characterization of a constitutional question as a political question based on its commitment to a branch other than the judiciary does not necessarily preclude judicial jurisdiction over cases, or claims within cases, that include political questions—even when resolving the political questions requires constitutional interpretation.⁶⁴

Luther v Borden illustrates the point. *Luther* was a trespass action in which a central issue involved whether the longstanding

⁵⁹ See *Nixon*, 506 US at 229–30.

⁶⁰ Id at 228–29.

⁶¹ See Seidman, 37 John Marshall L Rev at 453 (cited in note 29):

[T]he political question doctrine does work only when, but for the doctrine, the losing party in a law suit would have been victorious. Thus, a judge relying on the political question doctrine must start by asserting that a right has been violated. But it is precisely in the cases where the political question doctrine makes a difference that the judge must also deprive the right of efficacy. Put differently, giving the political question doctrine work to do always means frustrating the work that rights would otherwise do.

⁶² See, for example, Rebecca L. Brown, *When Political Questions Affect Individual Rights: The Other Nixon v United States*, 1993 S Ct Rev 125, 128 (reading *Nixon* as holding that “the question whether the Senate breached its duty to ‘try’ Nixon is a nonjusticiable political question” and that “the Court will not consider any case presenting an issue about whether the procedures used during an impeachment trial comported with any standard of adequacy associated with notions of what constitutes a ‘trial’”); Michael J. Gerhardt, *Rediscovering Nonjusticiability: Judicial Review of Impeachments After Nixon*, 44 Duke L J 231, 244 (1994) (observing that “the determination of a political question requires a court to make the kind of decision it must routinely make in adjudicating preliminary issues about the ripeness or mootness of a lawsuit, personal jurisdiction, and standing”).

⁶³ Harrison, 67 Am U L Rev at 481, 504 (cited in note 43) (interpreting *Nixon* as according “finality” to a determination by the Senate, not finding an absence of subject matter jurisdiction).

⁶⁴ See id at 460–68.

government of Rhode Island was a constitutionally lawful one under the Guarantee Clause,⁶⁵ which provides that “[t]he United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.”⁶⁶ The Supreme Court found that question to be political in character, and committed to Congress by the Guarantee Clause, with Congress in turn having authorized the president by statute to call out the militia as might be necessary to suppress insurrection.⁶⁷ Because the Court believed that the political branches had implicitly resolved the disputed question against the plaintiff, it affirmed an order of dismissal, but it did so on the merits.⁶⁸ In ordering dismissal on the merits, the Court accepted, and viewed itself as bound by, the decision of the political branches concerning the lawful status of the Rhode Island government under the Guarantee Clause.⁶⁹ If the political branches had reached a different decision, the case would still have turned on a political question, but Luther’s trespass action against a defendant who pleaded a defense of state authorization for his actions might have succeeded.

The idea of the Supreme Court being bound by other branches’ constitutional interpretations—under the Impeachment Trial Clause or the Guarantee Clause, for example—strikes some commentators as anomalous.⁷⁰ But those critics of the political question doctrine purport to find anomaly or mystery where none exists, provided that one keeps the ultra vires limitation on judicial reliance on other branches’ determinations in mind. Under a variety of long-established doctrines, courts, including the Supreme Court, can sometimes be bound by the rulings of other institutions, including on constitutional matters, as long as the other institutions act within the scope of their jurisdiction. One

⁶⁵ *Luther*, 48 US (7 How) at 34–35, 42.

⁶⁶ US Const Art IV, § 4.

⁶⁷ See *Luther*, 48 US (7 How) at 42–44.

⁶⁸ *Id.* at 46–47.

⁶⁹ *Id.*

⁷⁰ See, for example, Redish, 79 Nw U L Rev at 1059–60 (cited in note 1) (“Once we make the initial assumption that judicial review plays a legitimate role in a constitutional democracy, we must abandon the political question doctrine, in all of its manifestations.”); Brown, 1993 S Ct Rev at 131 (cited in note 62) (“The assumption that provides the necessary logical premise to each of the steps in the Court’s [political question] analysis is antithetical to the system of separated powers and checks and balances embodied in the Constitution.”).

example comes from the doctrines of claim and issue preclusion, under which courts sometimes view themselves as bound by the legal and even the constitutional determinations of other tribunals or institutions, provided that those institutions acted within the bounds of their jurisdiction and afforded a fair opportunity for the litigation of disputed claims or issues.⁷¹

Sometimes, moreover, the law requires courts to treat nonjudicial rulings as conclusive. An example emerges from the traditions of habeas corpus, pursuant to which a court would inquire only into whether a detaining authority had jurisdiction to effect a detention.⁷² Within the traditional framework, whether a soldier was lawfully held or incarcerated in wartime lay within the jurisdiction of military authorities to determine, even though military authorities could obviously err. A court would issue the writ to inquire into the legality of a detention, but it would constitute an adequate return if the respondent reported that the detention had occurred pursuant to the order of an official with lawful authority to impose wartime restraints or to try and punish alleged violations of the laws of war.⁷³ If satisfied that detaining authorities had acted within the scope of their jurisdiction, courts would not inquire further into whether the respondents had correctly resolved the questions of law or fact on which their decisions rested.⁷⁴ Nevertheless, the judicial denial of the writ would represent a decision on the merits, not a dismissal of the petition for want of jurisdiction.

⁷¹ See, for example, *Allen v McCurry*, 449 US 90, 101 (1980) (finding no sign that when Congress enacted 42 USC § 1983, it “intended to allow relitigation of federal issues decided after a full and fair hearing in a state court simply because the state court’s decision may have been erroneous”); *Migra v Warren City School District Board of Education*, 465 US 75, 83–84 (1984) (extending *Allen* to claim preclusion).

⁷² See, for example, *Ex parte Reed*, 100 US 13, 23 (1879) (“Having had such jurisdiction, [the tribunal’s] proceedings cannot be collaterally impeached for any mere error or irregularity, if there were such, committed within the sphere of its authority.”); *Dynes v Hoover*, 61 US (20 How) 65, 74 (1857) (“As the [military] court had jurisdiction, no errors committed in its exercise can be reviewed or corrected by this court.”). See also Richard H. Fallon Jr, John Manning, Daniel Meltzer, and David Shapiro, *Hart and Wechsler’s The Federal Courts and the Federal System* 1238 (Foundation 7th ed 2015) (“[P]recedents often state that habeas review is limited to questions of jurisdiction.”).

⁷³ See *Ludecke v Watkins*, 335 US 160, 173 (1948) (concluding “that full responsibility for the just exercise of [the] great power” to detain and remove enemy aliens “may validly be left where the Congress has constitutionally placed it—on the President of the United States”); *Moyer v Peabody*, 212 US 78, 85 (1909) (noting that “[p]ublic danger warrants the substitution of executive process for judicial process” in review of executive detention during a period of insurrection).

⁷⁴ See *Johnson v Eisentrager*, 339 US 763, 775 (1950) (stating that “[o]nce these jurisdictional elements have been determined, courts will not inquire into any other issue

Furthermore, and perhaps more to the point for current purposes, a return to the writ asserting that a custodian had lawful jurisdiction to detain a prisoner would not be utterly conclusive. A court would always have jurisdiction to determine, at the least, whether an assertion of jurisdiction by a particular official under particular circumstances was lawful.⁷⁵ For example, if executive jurisdiction to detain a civilian without trial depended on whether the civilian was a citizen of a country at war with the United States or whether the privilege of the writ of habeas corpus had been validly suspended, courts would ascertain whether those predicates were satisfied. And the assertion of judicial jurisdiction, in turn, created the possibility of competing claims of ultra vires action by the executive and judicial branches. That possibility was famously realized in *Ex parte Merryman*,⁷⁶ which presented a question about the validity of a purported suspension of the writ of habeas corpus. I discuss *Merryman* extensively below.⁷⁷

C. Constitutional Questions for Which Courts Cannot Identify Judicially Manageable Standards

The Supreme Court denominates a further set of questions as political based on an absence of judicially manageable standards for resolving them. Questions involving an absence of judicially manageable standards lie beyond the jurisdiction of the federal courts in a different way and for different reasons from those that apply in cases involving textually demonstrable commitments to other branches.

As *Rucho* illustrates, this category need not involve a commitment of interpretive responsibility to another branch. In *Rucho*, it is implausible to imagine that the Constitution assigns responsibility to state legislatures to identify and remedy the

as to [an enemy alien's] internment"); *Ex parte Quirin*, 317 US 1, 25 (1942) (rejecting the contention that, in reviewing the trial of enemy combatants before a military commission, a reviewing court can consider issues unrelated to the "basis of the Commission's authority").

⁷⁵ See, for example, *Eisentrager*, 339 US at 775, citing *Ludecke*, 335 US at 160:

The resident enemy alien is constitutionally subject to summary arrest, internment and deportation whenever a "declared war" exists. Courts will entertain his plea for freedom from Executive custody only to ascertain the existence of a state of war and whether he is an alien enemy and so subject to the Alien Enemy Act. Once these jurisdictional elements have been determined, courts will not inquire into any other issue as to his internment.

⁷⁶ 17 F Cases 144 (CC D Md 1861).

⁷⁷ See Part IV.B.

equal protection and First Amendment violations that the plaintiffs alleged. In addition, the Supreme Court expressly rejected a suggestion that “through the Elections Clause, the Framers set aside electoral issues such as the one before us as questions that only Congress can resolve.”⁷⁸ Nevertheless, the Court found an Article III bar to the exercise of judicial jurisdiction to identify constitutional violations and enforce constitutional norms.⁷⁹

In this category of cases, it seems plausible to think of a political question ruling as signifying an absence of judicial subject matter jurisdiction. Upon finding that political gerrymandering claims present political questions, the judicial role terminates, without occasion to enforce the constitutional decisions of a nonjudicial institution and without further worries about how nonjudicial institutions exercise their authority. Even here, however, there are complications in plumbing the outer boundaries of the Supreme Court’s jurisdiction and in identifying the point at which they materialize.

The Supreme Court appears never to have given a full explication of the concept of judicially manageable standards.⁸⁰ But if we seek to reconstruct its content from the Court’s cases—including but not limited to discussions of the political question doctrine—two central points emerge. First, to count as judicially manageable, a standard must give intelligible guidance and yield reasonably consistent, predictable outcomes when applied by different courts to different cases.⁸¹ Second, the term judicially manageable standards is ambiguous: it can refer either to the inputs or to the outputs of constitutional adjudication.⁸²

Many constitutional provisions—if viewed solely in light of text and history—would fail to qualify as judicially manageable standards in the input sense. Taken by themselves, they are too vague.⁸³ Crucially, however, the modern Supreme Court, upon finding that a constitutional provision fails to furnish a judicially

⁷⁸ *Rucho*, 139 S Ct at 2495.

⁷⁹ See *id.* at 2493, 2498–2506.

⁸⁰ For discussion, see Richard H. Fallon Jr., *Judicially Manageable Standards and Constitutional Meaning*, 119 Harv L Rev 1275, 1281–82 (2006).

⁸¹ See *id.* at 1287–90.

⁸² See *id.* at 1282–83 (defining a judicially manageable standard as an input when an existing standard is applied to a constitutional controversy, and as an output “in any case in which a court successfully devises a [new standard] that can thereafter be used to implement a constitutional provision”).

⁸³ See *id.* at 1283 (“Viewed as an input in light of which a court might be asked to resolve constitutional cases, the bare language of the Equal Protection Clause is not a judicially manageable standard in political gerrymandering disputes.”).

manageable standard, does not typically conclude immediately that an issue is nonjusticiable. Instead, when confronted with troublingly underdeterminate inputs, the Court proceeds to a second stage, in which it seeks to devise tests or formulae of the kind that dominate the landscape of modern constitutional law—a three-part test of congressional power under the Commerce Clause,⁸⁴ the “strict judicial scrutiny” formula for gauging the permissibility of infringements on fundamental rights,⁸⁵ a plethora of standards for identifying violations of the free speech guarantee,⁸⁶ and so forth. In other words, when a constitutional provision is not a judicially manageable standard in the input sense, the Court assumes the partly creative, consequence-sensitive task of developing judicially manageable standards in the output sense.⁸⁷

Chief Justice John Roberts’s opinion in *Rucho* illustrates the two-stage process, though in a context in which the second resulted in failure. In appraising the challengers’ complaints under constitutional provisions that included the rights-conferring Equal Protection Clause and the First Amendment, the Chief Justice reviewed the efforts of the plaintiffs and then of the dissenting opinion to devise standards by which to identify constitutionally impermissible partisan gerrymanders.⁸⁸ Tellingly, he did not criticize efforts to fashion judicially manageable standards. Instead, he adjudged that those efforts fell short of success. If the Court were to wade into the political controversies in which adjudication of challenges to gerrymanders would enmesh it, he thought it “vital . . . that the Court act only in accord with especially clear standards”⁸⁹ that he found lacking in the proposals that the plaintiffs and the dissenting justices advanced.

Although much more might be said about the branch of the political question doctrine that involves an absence of judicially manageable standards, I venture only three brisk comments, all

⁸⁴ See, for example, *United States v Morrison*, 529 US 598, 608 (2000) (noting that “modern Commerce Clause jurisprudence has ‘identified three broad categories of activity that Congress may regulate under its commerce power’”), quoting *United States v Lopez*, 514 US 549, 558 (1995).

⁸⁵ On the historical emergence of strict judicial scrutiny, see generally Richard H. Fallon Jr., *Strict Judicial Scrutiny*, 54 UCLA L Rev 1267 (2007).

⁸⁶ See, for example, *Reed v Town of Gilbert*, 135 S Ct 2218, 2226 (2015) (stating the relevant test for content-discriminatory regulations); *Brandenburg v Ohio*, 395 US 444, 447 (1969) (same with respect to incitements to violence); *New York Times Co v Sullivan*, 376 US 254, 279–80 (1964) (same with respect to libel actions brought by public officials).

⁸⁷ See Fallon, 119 Harv L Rev at 1281–97 (cited in note 80).

⁸⁸ *Rucho*, 139 S Ct at 2497–98.

⁸⁹ *Id* at 2498.

related to the ultra vires dilemma and the complex jurisdictional issues that it highlights. First, the determination that the Supreme Court lacks jurisdiction based on an absence of judicially manageable standards can come only at the conclusion of a judicial effort to devise judicially manageable standards in the output sense. If a political question ruling results in a dismissal for want of subject matter jurisdiction, it does not come until the Court involves itself intently in a case not merely to determine what the parties have pleaded or proved, or even what the law establishes or requires, but also to attempt to craft judicially manageable standards. The Court's initial engagement in the search for judicially manageable standards—even if such standards do not perfectly reflect the Constitution's "meaning"—testifies to the importance of the judicial role in checking constitutional overreach by nonjudicial officials.⁹⁰

Second, there is a sense in which the judicial conclusion that judicially manageable standards are lacking represents a judicial failure: despite best efforts, the Supreme Court pronounces that it came up short in its effort to craft standards on which the enforcement of constitutional rights depends. To be sure, the Court views itself as subject to role-based constraints that dictate the embrace of failure under some circumstances.⁹¹ It would be ultra vires for the Court to establish rules of decision that were too far removed from the Constitution's language, history, and ascertainable purposes. But the categorical determination that all challenges to partisan gerrymanders must be dismissed in all cases presents problems of its own. In *Rucho*, Chief Justice Roberts did not attempt to prove an impossibility theorem or otherwise establish that the devising of judicially manageable standards was or would forever be impossible. Rather, although he did not say so expressly, the chief justice appears to have determined that the costs of allowing plaintiffs to keep on proposing new standards for gauging the permissibility of partisan gerrymanders were—pursuant to some undisclosed scale—not worth the benefits. It is not merely smart-alecky to observe that the Court has never articulated judicially manageable second-order standards for determining when proposed first-order standards are judicially manageable.

⁹⁰ See Fallon, 119 Harv L Rev at 1317 (cited in note 80) (emphasizing the existence of "permissible disparities between constitutional meaning and implementing doctrine").

⁹¹ For further discussion, see notes 108, 197 and accompanying text.

Third, to enter into the domain of admittedly opinionated comment, I believe that *Rucho*'s analysis was mistaken for reasons that attention to the ultra vires conundrum helps to highlight. Although contemplating that the pursuit of partisan advantage in the drawing of district lines might in principle go too far and thereby violate constitutional norms, the Supreme Court held in *Rucho* that the judiciary could not identify and thus could not prohibit or remedy even ultra vires action along the dimension of merely excessive partisanship (that did not, for example, involve racial discrimination or an abridgment of one-person, one-vote principles).⁹² Given the absence of reasonably clear second-order standards for marking proposed first-order rules as judicially manageable or not, one might expect the Court to exhibit special hesitation before concluding that the federal judiciary cannot identify even the most egregious violations of constitutional norms by districting authorities. Instead, the Court bent, erroneously, in the opposite direction.

In taking the anomalous step of dismissing a constitutional complaint as presenting a political question solely because it thought the task of identifying individual rights “beyond judicial capabilities,”⁹³ Chief Justice Roberts—as I have noted—insisted that any judicially formulated test for identifying unconstitutional partisan gerrymanders must be “especially clear.”⁹⁴ A standard that would suffice as adequately judicially manageable under other circumstances would not do in *Rucho*, he implied, for reasons involving the need of the judiciary to maintain public trust in its nonpartisan character. Quoting Justice Anthony Kennedy’s opinion in *Vieth*, Chief Justice Roberts wrote that “[w]ith uncertain limits [guiding judicial decision-making about when partisan gerrymandering went too far], intervening courts—even when proceeding with best intentions—would risk assuming political, not legal, responsibility for a process that often produces ill will and distrust.”⁹⁵ Chief Justice Roberts spoke even more explicitly in the oral argument in an earlier case, *Gill v Whitford*,⁹⁶ that the Court ultimately resolved on standing grounds. There, he worried aloud that adjudicating gerrymandering challenges

⁹² *Rucho*, 139 S Ct at 2506–07.

⁹³ *Id* at 2509 (Kagan dissenting).

⁹⁴ *Id* at 2498 (majority).

⁹⁵ *Id*, quoting *Vieth*, 541 US at 307 (Kennedy concurring in the judgment).

⁹⁶ 138 S Ct 1916 (2018).

would entail courts “decid[ing] in every case whether the Democrats win or the Republicans win.”⁹⁷ Given that premise, he conjectured that if the courts became involved, “the intelligent man on the street is going to say [that if the Supreme Court rules for the Democrats] . . . [i]t must be because the Supreme Court preferred the Democrats over the Republicans.”⁹⁸ If so, one could infer, Chief Justice Roberts feared that “the intelligent man on the street” would lose respect for the Court.

I do not question that it can sometimes be appropriate for the Supreme Court to take account of likely public perceptions in appraising whether proposed standards are judicially manageable. But such considerations should matter only insofar as the Court can respond to them without defaulting on its more urgent responsibility to protect and promote—within bounds allowed by law—the moral and political legitimacy of the constitutional system as a whole.⁹⁹ As a property of both political regimes and judicial decisions, moral legitimacy signifies entitlement to respect or obedience.¹⁰⁰ It is an especially important concept under circumstances of political division. None of us can expect political institutions to reach decisions that we think are ideally just in all cases. In light of inevitable shortfall, moral legitimacy—or respectworthiness—becomes the critical concept both in justifying the exercise of political power and in grounding claims of political obligation.

Moral legitimacy can have multiple and diverse sources, including substantive justice and procedural fairness.¹⁰¹ But few would deny that the moral legitimacy of constitutional government in the United States depends vitally on wellsprings in political democracy. In cases of reasonable disagreement, it is presumptively fair for the majority to rule. Even when we disagree, we can all understand why decisions reached through reasonably fair democratic processes have a presumptive claim to our respect and obedience.

In my view, the Supreme Court majority in *Rucho* failed to reckon adequately with the threat that partisan gerrymandering

⁹⁷ Transcript of Oral Argument, *Gill v Whitford*, No 16-1161, *36–38 (US filed Oct 3, 2017).

⁹⁸ *Id.* at *38.

⁹⁹ See Richard H. Fallon Jr., *Law and Legitimacy in the Supreme Court* 41–46 (Belknap 2018).

¹⁰⁰ See *id.* at 23.

¹⁰¹ See *id.* at 29.

poses to the integrity and ultimately the moral legitimacy of American political democracy. As Justice Elena Kagan wrote:

[T]he need for judicial review is at its most urgent in cases like these. “For here, politicians’ incentives conflict with voters’ interests, leaving citizens without any political remedy for their constitutional harms.” Those harms arise because politicians want to stay in office. No one can look to them for effective relief.¹⁰²

With regard to Chief Justice Roberts’s worries about the Court putting its sociological legitimacy at risk if the public perceived it as taking sides between Democrats and Republicans, I further agree with Justice Kagan in sounding more paramount themes of legal and moral legitimacy: “Part of the Court’s role” in our system of government “is to defend [our democracy’s] foundations” in a fair system of elections, even at the risk of some damage to the Court’s institutional stature in the eyes of some.¹⁰³ By forsaking the judicial role in upholding the democratic integrity of our electoral system, the *Rucho* Court erred grievously.

* * *

If one tries to tally the senses in which the various categories of political questions are jurisdictional in light of the ultra vires conundrum, two conclusions emerge. First, although all three of the categories of political questions that I have discussed in this Part are jurisdictional in one sense or another, the label of subject matter jurisdiction seems a bad fit, except possibly in cases involving dismissal solely due to an absence of judicially manageable standards. Otherwise, there is too much of a residual judicial role in implementing decisions made by other branches within the scope of their jurisdiction and in identifying and enforcing limits against ultra vires action by other branches, even in the purported exercise of their jurisdiction to resolve political questions.

Second, because of the ultra vires conundrum, courts deciding political question cases must nevertheless confront questions of jurisdiction in one or another sense of that sometimes chameleon-like term. In particular, the federal courts, centrally including the Supreme Court, inescapably need to gauge the outer limits of

¹⁰² *Rucho*, 139 S Ct at 2523 (Kagan dissenting) (citation omitted), quoting *Gill*, 138 S Ct at 1941 (Kagan concurring).

¹⁰³ *Rucho*, 139 S Ct at 2525 (Kagan dissenting).

both their jurisdiction and that of other branches or institutions as defined by the concept of ultra vires action.

III. BASES FOR DENOMINATING QUESTIONS AS POLITICAL QUESTIONS: A PLURALISTIC ACCOUNT

Justices, judges, and commentators have offered a variety of theories specifying proper grounds for identifying political questions, sometimes with the aim of rejecting bases that others have defended. This Part first examines the three leading theories—which are conventionally labeled as classical, functional, and prudential—of why and when the courts should determine that constitutional disputes pose political questions. All have some resonance in the doctrine, but none can explain everything, especially once the ultra vires conundrum and the various senses in which political question determinations can be jurisdictional come into the picture. Accordingly, without pretending to offer a full positive theory that would explain all decided cases, this Part sketches the outlines of a pluralistic account.

A. The Classical Theory

The classical theory holds that identifications of questions as political questions are continuous with, rather than deviations from, the ordinary processes of constitutional interpretation that more customarily result in rulings on the merits.¹⁰⁴ Professor Herbert Wechsler offered the paradigmatic articulation of this theory:

[A]ll the [political question] doctrine can defensibly imply is that the courts are called upon to judge whether the Constitution has committed to another agency of government the autonomous determination of the issue raised, a finding that itself requires an interpretation.

. . .

[T]he only proper judgment that may lead to an abstention from decision is that the Constitution has committed the determination of the issue to another agency of government than the courts. Difficult as it may be to make that judgment wisely, . . . what is involved is in itself an act of constitutional

¹⁰⁴ See, for example, Laurence H. Tribe, *American Constitutional Law* 96 (Foundation 2d ed 1988); Barkow, 102 Colum L Rev at 336 (cited in note 22). The recurrently cited sources for this view are Herbert Wechsler, *Principles, Politics, and Fundamental Law* 11–14 (Harvard 1961), and Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 Harv L Rev 1, 9 (1959).

interpretation, to be made and judged by standards that should govern the interpretive process generally. [That is totally] different from a broad discretion to abstain or intervene.¹⁰⁵

As thus formulated, the classical view has two defining elements. First, it rejects the notion—especially as associated with prudential theories, to be discussed below—that when identifying questions as political, courts assert an “extra-ordinary” discretion¹⁰⁶ to refuse to adjudicate disputes on grounds not explainable in terms of “neutral principles.”¹⁰⁷ Second, the classical theory assumes that courts in political question cases must adhere to constraints of judicial role that distinguish judicial from political, pragmatic, or expediently consequence-driven reasoning.¹⁰⁸

Framed in these terms, the classical view accepts that political question determinations are jurisdictional in some sense of that term, identifying questions committed to other branches for ultimate resolution. In a possible exemplification, Justice Hugo Black’s concurring opinion in *Coleman v Miller*,¹⁰⁹ which held that the questions whether a state could ratify a constitutional amendment that it had previously rejected and whether a proposed amendment lapses if not ratified within a reasonable time were nonjusticiable political questions, reasoned that Article V grants Congress “exclusive power over the amending process.”¹¹⁰ The classical view is also compatible in principle with the result in *Nixon*, which holds that Article I, § 3, clause 6 gives the Senate sole authority to determine the procedural requisites of an impeachment trial.¹¹¹

By contrast, *Rucho* broke sharply with the classical theory by rejecting jurisdiction over a constitutional question, involving a claim of individual rights, that the Constitution does not assign to any other branch or institution via a textually demonstrable

¹⁰⁵ Wechsler, 73 Harv L Rev at 7–9 (cited in note 104).

¹⁰⁶ See Henkin, 85 Yale L J at 599 (cited in note 1) (contrasting “the ordinary respect of the courts for the substantive decisions of the political branches, and extra-ordinary deference to those branches’ determination that what they have done is constitutional”).

¹⁰⁷ See Wechsler, 73 Harv L Rev at 19 (cited in note 104) (arguing that courts are restricted to deciding cases based on “reasons that in their generality and their neutrality transcend any immediate result that is involved”).

¹⁰⁸ See *id.* at 14–15 (distinguishing the instrumental uses for which principles are displayed in political reasoning from the “neutral” testing and application of principles that should distinguish judicial reasoning).

¹⁰⁹ 307 US 433 (1939).

¹¹⁰ *Id.* at 459 (Black concurring).

¹¹¹ *Nixon*, 506 US at 229, 238.

commitment of authority for constitutional interpretation.¹¹² A proponent of the classical theory might, of course, simply reject *Rucho* as wrongly decided. Even if so, the conjunction of *Rucho* with *Nixon*—which also highlights the central role that judicially manageable standards play in modern political question analysis¹¹³—reveals a subtler but deeper challenge for the classical theory in the current day. That challenge is to give an account of where the boundaries of properly judicial reasoning—as distinguished from political, pragmatic, or prudential reasoning—lie. As I explained in Part II.C, judicial efforts to craft judicially manageable standards require a mix of pragmatic, predictive, and consequence-sensitive reasoning that fits uneasily with classical assumptions about role-based constraints on properly neutral and principled judicial reasoning. As judicial reasoning depends increasingly heavily on what *Baker v Carr* referred to as “policy determination[s],”¹¹⁴ efforts to constrain the judicial role by reference to a classical conception of judicial reasoning seem descriptively inadequate.¹¹⁵

B. Functional Theories

Functional theories emphasize comparative institutional competence and, in particular, call for judicial renunciation of decision-making authority in domains in which the courts would

¹¹² Wechsler himself maintained that

the power of Congress to “make or alter” state regulations of the “Manner of holding Elections for Senators and Representatives,” implying as it does a power to draw district lines or to prescribe the standards to be followed in defining them, excludes the courts from passing on a constitutional objection to state gerrymanders, even if the Constitution can be thought to speak to this kind of inequality.

Wechsler, 73 Harv L Rev at 8–9 (cited in note 104) (citations omitted). But this view has subsequently been rejected by a long line of cases, as *Rucho* recognized:

Appellants suggest that, through the Elections Clause, the Framers set aside electoral issues such as the one before us as questions that only Congress can resolve. We do not agree. In two areas—one-person, one-vote and racial gerrymandering—our cases have held that there is a role for the courts with respect to at least some issues that could arise from a State’s drawing of congressional districts.

Rucho, 139 S Ct at 2495–96 (citation omitted), citing *Wesberry v Sanders*, 376 US 1 (1964); *Shaw v Reno*, 509 US 630 (1993).

¹¹³ See *Nixon*, 506 US at 228–29 (noting that “the lack of judicially manageable standards may strengthen the conclusion that there is a textually demonstrable commitment to a coordinate branch”).

¹¹⁴ *Baker*, 369 US at 217.

¹¹⁵ I say more about this difficulty in Part IV.A.

lack requisite information or skills, especially relative to some other institution.¹¹⁶ In modern cases, the Supreme Court most familiarly gestures toward the functional theory when it maintains that it lacks authority to decide questions for which no judicially manageable standards exist.¹¹⁷ Absent judicially manageable standards, courts could not adjudicate well and, accordingly, should vacate the field to institutions with greater presumptive competence.

Recent cases, including *Nixon* and *Rucho*, have accorded great significance to the presence or absence of judicially manageable standards—sometimes in conjunction with evidence of textual commitments (as in *Nixon*)—and have thus suggested that the political question doctrine reflects functional considerations. Even so, functional competence all by itself cannot account for the existence and contents of the category of nonjusticiable political questions. Of foremost significance, functional competence is seldom all-or-nothing. Accordingly, functional concerns can support more- and less-exacting standards of judicial review on the merits as readily as the classification of some questions as political questions that courts lack jurisdiction to resolve. For example, the Supreme Court typically insists that challenges to regulations of conduct within the military and prisons will receive only very deferential judicial review, due to the courts' limited functional competence, but not no judicial review at all.¹¹⁸

The contrast between judicial deference in military and prison cases and the majority's approach in *Nixon* and *Rucho*—both of which cited an absence of judicially manageable standards as a basis for eschewing judicial review altogether—raises questions on which the ultra vires conundrum sheds at least some

¹¹⁶ See, for example, Fritz W. Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 *Yale L J* 517, 566–97 (1966).

¹¹⁷ See, for example, *Vieth*, 541 US at 281 (Scalia) (plurality) (lamenting “[e]ighteen years of judicial effort with virtually nothing to show for it”); *Nixon*, 506 US at 230 (concluding that language in the Impeachment Trial Clause “lacks sufficient precision to afford any judicially manageable standard of review of the Senate’s actions”). See generally Fallon, 119 *Harv L Rev* 1275 (cited in note 80).

¹¹⁸ See, for example, *Florence v Board of Chosen Freeholders*, 566 US 318, 326 (2012) (“The Court has confirmed the importance of deference to correctional officials and explained that a regulation impinging on an inmate’s constitutional rights must be upheld ‘if it is reasonably related to legitimate penological interests.’”), quoting *Turner v Safley*, 482 US 78, 89 (1987); *Chappell v Wallace*, 462 US 296, 305 (1983) (“[C]ourts are ill-equipped to determine the impact upon [military] discipline that any particular intrusion upon military authority might have.”), quoting Earl Warren, *The Bill of Rights and the Military*, 37 *NYU L Rev* 181, 187 (1962).

light. As Justice Byron White emphasized in *Nixon*, the Senate may have broad discretion in determining what constitutes “try[ing]” impeachments, but the idea that there are no judicially manageable standards by which to conduct any judicial review whatsoever seems preposterous.¹¹⁹ Justice David Souter offered one such standard: whatever else the Senate may do, it must not decide by coin flip.¹²⁰ Justice White similarly propounded the examples of a Senate judgment that an impeached official is simply “a bad guy”¹²¹ and of a practice “of automatically entering a judgment of conviction whenever articles of impeachment” pass the House of Representatives.¹²² Although these proposed markers of bounds on Senate authority may seem caricatured, they show the ease with which the Supreme Court could have affirmed that the Senate’s constitutional determinations in conducting impeachment trials were judicially reviewable, albeit subject to a highly deferential standard under which courts would rarely—if ever—find constitutional violations.

Functional considerations could also have supported alternative approaches in *Rucho*, not just the one that the Court adopted. Following the model of Justices White and Souter in *Nixon*, the *Rucho* Court could have found no constitutional violation on the merits, but without pronouncing categorically that all challenges to partisan gerrymanders are nonjusticiable. Alternatively, the Court could have adapted the approach that Justice Kennedy employed in an opinion concurring in the judgment in *Veith*. Whereas Justice Scalia’s plurality opinion would have pronounced categorically that when gerrymanders go “too far” is a political question,¹²³ Justice Kennedy held, more narrowly, that although the plaintiffs had failed to articulate a judicially manageable standard under which they deserved to prevail, the possibility could not be foreclosed that other challengers in another case could establish a constitutional violation by producing a test fitted to the facts of their case.¹²⁴

Nor should we necessarily accept that functional considerations dictated that the *Rucho* plaintiffs had to lose. Even taking functional considerations into account, the Court could have ruled

¹¹⁹ *Nixon*, 506 US at 246–47 (White concurring in the judgment). See also Tushnet, 80 NC L Rev at 1210–11 (cited in note 58).

¹²⁰ *Nixon*, 506 US at 253–54 (Souter concurring in the judgment).

¹²¹ *Id* at 239 (White concurring in the judgment) (quotation marks omitted).

¹²² *Id* at 246.

¹²³ *Veith*, 541 US at 291 (Scalia) (plurality).

¹²⁴ See *id* at 308–11 (Kennedy concurring in the judgment).

for the challengers in *Rucho* even without propounding a generally applicable judicially manageable standard. Ironically, Chief Justice Roberts supplied a model for analysis along these lines in his opinion for the Court in *National Federation of Independent Businesses v Sebelius*¹²⁵ (*NFIB*). Among the issues in *NFIB* was whether Congress overreached its powers under the Spending Clause when it dictated that states must either expand their Medicaid programs or forfeit all Medicaid funds.¹²⁶ As established by prior cases, a mandate of that kind was constitutionally impermissible if coercive.¹²⁷ In finding the challenged mandate coercive and therefore invalid, Chief Justice Roberts did not purport to advance a judicially manageable standard for identifying coercive exercises of the Spending Clause. “It is enough for today that wherever [the] line may be” between constitutionally permissible inducement and constitutionally forbidden coercion, “this statute is surely beyond it,” he wrote.¹²⁸

Dissenting in *Rucho*, Justice Kagan—whose analytical approach I applauded above—would have followed a variant of that model. Wherever the line lay between constitutionally acceptable and constitutionally excessive partisan gerrymanders, she thought that the Court could have described the facts of the case in full detail and concluded as “a first-cut answer [to the ‘how much is too much’ question]: This much is too much.”¹²⁹

Overall, I do not question that functional concerns are significant to the identification of political questions. Nevertheless, functional criteria seem incapable of explaining when and why the Court should prefer the denomination of questions as political to the application of highly deferential standards of on-the-merits review.

C. Prudential Theories

In contrast with both classical and functional theories, prudential theories insist that the political question doctrine involves ad hoc judgments rooted in expediency, not “principled” determinations of textual commitment or generalizable assessments of

¹²⁵ 567 US 519 (2012).

¹²⁶ *Id.* at 542.

¹²⁷ *Id.* at 575–80 (Roberts) (plurality).

¹²⁸ *Id.* at 585.

¹²⁹ *Rucho*, 139 S Ct at 2521 (Kagan dissenting).

functional competence.¹³⁰ Professor Alexander Bickel provided the archetypal articulation of a prudential approach:

[O]nly by means of a play on words can the broad discretion that the courts have in fact exercised be turned into an act of constitutional interpretation governed by the general standards of the interpretive process. The political-question doctrine simply resists being domesticated in this fashion. There is . . . something different about it, in kind not in degree; something greatly more flexible, something of prudence, not construction and not principle. And it is something that cannot exist within the four corners of *Marbury v. Madison*.

. . .

Such is the foundation, in both intellect and instinct, of the political-question doctrine: the Court's sense of lack of capacity, compounded in unequal parts of (a) the strangeness of the issue and its intractability to principled resolution; (b) the sheer momentousness of it, which tends to unbalance judicial judgment; (c) the anxiety, not so much that the judicial judgment will be ignored, as that perhaps it should but will not be; (d) finally ("in a mature democracy"), the inner vulnerability, the self-doubt of an institution which is electorally irresponsible and has no earth to draw strength from.¹³¹

Although no modern Supreme Court decisions rest on irreducibly prudential reasoning of the kind that Bickel championed, a fair characterization of the themes that run through and help to explain the Court's political question decisions over time could not wholly exclude reference to Bickelian prudentialism. Justices Souter, Breyer, and Sonia Sotomayor have all written either concurring or dissenting opinions in which they echoed concerns of

¹³⁰ See Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* 125–26, 184 (Bobbs-Merrill 1962). See also Maurice Finkelstein, *Judicial Self-Limitation*, 37 Harv L Rev 338, 344–45 (1924) (citations omitted):

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

¹³¹ Bickel, *The Least Dangerous Branch* at 125–26, 184 (cited in note 130).

the kind that Bickel articulated, even if only in modulated form. In *Zivotofsky*, in which the Court rejected political question objections in holding that the federal courts could determine the constitutionality of a statute requiring the State Department to list “Israel” as the place of birth on the passports of Americans born in Jerusalem, Justice Breyer dissented in light of “prudential considerations.”¹³² Among them, he cited the potential foreign policy ramifications of having US passports denominate Jerusalem as part of Israel when Jerusalem’s status is a subject of international contention.¹³³ Justice Sotomayor concurred in the majority’s disposition of *Zivotofsky*, but she wrote separately to emphasize that in “rare case[s]” the Court should find questions nonjusticiable based principally on prudential grounds.¹³⁴ Justice Souter sounded similar themes in his concurring opinion in *Nixon*.¹³⁵ Justice Lewis Powell also affirmed his view that “the political-question doctrine rests in part on prudential concerns” in his concurring statement in *Goldwater v Carter*.¹³⁶

Accordingly, a justice who wanted to characterize a question as political based on largely ad hoc, prudential considerations could find bases within existing law on which to do so. In taking that stand, a justice would need to claim a robust, discretionary power to identify limits on judicial jurisdiction. But prudential theories of the political question distinguish themselves by insisting that such a power exists.

Nevertheless, it is nearly self-evident that the prudential theory cannot account for all of the decided cases any more than the classical and functional theories can. To cite just one example, the Supreme Court’s decision in *Nixon*, which cited a “textually demonstrable commitment” of judicially unreviewable authority to the Senate and involved the removal from office of a largely unknown federal judge, does not fit the mold.¹³⁷ Nothing momentous was at stake. No case-specific exigency impelled the Justices to decide as they did. Although the Court anticipated that a presidential impeachment might raise prudential considerations, its ruling swept more broadly.

¹³² *Zivotofsky*, 566 US at 213 (Breyer dissenting).

¹³³ *Id.* at 216–18.

¹³⁴ *Id.* at 207 (Sotomayor concurring in part and concurring in the judgment).

¹³⁵ *Nixon*, 506 US at 252–54 (Souter concurring in the judgment).

¹³⁶ 444 US 996, 1000 (1979) (Powell concurring in the judgment to grant, vacate, and remand the case with directions to dismiss).

¹³⁷ *Nixon*, 506 US at 229.

D. The Need for a Nonexclusive Theory

From the individual inadequacies of the classical, functional, and prudential theories to explain all aspects of the political doctrine, a relatively straightforward conclusion follows: any descriptively adequate explanation of when, why, and how the Supreme Court applies the political question doctrine would need to include a mix of elements. It is a partly distinct question whether judicial practice that relies on combined aspects of the classical, functional, and prudential theories can be justified as a matter of law and judicial-role morality. I believe that the answer is yes, provided that elements of the classical, functional, and prudential theories are combined properly.

1. Descriptive analysis.

The failure of the Supreme Court to choose decisively among the classical, functional, and prudential conceptions of the political question doctrine should be acknowledged on all sides. The justices continue to rely on themes from all of the theories, despite the claims of their proponents that they are distinct and sometimes irreconcilable alternatives. Insofar as the classical theory can stand independently of functional and prudential theories, it seems to provide the best account of the important doctrinal strand involving textually demonstrable commitment of issues to nonjudicial decision-makers. Yet the classical theory fails to provide a convincing explanation of political question reasoning that turns on the presence or absence of judicially manageable standards, especially once the judicial role in devising judicially manageable standards is brought into view. By contrast, although functional theories can partly—but only partly—explain the aspect of political question analysis that focuses on judicially manageable standards, inquiries into textually demonstrable commitments hinge centrally, even if not exclusively, on other kinds of considerations. And prudential theories, though inadequate if offered as attempts to explain the entirety of the political question doctrine, seem to capture some strains of political question reasoning distinctively well.

In addition, there is no good reason to try to keep the leading theories hermetically sealed off from one another. The Supreme Court's *Nixon* opinion included a compendium of partly overlapping rationales—and, in my view, wisely so. Chief Justice William Rehnquist thus buttressed his conclusion that Article I, § 3,

clause 6 constituted a textually demonstrable commitment of jurisdiction to the Senate by reasoning that there were no judicially manageable standards for determining whether the Senate had properly tried Chief Judge Nixon.¹³⁸ In addition, the Court cited prudential factors that would counsel urgently against judicial review of an impeachment and conviction of the president, should one ever occur:

We agree with the Court of Appeals that opening the door of judicial review to the procedures used by the Senate in trying impeachments would “expose the political life of the country to months, or perhaps years, of chaos.” This lack of finality would manifest itself most dramatically if the President were impeached. The legitimacy of any successor, and hence his effectiveness, would be impaired severely, not merely while the judicial process was running its course, but during any retrial that a differently constituted Senate might conduct if its first judgment of conviction were invalidated.¹³⁹

The Court’s opinion in *Rucho* proceeded along similar lines. Chief Justice Roberts blended functionalist arguments about the absence of judicially manageable standards with reasoning that emphasized the hazards of judicial intervention in a redistricting “process that often produces ill will and distrust.”¹⁴⁰ The latter strand in the Court’s analysis had quasi-prudential aspects, though it was framed in generalized terms, not presented as the kind of ad hoc discretionary judgment that Bickel thought incapable of being “domesticated” within ordinary legal reasoning.¹⁴¹

2. Jurisprudential foundations.

If there is any valid objection to combination of the functional and prudential with the classical theory of the political question doctrine, it would need to hold that judges should not rely on considerations that they sometimes, perhaps frequently, have relied on in the past. The most powerful challenge of this kind emanates from the classical theory’s two defining elements: its insistence that courts must adhere to legal norms that define obligations of the judicial role and that they must eschew exercises of judicial

¹³⁸ See *id.* at 228–29.

¹³⁹ See *id.* at 236 (citation omitted).

¹⁴⁰ *Rucho*, 139 S Ct at 2498, quoting *Vieth*, 541 US at 307 (Kennedy concurring in the judgment).

¹⁴¹ Bickel, *The Least Dangerous Branch* at 125 (cited in note 130).

discretion that lack legal authorization. Each of these tenets might appear in tension with functional theories, prudential approaches, or both.

The best response begins with acceptance of the premise that judges and justices have a role-based obligation to obey the law and thus to accede to legal constraints on their authority, even when identifying political questions. But, having accepted that premise, I would insist that the law, properly understood, does not preclude reliance on functional and prudential considerations in the way that Professor Wechsler and other traditional proponents of the classical model assumed.

We can best understand the political question doctrine by situating the Constitution and the role of the Article III judiciary within a practice-based theory of law. According to practice-based theories, the foundations of law lie in acceptance. For example, the Constitution is law, not because the Framers commanded that it should be, but because relevant constituencies living in the present accept it as such.¹⁴² To refer to the practices of acceptance that constitute a legal system, Professor Hart introduced the term “rule of recognition.”¹⁴³ As others have emphasized, the term “rule” may seem too quasi-algorithmic to capture the complex practices of judges and other officials in identifying and applying the law.¹⁴⁴ But the underlying idea, which conveys a deep insight, holds that for a legal system to exist, judges and other officials must share criteria of legal validity. According to Hart, the rule of recognition in all functioning legal systems exists as a matter of social fact and is fixed by “the law-identifying and law-applying operations of the courts.”¹⁴⁵

As applied to the United States, the Hartian framework explains how the Constitution came to be law in the 1780s, despite

¹⁴² See Fallon, *Law and Legitimacy* at 87–92 (cited in note 99).

¹⁴³ See Hart, *Concept of Law* at 94–95, 100–10, 116, 256 (cited in note 18).

¹⁴⁴ See Frederick Schauer, *Amending the Presuppositions of a Constitution*, in Sanford Levinson, ed., *Responding to Imperfection: The Theory and Practice of Constitutional Amendment* 145, 150 (Princeton 1995) (emphasis in original):

There is no reason to suppose that the ultimate source of law need be anything that looks at all like a rule, whether simple or complex, or even a collection of rules, and it may be less distracting to think of the ultimate source of recognition . . . as a *practice*.

¹⁴⁵ Hart, *Concept of Law* at 256 (cited in note 18). See also *id.* at 116 (asserting that the “rules of recognition specifying the criteria of legal validity and [the legal system’s] rules of change and adjudication must be effectively accepted as common public standards of official behaviour by its officials”).

being discontinuous with prior law. The Hartian framework also elucidates why a variety of extraconstitutional rules of interpretation are also law.¹⁴⁶ For example, the justices seem to adhere to a rule or standard under which judicial precedents sometimes control subsequent constitutional interpretation, especially if they have generated weighty reliance interests, even if they deviate from the Constitution's original meaning.¹⁴⁷ Plainly, however, any effort to conceptualize American constitutional practice in Hartian terms must postulate that the rule of recognition that prevails in the Supreme Court is underdeterminate in important respects. No other plausible explanation can account for recurrent divisions among the justices, some of which reflect moral or policy disagreements. Taking note of this phenomenon, Professor Jules Coleman has maintained that in reasonably disputable cases, the judicial practices that fix the rule of recognition function less as a determinant of uniquely correct decisions than as a conventional "framework for bargaining."¹⁴⁸

The vagueness or underdeterminacy of the rule of recognition provides crucial background for understanding the status of the political question doctrine. Such a doctrine exists. It is defined and limited by norms of legal obligation and judicial role that constrain and sometimes mandate the exercise of judicial power. But the pertinent norms, as rooted in judicial practice and judges' self-understanding of their role-based obligations, are vague in some respects, and they do not categorically rule out judicial reliance on functional and prudential considerations in weighing invocation of the political question doctrine.

In relying on judicial practice to vindicate judicial weighing of functional and prudential considerations in identifying political questions, I acknowledge that Hart did not equate the law with whatever a court—including our Supreme Court—might do or assert in particular cases. To the contrary, he maintained that courts, including highest courts, could violate the rule of recognition.¹⁴⁹ Nevertheless, in maintaining that judges and justices violate the law by taking functional and prudential considerations into account in political question and other cases, proponents of

¹⁴⁶ See Richard H. Fallon Jr., *Constitutional Precedent Viewed Through the Lens of Hartian Positivist Jurisprudence*, 86 NC L Rev 1107, 1122–32 (2008).

¹⁴⁷ See id.

¹⁴⁸ See Jules L. Coleman, *The Practice of Principle: In Defence of a Pragmatist Approach to Legal Theory* 100 (Oxford 2001).

¹⁴⁹ See Hart, *Concept of Law* at 145 (cited in note 18) (insisting that rules supply "standards of correct judicial decision" that courts "are not free to disregard").

the classical theory would need to insist that the judges and justices who do so have misunderstood the implications of some fundamental legal rule that is either validated by practice or directly traceable to a rule that is. So far, proponents of the classical theory have failed to meet that burden. Their position, moreover, is rendered increasingly implausible by widespread acceptance of functional and prudential judicial reasoning not only in political question analysis, but also in reasoning on the merits of disputed cases. I discuss the overlap between judicial reasoning in political question and merits analysis in Part IV.A.

Professor Bickel had a subtly different reason for affirming that the prudential theory of the political question doctrine could not be reconciled with the classical model. He insisted that the political question doctrine was different “in kind not in degree” from other legal doctrines and that it “cannot exist within the four corners of *Marbury v. Madison*.”¹⁵⁰ As reflection on that formulation suggests, Bickel’s claims about the nature of the political question doctrine were at best enigmatic. I am not sure what it would mean for the political question doctrine or any other doctrine to “exist within the four corners of *Marbury*.” More important, Bickel’s stance was paradoxical. Although he implied that the political question doctrine was somehow extralegal, his argument was at bottom a legal argument about the criteria for the appropriate application of a legal doctrine. He did not deny that the political question doctrine exists as a matter of law. Nor did he deny that judges could misapply it as a matter of law—for example, by denominating questions as political whenever judges disliked the parties for whom they would be obliged to rule if they decided a case on the merits.

Modern justices who have echoed Bickel in emphasizing the prudential aspect of the political question doctrine have therefore rightly retained Bickel’s core insight that prudential considerations sometimes properly matter while abandoning his paradoxical insistence that the political question doctrine is extralegal. Where courts have prudential reasons to invoke the political question doctrine, they can and should cite those reasons as grounds for their decision.

Judicial reliance on functional reasons for invoking the political question doctrine should be tested, and frequently accepted, on the same terms. Within the law-defined limits of the judicial

¹⁵⁰ Bickel, *Least Dangerous Branch* at 125–26 (cited in note 130).

role, judges are often (though not always) justified in basing their decisions on functional considerations, including in political question cases.

In short, the political question doctrine can and does combine elements modeled by the classical, functional, and prudential theories. The one strong condition for successful reconciliation of the theories is that functional and prudential reasoning are permissible only insofar as authorized by law. Although strong in one sense, that condition is of course debatable in its application to some cases. As I have emphasized, any practice-based jurisprudential theory must acknowledge that the rule of recognition is vague or underdeterminate in some important respects. That said, it is past time to recognize that the classical, functional, and prudential theories all play legally permissible roles in the shaping and application of the political question doctrine.

IV. EXPLAINING THE NARROWNESS OF THE POLITICAL QUESTION DOCTRINE, BUT ALSO ITS PERSISTENCE

This Part explores two puzzles about the political question doctrine that form mirror images of one another. The first involves the infrequency with which the Supreme Court invokes the political question doctrine. *Rucho* furnishes an important recent data point, which must be accounted for, but it is an anomaly. Given the broad range of considerations that can support the identification of political questions, one might expect the doctrine to have a capacious reach. Yet *Rucho* is only the third majority opinion since the 1930s to find that a case poses a nonreviewable political question. Why?

The first two Sections of this Part answer that question by offering paired explanations, both of which emerge from the ultra vires conundrum. First, the reasons that would support the denomination of an issue as a political question can most often be recast as reasons to deny relief on the merits, and the substantive rejection of a plaintiff's claim will typically have nearly the same practical effects as a dismissal on political question grounds. Second, the Supreme Court most frequently prefers not to signal its jurisdictionally based incapacity to function as the ultimate constitutional expositor in all cases. Among other reasons for the Court not to advertise limits on its jurisdiction to resolve constitutional issues in otherwise justiciable cases, such advertisements would invite attention to the ultra vires conundrum that would materialize if another institution were to insist that the

Court, in a particular case, had acted *ultra vires*. Once the possibility of *ultra vires* judicial action is highlighted, a question might follow that the Court understandably would prefer to see unasked: If the Supreme Court claims to be the ultimate authority on constitutionally *intra* and *ultra vires* action, including its own, who will guard the guardians?

The limited range of the political question doctrine frames the puzzle that the third Section of this Part addresses: Why does the modern Supreme Court retain the political question doctrine at all? On this point, the evidence from *Nixon* and *Rucho* speaks unequivocally. Political question rulings, I argue, send a stronger signal than on-the-merits dismissals of judicial commitment to avoid oversight of another branch of government in future cases. They also further distance the Court from approving decisions by the political branches that the justices decline to countermand. While the Court normally prefers not to disavow all oversight, the political question doctrine permits it to communicate singularly unmistakable messages that responsibility for some ultimate decisions lies elsewhere.

A. The Overlap of Political Question Reasoning and Merits Reasoning

Almost without exception, the considerations that would support a determination that a case poses a political question are equally at home in judicial reasoning about appropriate outcomes on the merits.¹⁵¹ To frame the point in light of the *ultra vires* conundrum, the distinction between on-the-merits review and judicial oversight only to redress *ultra vires* action blurs at the edges, where highly deferential substantive review may have little more practical bite than judicial inquiry into whether another institution has acted *ultra vires*.¹⁵² Under these circumstances, it should

¹⁵¹ See *Zivotofsky*, 566 US at 198, 201 (noting that the respondent's merits arguments "reprise[d]" her arguments that the case presented a political question and concluding that "[r]ecitation of these arguments—which sound in familiar principles of constitutional interpretation—is enough to establish that this case does not 'turn on standards that defy judicial application'"); Tushnet, 80 NC L Rev at 1211 (cited in note 58) (contending that "in a world where the Court is comfortable with interpreting the Constitution and uncomfortable with allowing anyone else to do so, once it is conceded that a provision means something, the 'textually demonstrable commitment' element simply falls away."); Henkin, 85 Yale L J at 605 (cited in note 1) (arguing that the *Baker* factors "seem rather to be elements of the ordinary respect which the courts show to the substantive decisions of the political branches").

¹⁵² The tendency of the distinction to blur at the edges is illustrated in the history of habeas corpus jurisdiction, where "decisional law, especially in recent times, has stretched

occasion no surprise that the kinds of reasons that would lead to deferential review are normally indistinguishable from those that could be adduced to identify a nonjusticiable political question. Nor should it be a shock that the Supreme Court would prefer to define the limits of its capacity to review and revise other institutions' constitutional determinations in nonjurisdictional terms.

The conclusion that the Supreme Court reasons identically in identifying political questions and issuing merits rulings constitutes a defining tenet of the classical theory of the political question doctrine. As I emphasized, however, the classical theory insists that considerations involving the judicial role impose sharp limits on the factors that courts can take into account when deciding constitutional cases on the merits.¹⁵³ By contrast, the modern Court takes it for granted that textual and historical indicia of constitutional meaning sometimes require supplementation by functional, prudential, and other instrumental factors to yield sound and determinate conclusions.¹⁵⁴ As the range of considerations that courts can evaluate broadens, the classical theory loses its bite. Functional and prudential analysis that the classical theory sought to minimize or exclude now feature as prominently in merits reasoning as in identification of political questions.

Nixon exemplifies the blurring of boundaries. As Justice White emphasized in concurrence, Articles I and II abound with delegations of authority to Congress and the president.¹⁵⁵ In nearly all cases challenging the exercise of congressional and presidential authority, courts therefore must engage in line drawing, if not to mark the boundaries of another branch's judicially unreviewable authority, then to determine the substantive limits of constitutionally permissible but judicially reviewable action.¹⁵⁶ In other words, as the ultra vires problem highlights, courts must almost always decide whether Congress or the president overstepped constitutional bounds. The disputed issue in political question cases typically involves the proper characterization of

the notion of jurisdiction, thereby making it difficult at times to distinguish jurisdiction from the legal merits." Fallon, et al, *Hart and Wechsler* at 1238 (cited in note 72).

¹⁵³ See Part III.A.

¹⁵⁴ See, for example, David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U Chi L Rev 190, 208 (1988) ("Under any plausible approach to constitutional interpretation, the courts must be authorized—indeed, required—to consider their own, and the other branches', limitations and propensities when they construct doctrine to govern future cases."); Fallon, 119 Harv L Rev at 1285–97 (cited in note 80).

¹⁵⁵ See *Nixon*, 506 US at 240–42 (White concurring in the judgment).

¹⁵⁶ See Part I.

the bounds that the courts first must identify and then police: Are they the bounds of another branch's judicially unreviewable authority, or are they the criteria by which courts identify constitutional error in a domain in which another branch's decisions are judicially reviewable?

Rucho, in which the Court declined to find that the Constitution vested another branch with ultimate authority to interpret a controverted provision, is admittedly a partial anomaly. It contemplates no judicial review of legislative discretion in drawing district lines along a single, identified dimension, involving no constitutional offense other than partisan advantage seeking, even on the assumption that the legislature goes too far. Yet even *Rucho* highlights the inescapable judicial responsibility for constitutional line drawing along other dimensions, even when challengers object to a gerrymander enacted to aid one political party and harm another. In particular, the majority opinion expressly recognized that the prerogative of legislatures to engage in partisan gerrymandering is bounded by a judicially enforceable prohibition against racial vote dilution and a demand for adherence to the one-person, one-vote requirement.¹⁵⁷

Moreover, whether the Supreme Court characterizes the rules that it enforces as bounding a judicially nonreviewable jurisdiction or as substantive restrictions on judicially reviewable decision-making, the Court must devise the tests that it applies.¹⁵⁸ And when the Court does so, functional and prudential considerations that once were thought to be the hallmarks of political question reasoning frequently exert a large influence.

Commerce Clause doctrine furnishes an example. As much as the Impeachment Trial Clause, the Commerce Clause is a textual assignment of authority to another branch.¹⁵⁹ One could, accordingly, imagine an argument that questions arising from Congress's exercise of powers under the Commerce Clause are judicially unreviewable political questions. Indeed, historical experience might have pointed the Supreme Court toward that approach. In the period leading up to the Court's famous "switch

¹⁵⁷ See *Rucho*, 139 S Ct at 2495–96.

¹⁵⁸ See Fallon, *Law and Legitimacy* at 26–44 (cited in note 99).

¹⁵⁹ See US Const Art I, § 8 ("The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.").

in time [that] save[d] nine” in 1937,¹⁶⁰ the Court had tried to formulate tests that significantly circumscribed Congress’s regulatory powers. But the effort proved unsuccessful by a variety of standards. When the Court reconsidered its standards for gauging congressional power under the Commerce Clause in the late 1930s and early 1940s, it gave Congress so much latitude that Justice Robert Jackson, in private correspondence, expressed doubt that the Court could ever again invalidate a regulatory statute.¹⁶¹

Yet the Court, in rendering its crucial rulings in the 1930s and 1940s, never described questions about Congress’s Commerce Clause authority as political questions. Instead, from then through the current day, it has consistently assumed that challenges to the exercise of Congress’s power are justiciable, even though challenges to the regulation of private actors never succeeded in the Supreme Court in the nearly sixty years prior to the Court’s 1995 decision in *United States v Lopez*.¹⁶²

In the view of some commentators, the Supreme Court’s reasoning in *Garcia v San Antonio Metropolitan Transit Authority*¹⁶³ effectively pushed one set of Commerce Clause questions into the political question category.¹⁶⁴ *Garcia* involved a challenge to congressional regulation of the wages and hours of local government employees.¹⁶⁵ Framed broadly, the question before the Court was

¹⁶⁰ See Joseph Alsop and Turner Catledge, *The 168 Days* 135 (Doubleday, Doran & Co 1938).

¹⁶¹ See Barry Cushman, *Rethinking the New Deal Court: The Structure of a Constitutional Revolution* 221 (Oxford 1998) (“If we were to be brutally frank . . . I suspect what we would say is that in any case where Congress thinks there is an effect on interstate commerce, the Court will accept that judgment.”), quoting Letter from Robert Jackson to Sherman Minton (Dec 21, 1942).

¹⁶² 514 US 549 (1995). *National League of Cities v Usery*, 426 US 833 (1976), found limitations on Congress’s powers under the Commerce Clause to regulate state and local governments in the performance of traditional governmental functions vital to their integrity, but the Court reversed that decision less than a decade later in *Garcia v San Antonio Metropolitan Transit Authority*, 469 US 528 (1985).

¹⁶³ 469 US 528 (1985).

¹⁶⁴ See, for example, Barkow, 102 Colum L Rev at 308–10 (cited in note 22) (arguing that “the Court’s treatment of the Commerce Clause tracks the rise and fall of the political question doctrine” and citing the example of *Garcia*); Redish, 79 Nw U L Rev at 1057–59 (cited in note 1) (suggesting that the Court “employ[ed] some of [the political question doctrine’s] precepts” in *Garcia*), citing Jesse Choper, *Judicial Review and the National Political Process* (Chicago 1980); Mark Tushnet, *Principles, Politics, and Constitutional Law*, 88 Mich L Rev 49, 58–59 (1989) (contending that *Garcia* “can be understood as adopting the view that objections to federal legislation on the ground that it intrudes on constitutionally protected domains of the states raise political questions”).

¹⁶⁵ See *Garcia*, 469 US at 532–35.

whether there are judicially enforceable limits on Congress's power under the Commerce Clause to regulate state and local governments.¹⁶⁶ In response, the Court held that when Congress validly regulates private parties, it may regulate state and local governments on the same basis, federalism-based concerns to the contrary notwithstanding.¹⁶⁷ In so ruling, Justice Harry Blackmun's opinion for the Court spoke in terms familiar in political question analysis. The Constitution, he affirmed, confers authority to decide whether state and local governments should be exempted from federal regulation to Congress, not the courts.¹⁶⁸ The Constitution's assignment of this power should occasion neither surprise nor alarm, Justice Blackmun reasoned. "It is no novelty," he wrote, "to observe that the composition of the Federal Government was designed in large part to protect the States from overreaching by Congress," including through the equal representation of states in the Senate.¹⁶⁹ With regard to judicial power, Justice Blackmun also professed "doubt that courts ultimately can identify principled constitutional limitations on the scope of Congress' Commerce Clause powers over the States merely by relying on *a priori* definitions of state sovereignty."¹⁷⁰ Nevertheless, the Court cast its ruling as one on the merits.

The Court has followed similar trains of reasoning in a myriad of cases in which constitutional allocations of power to Congress and the executive have profound implications for constitutional rights. Even when upholding broad official discretion, traceable to textually demonstrable grants of authority, the Court would rarely think it appropriate to characterize claims of individual rights as presenting political questions, no matter how deferential its standards of review might be. Nevertheless, the Court's reasoning often closely tracks the rhetoric of political question analysis in combining reliance on a constitutional assignment of power to nonjudicial institutions with recognition of

¹⁶⁶ Id at 537.

¹⁶⁷ See id at 547–57.

¹⁶⁸ See id at 552:

[T]he Framers chose to rely on a federal system in which special restraints on federal power over the States inhered principally in the workings of the National Government itself, rather than in discrete limitations on the objects of federal authority. State sovereign interests, then, are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power.

¹⁶⁹ *Garcia*, 469 US at 550–51.

¹⁷⁰ Id at 548.

functional or prudential limits on the courts' capacity to craft judicially manageable standards. Cases involving deference to the military and to prison officials exemplify the pattern.¹⁷¹ As the Court explained in *Chappell v Wallace*,¹⁷² "courts are ill-equipped to determine the impact upon [military] discipline that any particular intrusion upon military authority might have."¹⁷³ Similarly, functional considerations underlie the Court's approach to complaints about the exercise of official discretion in prison cases.¹⁷⁴

Prudential considerations—which are not always sharply distinguishable from reasons involving the courts' lack of functional capacity to make good decisions in categories of cases with potentially momentous consequences—also exert widespread influences on judicial decision-making in cases outside the political question doctrine. It is hornbook law that courts of equity must balance public and private interests before issuing injunctions.¹⁷⁵ Accordingly, as Professor Louis Henkin persuasively argued, a number of the Supreme Court's political question holdings could be recast as decisions about the inappropriateness of requested

¹⁷¹ For critical analysis of relevant doctrine, generally arguing that the Court's decisions are undertheorized, see Eric Berger, *Deference Determinations and Stealth Constitutional Decision Making*, 98 Iowa L Rev 465, 485–92 (2013).

¹⁷² 462 US 296 (1983).

¹⁷³ *Id.* at 305, quoting Earl Warren, *The Bill of Rights and the Military*, 37 NYU L Rev 181, 187 (1962) (quotation marks omitted).

¹⁷⁴ See *Shaw v Murphy*, 532 US 223, 229–30 (2001) (rejecting a claim that inmates have a First Amendment right to give legal advice to other inmates and noting that "courts are particularly 'ill equipped' to deal with [the] problems" of prisons), quoting *Procunier v Martinez*, 416 US 396, 404–05 (1974); *O'Lone v Estate of Shabazz*, 482 US 342, 349–50, 353 (1987) (noting the courts' lack of institutional competence and applying *Turner v Safley*, 482 US 78 (1987), to reject a free exercise challenge to prison regulations); *Turner*, 482 US at 84–85, 89 (establishing a relaxed standard of review in light of courts' relative lack of expertise in prison administration and separation-of-powers concerns). See also Sharon Dolovich, *Forms of Deference in Prison Law*, 24 Fed Sent Rptr 245, 246 (2012) (observing that "it is a rare case decided under *Turner* in which the plaintiff ultimately prevails").

¹⁷⁵ Under the traditional balance-of-equities test, a federal court will not issue a permanent injunction unless the plaintiff can demonstrate:

- (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury;
- (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.

eBay Inc v MercExchange, LLC, 547 US 388, 391 (2006).

equitable relief in light of the balance of public and private interests.¹⁷⁶ Among his examples he listed *Gilligan v Morgan*, in which the plaintiffs requested an injunction that would have entailed ongoing judicial oversight of the organization, training, and deployment of the Ohio National Guard.¹⁷⁷ However one judges the result in *Gilligan*, it is indisputable that courts weigh prudential considerations in determining whether and how to frame equitable decrees.

As recently as in *Baker v Carr*, the Supreme Court credited the idea that questions were political if they required policy-based discretionary judgments.¹⁷⁸ Today, discretionary, policy-based reasoning has become commonplace in constitutional cases decided by the Supreme Court.

B. The Typical Dispreference for Invoking the Political Question Doctrine

With “ordinary” judicial reasoning involving considerations that once might have seemed more political than judicial, Supreme Court decisions to invoke the political question doctrine mostly reflect legally unforced choices. Moreover, as the rarity of political question holdings illustrates, the Court almost invariably prefers to cast its decisions as resolving disputes on the merits. To explain the Court’s characteristic preference for framing its decisions in merits rather than political question terms, I would offer three conjectures, all related to the signal that a decision to invoke the political question doctrine sends.

First, the Supreme Court hesitates to mark issues as outside its jurisdiction because of a belief among the justices that the Court’s availability to resolve constitutional disputes is crucial to the successful operation of the American constitutional order.¹⁷⁹ Quite simply, the justices do not trust other branches of government to behave responsibly. Professor Pamela Karlan has written of the modern Court’s “disdain” for Congress.¹⁸⁰ Whether or not

¹⁷⁶ Henkin, 85 Yale L J at 617–22 (cited in note 1).

¹⁷⁷ See id at 619–22.

¹⁷⁸ *Baker*, 369 US at 217 (suggesting that some cases may be nonjusticiable because of “the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion”).

¹⁷⁹ See, for example, Barkow, 102 Colum L Rev at 317 (cited in note 22) (suggesting that “[t]he political question doctrine cannot coexist with the current Court’s view of the judiciary’s place in the constitutional structure”).

¹⁸⁰ Pamela S. Karlan, *The Supreme Court, 2011 Term—Foreword: Democracy and Disdain*, 126 Harv L Rev 1, 41–55 (2012).

that term is apt, insofar as the Founding generation looked to Congress to check constitutional overreach by the executive branch, the rise of political parties has upset their plan. Congress rarely asserts its prerogatives to thwart action in excess of jurisdiction by a president of the same party.¹⁸¹ Congress's unreliability as a guardian of constitutional norms may encourage the Court to regard judicial review as indispensable.

Even apart from negative attitudes toward other branches, the Court has a lofty assessment of its own competence and of the trust the American people have in it.¹⁸² In *Cooper v Aaron*,¹⁸³ the Court declared it to be a "basic principle" of our constitutional order "that the federal judiciary is supreme in the exposition of the law of the Constitution."¹⁸⁴ The Court has also associated judicial finality in constitutional adjudication with the requirements of the rule of law, including in *United States v Nixon*,¹⁸⁵ which held that a court could compel the president to surrender tapes of Oval Office conversations,¹⁸⁶ and *Planned Parenthood v Casey*,¹⁸⁷ which involved abortion rights.¹⁸⁸

In the minds of many, the Supreme Court's exercise of its certiorari jurisdiction to resolve the dispute in *Bush v Gore*¹⁸⁹ epitomized the normally reigning attitude among the justices.¹⁹⁰ Although divided about much else, the justices apparently agreed that the case was meet for judicial decision, despite its obviously political subject matter and despite the availability of other institutions—including Congress, in discharge of its responsibility to count the votes submitted by members of the electoral college in presidential elections—to resolve disputed issues.¹⁹¹

¹⁸¹ See Daryl J. Levinson and Richard H. Pildes, *Separation of Parties, Not Powers*, 119 Harv L Rev 2312, 2324–25 (2006).

¹⁸² See Barkow, 102 Colum L Rev at 301–02 (cited in note 22) ("In the past few decades, [] the Supreme Court has become increasingly blind to its limitations as an institution—and, concomitantly, to the strengths of the political branches—and . . . acknowledges few limits on its power to say what the law is.").

¹⁸³ 358 US 1 (1958).

¹⁸⁴ *Id.* at 18.

¹⁸⁵ 418 US 683 (1974).

¹⁸⁶ See *id.* at 703–14.

¹⁸⁷ 505 US 833 (1992).

¹⁸⁸ See *id.* at 868 (emphasizing the importance of steadfast and principled judicial decision-making to a nation of people who respect and "aspire to live according to the rule of law").

¹⁸⁹ 531 US 98 (2000).

¹⁹⁰ See Barkow, 102 Colum L Rev at 273–95 (cited in note 22); Tushnet, 80 NC L Rev at 1228–29 (cited in note 58).

¹⁹¹ See, for example, Jesse H. Choper, *Why the Supreme Court Should Not Have Decided the Presidential Election of 2000*, 18 Const Commen 335, 336 (2001) (arguing that

Also indicative of the Court's views is its refusal to tolerate any significant space for congressional interpretation of the Constitution in *City of Boerne v Flores*.¹⁹² Section 5 of the Fourteenth Amendment authorizes Congress "to enforce, by appropriate legislation, the provisions of this article."¹⁹³ On a plausible interpretation, Section 5 empowers Congress to prohibit conduct that the Supreme Court has not found to violate the Constitution. During the 1960s, the Court frequently upheld Congress's authority to do so under the enforcement clauses of the Thirteenth and Fifteenth as well as the Fourteenth Amendments.¹⁹⁴ But *City of Boerne* drew an emphatic distinction between Congress's power to enforce and its power to interpret the Civil War Amendments. The Court characterized the latter as one that, since *Marbury v Madison*,¹⁹⁵ has resided exclusively in the judicial branch¹⁹⁶—subject, presumably, to the narrow exception of the political question doctrine. Believing that judicial exclusivity and finality in defining constitutional rights are part of the warp and woof of American constitutionalism, the Court just as clearly believes that judicial supremacy in constitutional interpretation serves vital interests.

Given the Supreme Court's exalted appraisal of its role under the Constitution, the justices understandably dislike denominating constitutional questions as political questions. By contrast, merits rulings, even when deferential, affirm that judicial jurisdiction and oversight extend to uncharted limits.

A second reason for the justices to dislike the designation of questions as political emerges from the central role that judicially manageable standards play in political question cases. Once the judicial role in devising judicially manageable standards is made explicit, acknowledgment that no judicially manageable standards exist for the resolution of a dispute constitutes a confession

although "the issues addressed by the Justices in *Bush v. Gore* plainly presented two federal questions, . . . the central question in the case should have been resolved through the political rather than the judicial process").

¹⁹² 521 US 507 (1997).

¹⁹³ US Const Amend XIV, § 5.

¹⁹⁴ See generally Christopher W. Schmidt, *Section 5's Forgotten Years: Congressional Power to Enforce the Fourteenth Amendment Before Katzenbach v. Morgan*, 113 Nw U L Rev 47 (2018); *Jones v Alfred H. Mayer Co.*, 392 US 409 (1968); *South Carolina v Katzenbach*, 383 US 301 (1966); *Katzenbach v Morgan*, 384 US 641 (1966).

¹⁹⁵ 5 US (1 Cranch) 137 (1803).

¹⁹⁶ See *City of Boerne*, 521 US at 536.

of judicial failure: although it is a judicial function to devise judicially manageable standards, the Court came up short. For obvious reasons, the Court dislikes confessing failure.

To be sure, a failure by the Court to develop judicially manageable standards is not necessarily blameworthy. As I noted in discussing *Rucho*, the justices can point to role constraints as affording them a defense.¹⁹⁷ Nevertheless, as the recent course of the Supreme Court's decisions under the Commerce Clause has illustrated, new cases with previously unforeseen facts can invite case-by-case articulations of limits on the powers of another branch that a Herculean judiciary could have anticipated earlier. By dismissing a case on substantive rather than political question grounds, the Court holds open the possibility of successful development of judicially manageable limits on other branches' powers in subsequent cases.

Third, the Supreme Court prefers not to acknowledge the institutional vulnerability that a labeling of some exercises of judicial power as ultra vires signals. Although the Court rarely voices anxiety about its status as the ultimate arbiter of constitutional controversies, recognition that some judicial actions would be ultra vires invites questions that the Court would likely prefer to avoid.¹⁹⁸ For now, suffice it to say that the Court's institutional vulnerability is likely to be felt most acutely when a claim of judicial jurisdiction to resolve an issue confronts a competing claim of jurisdiction by another branch, most paradigmatically the executive.

An admittedly contested historical example may illustrate the kind of vulnerability that a charge of ultra vires judicial action in a collision with the executive branch might expose. *Ex parte Merryman* arose in Maryland in the aftermath of the Confederate firing on Fort Sumter and before the scheduled reconvening of Congress to address the secession crisis.¹⁹⁹ With Congress out of session, President Abraham Lincoln claimed authority to suspend access to the writ of habeas corpus, despite the location of the Suspension Clause in Article I, among the powers of Congress.²⁰⁰

¹⁹⁷ See note 91 and accompanying text. See also Lawrence Lessig, *Fidelity and Constraint: How the Supreme Court Has Read the American Constitution 17–18* (Oxford 2019) (arguing that the Supreme Court recognizes sometimes complementary and sometimes competing obligations of “fidelity to meaning” and “fidelity to role”).

¹⁹⁸ I talk more about the possible ramifications of ultra vires judicial action in Part V.

¹⁹⁹ For an account of the surrounding events and an analysis of the *Merryman* decision, see Daniel A. Farber, *Lincoln's Constitution 17*, 157–63, 188–95 (Chicago 2003).

²⁰⁰ See *id.* at 158.

Acting pursuant to ostensible authority delegated by the president,²⁰¹ military officials suspended the writ in Maryland,²⁰² where they detained John Merryman. A petition for the writ was nevertheless presented on Merryman's behalf to Chief Justice Roger Taney, who responded with an in-chambers opinion.²⁰³ In it, the chief justice recounted that he had issued the writ to compel Merryman to be brought before him and that military officials had failed to comply.²⁰⁴ Chief Justice Taney further rejected the claim that either the president or his delegates could suspend access to the writ of habeas corpus without congressional authorization.²⁰⁵ In hopes of achieving compliance with his ruling, Chief Justice Taney announced his intention to "order all the proceedings in this case, with [his] opinion, to be . . . transmit[ed], under seal, to the president of the United States . . . for that high officer, in fulfilment of his constitutional obligation . . . to determine what measures he will take to cause the civil process of the United States to be respected and enforced."²⁰⁶ Nevertheless, President Lincoln took no action to secure the prisoner's release.²⁰⁷

In a message to Congress several months later, President Lincoln defended the administration's response to the chief justice's ruling by explaining his legal conclusion that the Constitution permitted his emergency suspension of access to habeas corpus.²⁰⁸ Attorney General Edward Bates subsequently defended the refusal of federal officials to comply with Chief Justice Taney's order directing Merryman's release, essentially on the ground

²⁰¹ President Lincoln did not initially issue any public proclamation suspending the writ of habeas corpus, but instead authorized its suspension by military commanders in a letter to General Winfield Scott. Letter from President Abraham Lincoln to General Winfield Scott (Apr 27, 1861), in Don E. Fehrenbacher, ed, *Abraham Lincoln: Speeches and Writings 1859–1865: Speeches, Letters, and Miscellaneous Writings, Presidential Messages and Proclamations* 237 (Library of America 1989).

²⁰² There may be a difference between suspending "The *Privilege of the Writ*," US Const Art I, § 9 (emphasis added), and suspending the writ itself. See *Ex parte Milligan*, 71 US (4 Wall) 2, 130–31 (1866) ("The suspension of the privilege of the writ of *habeas corpus* does not suspend the writ itself."). President Lincoln used the latter phrase, which now predominates. See Baude, 96 Georgetown L J at 1853 n 255 (cited in note 19).

²⁰³ See Farber, *Lincoln's Constitution* at 17 (cited in note 199).

²⁰⁴ See *Merryman*, 17 F Cases at 147–48.

²⁰⁵ See *id* at 148–49.

²⁰⁶ *Id* at 153.

²⁰⁷ Merryman was released eventually and charged with, though never tried for, a crime. See Amanda L. Tyler, *Habeas Corpus in Wartime: From the Tower of London to Guantanamo Bay* ch 7 (2017).

²⁰⁸ Abraham Lincoln, *Message to Congress in Special Session* (July 4, 1861), in *Abraham Lincoln: Speeches and Writings 1859–1865* 246, 252–53 (cited in note 201).

that suspension of the writ and detention of prisoners under exigent wartime circumstances lay within the judicially unreviewable discretion of the president.²⁰⁹ By implication, he thus argued that the chief justice's order was ultra vires and, therefore, without legal authority.

President Lincoln's actions in purporting to suspend the writ of habeas corpus and in refusing to accede to the chief justice's decision in *Merryman* have provoked voluminous commentary.²¹⁰ Constitutional scholars agree with near unanimity that executive officials, including the president, must ordinarily obey judicial rulings in particular cases, even if they continue to dispute the legal reasoning on which those rulings rested, either in the court of public opinion or in other cases.²¹¹ But some have defended an exception to that rule, involving judicial decisions that are ultra vires: because ultra vires rulings exceed the jurisdiction of courts to issue, presidents and possibly other high federal officials can permissibly refuse to comply with them.²¹²

Applying the concept of ultra vires action to *Merryman* brings several complexities to the fore. On the surface, the question whether the president could validly suspend the writ of habeas corpus would appear to fall squarely within the jurisdiction of a court to resolve. Courts always have jurisdiction to determine

²⁰⁹ See *Suspension of the Privilege of the Writ of Habeas Corpus*, 10 Op Atty Gen 74, 79–81 (1861) (Edward Bates).

²¹⁰ See, for example, Farber, *Lincoln's Constitution* 159–62 (cited in note 199); Saikrishna Bangalore Prakash, *The Great Suspender's Unconstitutional Suspension of the Great Writ*, 3 Albany Govt L Rev 575, 614 (2010) (arguing that President Lincoln's purported suspension of the writ was unconstitutional because the Suspension Clause exclusively vests the suspension power in Congress); Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 Georgetown L J 217, 278–88 (1994) (defending President Lincoln's actions in connection with *Merryman* as a proper exercise of the President's "coordinate" power to interpret the Constitution). See also generally Jeffrey D. Jackson, *The Power to Suspend Habeas Corpus: An Answer from the Arguments Surrounding Ex Parte Merryman*, 34 U Balt L Rev 11 (2004) (reviewing the contemporaneous legal arguments surrounding President Lincoln's actions in the wake of *Merryman*).

²¹¹ See Thomas W. Merrill, *Judicial Opinions as Binding Law and as Explanations for Judgments*, 15 Cardozo L Rev 43, 46 (1993) ("[T]here is widespread agreement that the executive has a legal duty to enforce valid final judgments rendered by courts, regardless of whether the executive agrees with the legal analysis that forms the basis for the judgment."). The sole prominent exception may be Paulsen, 83 Georgetown L J (cited in note 210). See Gary Lawson and Christopher D. Moore, *The Executive Power of Constitutional Interpretation*, 81 Iowa L Rev 1267, 1313–14 (1996) (noting Professor Michael Stokes Paulsen's outlier status with regard to this point).

²¹² See Baude, 96 Georgetown L J at 1862 (cited in note 19) (arguing that the judicial power to bind the president applies only when a court is acting within its jurisdiction).

their own jurisdiction, including by considering whether purported limits on their jurisdiction are constitutionally valid.²¹³

To conclude that the chief justice had acted ultra vires, Bates therefore had to maintain that the authority to adjudge a judicial ruling ultra vires, in a case implicating what the president insisted were judicially unreviewable presidential powers, resided in the executive.²¹⁴ Bates did not claim that the president's conclusion lay beyond all question. Congress, he noted, might have responded to executive abuse of power (if it believed that such had occurred) by adopting articles of impeachment.²¹⁵ But apart from articles of impeachment or an adverse reaction by voters, Bates seemed to assume that the executive branch could and perhaps must judge for itself whether a suspension of habeas corpus lay within the president's power and whether a judicial decision to issue the writ was ultra vires.

Bates's opinion bears directly on the nature and scope of the political question doctrine. In stating the president's case, he argued that "the whole subject-matter" of how to fight a civil war or suppress a rebellion was "political and not judicial"²¹⁶ and thus, apparently, that whether the judicial branch had acted ultra vires by intruding into that domain must also be a political question. In "deny[ing] that [the president] is under any obligation to obey . . . a writ" that interfered with his "political" function in suppressing a rebellion,²¹⁷ the attorney general's opinion cited *Luther v Borden*,²¹⁸ which framed the political question doctrine in jurisdictional terms and identified some questions as committed to Congress and the president, not the courts, for authoritative resolution.

²¹³ See, for example, *Boumediene v Bush*, 553 US 723, 739 (2008) ("agree[ing]" that an applicable statute "deprives the federal courts of jurisdiction to entertain the habeas corpus actions now before us" but proceeding to address the question of the statute's constitutional validity); *Felker v Turpin*, 518 US 651, 658 (1996) (commencing inquiry into whether a statutory limitation on the Supreme Court's appellate jurisdiction "constitutes an unconstitutional restriction").

²¹⁴ See *Suspension of the Privilege of the Writ of Habeas Corpus*, 10 Op Atty Gen at 77 (cited in note 209).

²¹⁵ See *id.* at 91. When Congress subsequently discussed *Merryman* in the course of debates about whether to authorize the president to suspend the writ, reactions divided along political lines, with Lincoln's opponents condemning and his supporters approving his actions. See Tara Leigh Grove, *The Origins (and Fragility) of Judicial Independence*, 71 Vand L Rev 465, 493 (2018).

²¹⁶ *Suspension of the Privilege of the Writ of Habeas Corpus*, 10 Op Atty Gen at 86 (cited in note 209).

²¹⁷ *Id.* at 90.

²¹⁸ See *id.* at 90–91.

For the moment, I want to defer all of the questions that *Merryman* and President Lincoln's and Bates's responses to it raise. I come to some of them in Part V. For now, my point is narrow. By highlighting jurisdictional limits on the judicial power to interpret the Constitution authoritatively and identifying some constitutional questions as committed to other branches, political question rulings invite a series of questions—linked as aspects of the ultra vires conundrum—that the Supreme Court understandably might think discomfiting, including these: If a court were to issue an ultra vires ruling, would it have legally binding effect? And who gets to judge whether judicial rulings are ultra vires?

C. Reasons for Retaining the Political Question Doctrine: Signaling Effects

With the Supreme Court rarely invoking the political question doctrine, the question next to be confronted is why the Court retains it. Especially in light of the ultra vires problem, why does the Court not cast all of its rulings denying plaintiffs' claims to relief as merits decisions, as resting on standing or related doctrines, or as involving requests for relief that the law of remedies renders unavailable?²¹⁹

The best explanation involves signaling. In at least two ways, a ruling that a question is nonjusticiable may achieve different expressive effects from a decision that rejects a constitutional challenge on the merits.

First, as compared with a decision that a plaintiff's claim fails on the merits, a political question holding characteristically communicates a more emphatic message regarding the judicial commitment to a hands-off stance toward a category of disputes and thus more decisively underlines the futility of further litigation.²²⁰ The justices in *Nixon v United States* showed acute cognizance of this cueing, though they divided in their response. In the face of Justice Souter's insistence that surely the Senate would violate the Constitution if it resolved an impeachment case by flipping a coin, Chief Justice Rehnquist implied that the Court would not involve itself in impeachment disputes even under circumstances

²¹⁹ In response, Henkin argues that the Supreme Court's failure simply to resolve questions on merits, standing, or equitable grounds is confused and misleading. See Henkin, 85 Yale L J at 622 (cited in note 1).

²²⁰ See, for example, Gerhardt, 44 Duke L J at 245–46 (cited in note 62) (“[A] determination of nonjusticiability . . . signals once and for all that there is no judicial remedy available for any official misconduct within a certain area.”).

as extreme as those. Just as adamantly, Justices Souter and White thought that the Court should make plain that it had only ruled on the case before it, not tendered the Senate a blank check.²²¹

Signaling has played an even larger role in the Supreme Court's debates—culminating in *Rucho*—about whether challenges to partisan gerrymandering present political questions. Most revealing on this score was the division in *Vieth v Jubelirer* between Justice Scalia, who wrote the plurality opinion, and Justice Kennedy, who concurred in the result. Justice Scalia believed the Court should hold decisively that federal courthouse doors were closed to challenges to partisan gerrymanders.²²² By contrast, Justice Kennedy's careful insistence that no judicially manageable standards for resolving disputes about gerrymanders had yet emerged sought to signal that challengers could continue to press gerrymandering complaints and theories, even if their prospects for success were poor:

The plurality demonstrates the shortcomings of the [] standards that have been considered to date.

...

[But the fact that] no [adequate] standard has emerged in this case should not be taken to prove that none will emerge in the future. Where important rights are involved, the impossibility of full analytical satisfaction is reason to err on the side of caution.²²³

Chief Justice Roberts's majority opinion in *Rucho* sided with Justice Scalia. The majority determined categorically that challenges to partisan gerrymanders present political questions. Although Chief Justice Roberts noted that the political question doctrine would not apply to state courts adjudicating claims under state constitutions,²²⁴ he sought to communicate as unequivocally as possible that the Article III courts could entertain no future

²²¹ See notes 119–22 and accompanying text.

²²² *Vieth*, 541 US at 305 (Scalia) (plurality) (glossing Justice Kennedy's concurrence as "a reluctant fifth vote against justiciability at district and statewide levels—a vote that may change in some future case but that holds, for the time being, that this matter is nonjusticiable").

²²³ *Id.* at 308–11 (Kennedy concurring in the judgment).

²²⁴ See *Rucho*, 139 S Ct at 2507–08.

complaints about partisan gerrymanders (that do not offend previously articulated, judicially enforceable limits such as the one-person, one-vote norm).²²⁵

Although the justices are probably correct to believe that the expressive effects of dismissals on political question grounds are more potent than those of rulings on the merits in precluding future litigation, neither the Court nor we should exaggerate the difference. On the one hand, a merits ruling can sometimes preclude future litigation very decisively. Consider the Supreme Court's determination that there is no constitutional right to have electoral districts drawn with the aim of promoting racially proportional representation.²²⁶ That ruling leaves little room for argument in subsequent litigation. On the other hand, after a decision that one case presents a political question, litigants in a future case may substantially repackage their claims under another constitutional provision. Justice Felix Frankfurter thought that the vote dilution claim that the Court held justiciable in *Baker* was for all practical purposes identical to the claim that the Court had dismissed as nonjusticiable under the Guarantee Clause in *Colegrove v Green*.²²⁷

Moreover, in light of the ultra vires problem that this Article has emphasized, a ruling that a challenged action by a nonjudicial institution came within that institution's nonreviewable jurisdiction does not necessarily imply that another assertion of authority by the same actor under the same provision could not be ultra vires. To repeat a now-tired example, if the Senate purported to impose a punishment on an impeached official that went beyond removal from office, the courts would presumably remain open to that official's argument that the Senate had acted ultra vires, notwithstanding the decision in *Nixon*.

Nonetheless, the difference between merits review and ultra vires review can be significant, as the law has long recognized in

²²⁵ Id at 2506–08.

²²⁶ See *City of Mobile v Bolden*, 446 US 55, 75–76 (1980) (Stewart) (plurality) (“The Equal Protection Clause . . . does not require proportional representation as an imperative of political organization.”); id at 86 (Stevens concurring in the judgment) (“Neither *Gomillion* nor any other case decided by this Court establishes a constitutional right to proportional representation for racial minorities.”).

²²⁷ 328 US 549 (1946). See *Baker*, 369 US at 297 (Frankfurter dissenting) (“The present case involves all of the elements that have made the Guarantee Clause cases non-justiciable. It is, in effect, a Guarantee Clause claim masquerading under a different label.”).

affirming the narrowness of ultra vires inquiries.²²⁸ *Nixon* is again illustrative. The Court's pointed refusal to mark a decision by coin flip as ultra vires shows how limited ultra vires review can be.

A second signaling effect of the Supreme Court's denomination of a question as political rather than judicial is potentially more robust. As Professor Black argued, the public may perceive judicial decisions that reject constitutional challenges on the merits as conveying messages of approval or "legitimat[ion]."²²⁹ In *Rucho*, the Court emphasized that its ruling carried no such message. "Our conclusion does not condone excessive partisan gerrymandering," Chief Justice Roberts wrote.²³⁰ He added that "[e]xcessive partisanship in districting leads to results that reasonably seem unjust" and that "such gerrymandering is 'incompatible with democratic principles.'"²³¹

Regardless of whether the public accepts the chief justice's protestations, the Court's invocation of the political question doctrine made it possible for him to utter them. Had the Court ruled on the merits, it would have been much more complicated to explain how constitutional provisions that bar "too much"²³² partisan advantage seeking tolerate the extreme gerrymandering in *Rucho*.

* * *

Insofar as the distinctive effect and potential benefit of the political question doctrine reside in its signaling effects, the Supreme Court needs to weigh the costs and benefits of wanted and unwanted signals in determining whether to classify a particular constitutional question as beyond judicial jurisdiction to resolve.

²²⁸ See, for example, Thomas W. Merrill, *Step Zero After City of Arlington*, 83 *Fordham L Rev* 753, 772 & n 126 (2014) (noting that courts routinely "manage to resolve[, for instance,] . . . whether a federal question is presented without confounding this with the resolution of the merits" and criticizing *City of Arlington v Federal Communications Commission*, 569 US 290 (2013), for denying such a distinction in review of agency action).

²²⁹ See Charles L. Black Jr., *The People and the Court: Judicial Review in a Democracy* 80, 86 (Macmillan 1960) (arguing that "judicial review serves an affirmative function vital to the government of limited powers—the function of keeping up a satisfactorily high public feeling that the government has obeyed the law of its own Constitution"). For an equally classic argument that the Court should sometimes invoke justiciability doctrines to avoid the necessity of either invalidating or legitimating governmental actions, see Bickel, *The Least Dangerous Branch* at 69 (cited in note 130).

²³⁰ *Rucho*, 139 S Ct at 2507.

²³¹ *Id* at 2506, quoting *Arizona State Legislature v Arizona Independent Redistricting Commission*, 135 S Ct 2652, 2658 (2015).

²³² *Rucho*, 139 S Ct at 2489.

In some cases, a political question ruling promises to communicate the wanted message that no one should expect the courts to involve themselves in constitutional disputes of a particular kind. Moreover, even if the Court does not displace a constitutional decision by another branch, neither does the Court affirm or legitimate that decision. At the same time, however, a determination that a case presents a political question conveys a reminder—which courts may dislike emitting—that some imaginable judicial rulings would be ultra vires. In any particular case, the effects of the latter message would likely prove trivial. Even so, it is easy to see, once again, why the Supreme Court would not wish to signal the limits of its jurisdiction to interpret the Constitution authoritatively and its potential vulnerability to challenge for ultra vires decisions very often.²³³

V. THE ULTIMATE POLITICAL QUESTION: IS A JUDICIAL RULING ULTRA VIRES?

This Part confronts the challenges that serious allegations of ultra vires action by the judicial branch in failing to apply the political question doctrine would pose. It begins by addressing two questions that the prospect of ultra vires action by the courts make inescapable. First, are ultra vires judicial decisions nevertheless legally and morally binding? Second, if not, then who should decide, and who as a sociological matter would have the power to decide, whether judicial action is ultra vires?

With these questions, a new dimension of the concept of political questions assumes a crystalline importance. One might maintain that the courts should decide, authoritatively in all cases, whether their decisions are intra vires and thus binding on officials of the political branches. But another possibility would be that the Constitution, as properly interpreted, assigns the responsibility for determining whether judicial rulings are ultra vires and thus whether they are legally binding to nonjudicial institutions or officials.

This Part begins by offering a brisk, negative answer to the question whether ultra vires judicial rulings—defined as those in which courts overstep the outer bounds of their jurisdiction in

²³³ See Tushnet, 80 NC L Rev at 1230–31 (cited in note 58) (arguing that the political question doctrine has waned as our legal and political culture has grown more accepting of judicial supremacy and as Supreme Court justices have experienced less self-doubt than in earlier eras).

purporting to resolve a constitutional question—are legally binding. It then argues that courts cannot authoritatively determine the outer boundaries of their own jurisdiction in cases of manifest overreach. Although differing in important respects from judicially identified political questions, questions concerning whether courts have acted *ultra vires* and thus forfeited claims to obedience are political questions in a more ultimate sense, committed for authoritative resolution to nonjudicial decision-makers, as Attorney General Bates suggested in *Merryman*.²³⁴ In resolving such questions, officials of the political branches, and ultimately the American people, should afford strong deference to judicial rulings, but they should not regard themselves as estopped from assessing whether a judicial decision is *intra vires*.

A. The Nonbinding Character of *Ultra Vires* Judicial Rulings

Almost by definition, a purportedly authoritative decision-maker acting in excess of legal authority has no legal entitlement to obedience. The law recognizes as much in various contexts, including that of military justice. Service personnel are obliged to obey orders by their superiors within the scope of their superiors' authority, but not if a superior directs manifestly unlawful behavior such as war crimes.²³⁵ The difficulty lies in tracing the outer bounds of legal authority once it is recognized that jurisdiction encompasses the authority to decide erroneously, sometimes including about the scope of an institution's actual jurisdiction.²³⁶ I return to this point below.

²³⁴ See notes 209–18 and accompanying text.

²³⁵ See *Manual for Courts-Martial, United States* Rule 916(d) (2012) (“It is a defense to any offense that the accused was acting pursuant to orders unless the accused knew the orders to be unlawful or a person of ordinary sense and understanding would have known the orders to be unlawful.”).

²³⁶ Some older Supreme Court decisions hold that officials subject to writs of mandamus issued in excess of jurisdiction need not comply with the orders. See, for example, *Ex parte Ayers*, 123 US 443, 485–87 (1887); *Ex parte Rowland*, 104 US 604, 617–18 (1881). In *Ex parte Fisk*, 113 US 713, 718 (1885), the Court differentiated between the obligation to obey contempt orders made in error and the right to disobey orders made outside the jurisdiction of the court. More recently, *United States v United Mine Workers of America*, 330 US 258 (1947), affirmed the existence of an obligation to obey even constitutionally erroneous judicial orders, but in a case

where, as here, the subject matter of the suit, as well as the parties, was properly before the court; where the elements of federal jurisdiction were clearly shown; and where the authority of the court of first instance to issue an order ancillary to the main suit depended upon a statute, the scope and applicability of which were subject to substantial doubt.

Moral authority does not necessarily track legal authority.²³⁷ Under some circumstances, a person or institution without legal authority could acquire morally legitimate authority from some other source, such as the imperative demands of justice or public safety under emergency conditions.²³⁸ But a court claiming moral authority to resolve a question that is properly within the jurisdiction of another branch would need to carry an extraordinary burden of justification. There would have to be moral grounds not only for the court's overstepping its own jurisdiction, but also for usurping the jurisdiction of one or more other legally legitimate institutions.²³⁹

B. Who Should Decide?

The second question, involving who gets to decide whether a judicial decision is ultra vires, is more difficult. In a variety of contexts, courts have jurisdiction to determine their own jurisdiction—for example, to ascertain whether a plaintiff has standing, whether a complaint states a claim on which relief could be granted, or whether a statute purporting to confer or limit judicial jurisdiction is constitutionally valid.²⁴⁰ Moreover, as I have em-

Id at 294. Some commentators have read *United Mine Workers* as affirming an obligation to obey contempt orders and as permitting collateral attacks on them in subsequent proceedings only in cases involving a frivolous or insubstantial basis for the assertion of subject matter jurisdiction. See John R.B. Palmer, *Collateral Bar and Contempt: Challenging a Court Order After Disobeying It*, 88 Cornell L Rev 215, 233 (2002).

²³⁷ In distinguishing legal from moral legitimacy, see notes 99–103 and accompanying text, I embrace a positivist theory of law, see Fallon, 86 NC L Rev at 1126 & n 69 (cited in note 146), but one that invites distinctions between morally legitimate and morally illegitimate law.

²³⁸ See Joseph Raz, *Legitimate Authority*, in *The Authority of Law: Essays on Law and Morality* 3, 9–10 (Oxford 1979).

²³⁹ As a possible example, a plausible interpretation of the events surrounding *Merzhan* would be that President Lincoln acted with moral even if not with legal authority when he purported to suspend access to the writ of habeas corpus and that executive officials similarly acted morally legitimately in defying the writ of habeas corpus that Chief Justice Taney issued. See also Fallon, *Law and Legitimacy* at 37–38 (cited in note 99) (advancing a similar argument about *Bolling v Sharpe*, 347 US 497 (1954), in which the Supreme Court held that the Due Process Clause of the Fifth Amendment, which was ratified at a time when the Constitution tolerated slavery, barred race discrimination in the District of Columbia schools).

²⁴⁰ See, for example, *Bell v Hood*, 327 US 678, 682 (1946) (noting that “the court must assume jurisdiction to decide whether the allegations state a cause of action on which the court can grant relief”); *Boumediene v Bush*, 553 US 723, 739 (2008) (recognizing jurisdiction to inquire into validity of a statutory restriction on jurisdiction).

phasized is generally the case with jurisdiction, jurisdiction to determine jurisdiction can include a power to decide erroneously but nevertheless authoritatively.²⁴¹

In plumbing the scope of courts' authority to determine their own jurisdiction, analysis can begin with Professor Hart's idea of a rule of recognition. Despite his central focus on the courts, Hart contemplated that the practices of nonjudicial officials might play a part in determining a society's rule or rules of recognition.²⁴² In seeking clarity on this point, we should recognize that different rules of recognition might apply to different categories of officials. For instance, Supreme Court precedent binds lower court judges but not necessarily the justices. For lower court judges and other officials, we thus might say as a first approximation: whatever the Supreme Court says or has said is law, and has not overruled, is law. But that prescription would not hold for the justices, for whom adherence to *stare decisis* is not an absolute requirement. Nor should we assume that the simple formula "Whatever the Supreme Court says is law" holds categorically even for all nonjudicial officers. For example, there could, in principle, be an exception for Supreme Court rulings that were *ultra vires*, such as a hypothetical judicial decision directing the House to vote articles of impeachment against the president and the Senate to vote for conviction.

According to Hart, questions about the content of the rule of recognition typically have factual answers.²⁴³ And if we look to history, officials almost invariably accede to Supreme Court decisions, including rulings on the outer boundaries of judicial power that the officials regard as misguided. From this practice, one might infer that officials feel a legal obligation to accept judicial decisions about the scope of judicial power. If so, a practice-based analysis might point toward the conclusion that the rule of recognition that applies to nonjudicial officials dictates this result.

But we should not let our inferences run ahead of the evidence, as I sought to signal by imagining an order by the Supreme Court directing the House to impeach and the Senate to convict the president on charges of high crimes and misdemeanors. Such an order would run in the teeth of the Constitution and, in the view of any reasonable observer, would lie beyond the outer perimeter of the Court's lawful authority to render. If we ask

²⁴¹ See notes 27–28 and accompanying text.

²⁴² See Hart, *Concept of Law* at 116 (cited in note 18).

²⁴³ See *id.*

whether it would bind legally and morally conscientious members of the House and Senate, I do not believe that historical practice determines a clear answer. In a case exhibiting this degree of egregiousness, the historical practice of official accession to other judicial orders notwithstanding, I believe we could expect officials to look at one another and ask, Must we accept a judicial determination in *this kind of case*, the precise likes of which we have never seen before, in which the judicial overreach seems so clear and so serious?

If this question arose in enough minds, it could not be answered as one of fact. The most relevant fact would be that the officials whose felt obligations and resulting behavior fix the content of the rule of recognition were divided or uncertain in their judgments. Nor, it is important to see, should the question in issue be interpreted as involving whether officials are obliged to obey the law. Rather, in a case in which the rule of recognition picks out no determinate answer, the issue becomes one of constitutional role morality, which could itself be framed as one about how relevant officials could best promote the moral legitimacy of the American constitutional order: Under what circumstances, if any, should a conscientious official feel entitled or possibly obliged to disregard a judicial pronouncement?

Two possible approaches stand out. According to the first, it would better promote the rule of law and other relevant values for conscientious officials and citizens to accept judicial rulings on the outer boundaries of judicial jurisdiction as authoritative, even if fair-minded observers would adjudge the judicial rulings *ultra vires*. The foundation for this view traces to a conception of the rule of law requiring that some institution should have the authority to furnish final, binding decisions of disputed legal questions.²⁴⁴ If one accepts that premise, the most plausible ultimate arbiter within our system is the judicial branch.²⁴⁵ As the Supreme Court wrote in *Marbury v Madison*, “It is emphatically the province and duty of the judicial department to say what the law

²⁴⁴ See, for example, Larry Alexander and Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 Harv L Rev 1359, 1371–75 (1997).

²⁴⁵ See Larry Alexander and Frederick Schauer, *Defending Judicial Supremacy: A Reply*, 17 Const Commen 455, 476 (2000):

One reason for believing that the Supreme Court rather than Congress or the Executive is the best institution to wield the settlement authority, however, is the Court’s relative insulation from political winds, a clear virtue unless one holds the view that constitutional interpretation is and should be no more than the expression of contemporary values and policies.

is.”²⁴⁶ As Justice Jackson explicated in a later case, “We are not final because we are infallible, but we are infallible only because we are final.”²⁴⁷ This position also resonates with the iconic argument of Thomas Hobbes that sovereign authority to say what the law is must reside in a single body for the benefits of the rule of law to be realized.²⁴⁸

An alternative conception of the rule of law, which draws inspiration and support from the republican political tradition, opposes ceding “control over the law to any one individual or body.”²⁴⁹ In a series of thoughtful essays, Professor Gerald Postema has recently championed the republican position over the Hobbesian premise that the rule of law requires the vesting of unchallengeable authority to say what the law is in a single decision-maker.²⁵⁰ In a governmental regime that purports to be one “of laws, not of men [and women],”²⁵¹ the Hobbesian conception furnishes no answer to the worry, Who will guard the guardians? The best response, Postema maintains, requires that those who rule in the name of the law should themselves be ruled by law.²⁵² According to him, “[r]eflexivity—law ruling those who rule with law and in its name—is the rule of law’s sine qua non.”²⁵³ And the requisite reflexivity can exist, Postema argues, only if all officials—judges and justices as much as others—are locked in networks of mutual and reciprocal accountability for their fidelity to the law.

Stated in that abstract form, Postema’s argument does not directly establish the form that an ideal accountability network,

²⁴⁶ *Marbury*, 5 US (1 Cranch) at 177.

²⁴⁷ *Brown v Allen*, 344 US 443, 540 (Jackson concurring in the result).

²⁴⁸ See Thomas Hobbes, *Leviathan* 224 (Cambridge 1996) (Richard Tuck, ed) (originally published 1651) (rejecting the proposition that “he that hath the Sovereign Power, is subject to the Civill Lawes”) (emphasis omitted).

²⁴⁹ Philip Pettit, *On the People’s Terms: A Republican Theory and Model of Democracy* 5 (2012). Pettit associates republican thought with commitments to “the equal freedom of citizens,” the premise that “if [a] republic is to secure the freedom of its citizens then it must satisfy a range of constitutional constraints,” and the “idea [] that if the citizens are to keep the republic to its proper business then they had better have the collective and individual virtue to track and contest public policies.” *Id.*

²⁵⁰ See generally Gerald J. Postema, *Law’s Rule: Reflexivity, Mutual Accountability, and the Rule of Law*, in Xiaobo Zhai and Michael Quinn, eds, *Bentham’s Theory of Law and Public Opinion* 7 (Cambridge 2014). See also Gerald J. Postema, *Fidelity in Law’s Commonwealth*, in Lisa M. Austin and Dennis Klimchuk, eds, *Private Law and the Rule of Law* 17, 18 (Oxford 2014).

²⁵¹ *Marbury*, 5 US (1 Cranch) at 163.

²⁵² See Postema, *Law’s Rule* at 22 (cited in note 250).

²⁵³ *Id.* at 23 (emphasis omitted).

in which judges not only hold others accountable to law but can be held accountable themselves, ought to take. In a minimal conception, it might suffice for judges to be accountable only to each other or to be subject to professional criticism in law reviews. A more robust conception of accountability networks aimed at ensuring fidelity to law by judges as well as other officials has resounded through American history under the rubric of “departmentalism.”²⁵⁴ As formulated by Thomas Jefferson and James Madison, among others, departmentalism holds that the three branches or departments of the federal government are coequal, with each having authority to decide for itself what the Constitution means or requires.²⁵⁵ Ordinarily, departmentalists typically acknowledge, executive officials in particular should defer to judicial rulings in cases to which they are parties.²⁵⁶ But in important cases of perceived judicial overreach, the departmentalist view leaves open the possibility that the president could and sometimes should act on his or her own conscientious view of what the Constitution requires.²⁵⁷

Merryman furnishes a possible example of departmentalism in practice. For the executive branch, President Lincoln determined that he possessed constitutional authority to suspend access to the writ of habeas corpus. Acting with the authority of the judicial branch, Chief Justice Taney disagreed and issued the writ. The executive then invoked the departmentalist prerogative not to accede. In response to the resulting showdown, Congress could have added its voice to the mix: the House of Representatives could have sided with the chief justice by voting articles of impeachment against the president or with the president by voting articles of impeachment against the chief justice. In the event, it did neither. And with or without congressional action, the

²⁵⁴ See, for example, Larry D. Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* 105–10, 135–36 (Oxford 2004).

²⁵⁵ See *id.* at 106.

²⁵⁶ See, for example, Lawson and Moore, 81 *Iowa L Rev* at 1313–14 (cited in note 211) (“With the notable exception of Professor Michael Stokes Paulsen, every modern departmentalist scholar has maintained that the President has an obligation to enforce specific judgments rendered by federal courts, even when the President believes that the judgments rest on erroneous constitutional reasoning.”) (citations omitted).

²⁵⁷ See, for example, Baude, 96 *Georgetown L J* at 1812 (cited in note 19) (arguing that “judgment supremacy has jurisdictional limits”); Paulsen, 83 *Georgetown L J* at 222 (cited in note 210) (defending an independent presidential power of constitutional interpretation as a “consequence of a broader theory” that “liberty is best preserved where governmental power is diffused”).

American public could have claimed a role in the contest over executive and judicial power. By voting in subsequent elections, the electorate could have registered its approval or disapproval of the constitutional positions adopted by electorally accountable actors.²⁵⁸

To many contemporary Americans, the departmentalist approach looks clumsy, chaotic, and frightening.²⁵⁹ When it is taken in undiluted form, I agree.²⁶⁰ Nonetheless, Postema persuades me that an unalloyed embrace of judicial supremacy—in which Supreme Court pronouncements of what the law is or requires are accepted as self-validating by all other officials—is equally untenable. As he puts it, according any official or institution a boundless authority to determine its own jurisdiction leaves no logical space between a claim of lawful authority and an assertion of potentially arbitrary power.²⁶¹

In my view, the most reasonable accommodation of competing rule-of-law ideals—even in cases involving plausible allegations of ultra vires action by the judicial branch—calls for a very strong but not absolutely irrebuttable presumption that final judicial rulings authoritatively settle the obligations of the parties. Since it is the function of adjudication to resolve questions about which conscientious officials and citizens reasonably might differ,²⁶² the limit to deference or accession should come only at the point of unmistakable judicial overreach. Such a standard is neither unworkable nor unprecedented. To cite a comparative law example, the German Constitutional Court claims jurisdiction to

²⁵⁸ Some have described the resulting dispersal of control over constitutional interpretation as a wedding of departmentalism with “popular constitutionalism.” See Kramer, *The People Themselves* at 201 (cited in note 254) (describing a view of departmentalism as “grounded in” popular constitutionalism). As portrayed by then-Professor Larry Kramer, popular constitutionalism holds, roughly, that the constitution is written for laypeople, not lawyers, and that in cases in which the branches of government disagree in their interpretations, ultimate interpretive authority resides in the people themselves, expressing their views through means that include, but are not limited to, voting in elections. See *id.* at 91–92.

²⁵⁹ See generally, for example, Larry Alexander and Lawrence B. Solum, Book Review, *Popular? Constitutionalism?*, 118 Harv L Rev 1594 (2005).

²⁶⁰ Richard H. Fallon Jr., *Judicial Supremacy, Departmentalism, and the Rule of Law in a Populist Age*, 96 Tex L Rev 487, 490–91 (2018).

²⁶¹ Postema, *Law’s Rule* at 26 (cited in note 250) (“[T]o judge that one’s act is warranted [by law] is, necessarily, to claim a *self-transcending* warrant. . . . To deny the office of others to assess one’s assessments, to judge one’s judgments, is simultaneously to claim and deny self-transcending warrant.”) (emphasis in original).

²⁶² See, for example, Alexander and Schauer, 110 Harv L Rev at 1377 (cited in note 244) (“When the Constitution is subject to multiple interpretations, a preconstitutional norm must referee among interpretations to decide what is to be done. One such norm is that the Supreme Court’s interpretation is authoritative and supreme.”).

determine whether decisions by the institutions of the European Union, including the European Court of Justice, are ultra vires—in which case they would not be binding in Germany—but it has “always rejected” claims of ultra vires action.²⁶³ Although I do not mean to overstate the determinacy of applicable rules of recognition, historical practice of American officials in acceding to nearly all judicial rulings exhibits a felt constitutional duty of compliance in all but extreme cases. I have implicitly acknowledged as much by relying on an improbable hypothetical—involving a judicial order to the House to impeach and the Senate to convict a sitting president—to illustrate my conceptual point about judicial accountability for fidelity to law.

Looking to constitutional practice for markers of ultra vires judicial action that would have no entitlement to obedience, one might start with the range of considerations that are conventionally accepted as relevant to constitutional interpretation, including, for example, arguments based directly on the words of the Constitution’s text, arguments regarding various provisions’ historical meanings, arguments based on precedent, and arguments based on the Constitution’s structure.²⁶⁴ If an assertion of judicial power were not plausibly supportable based on any of these kinds of arguments, it would likely be ultra vires, with the likelihood increasing if the courts lacked the functional capacity to make sound decisions in the domain over which they had asserted authority. The potential of a particular judicial order to occasion catastrophically bad consequences might also matter. In a possible example, President Lincoln, in the aftermath of the *Merryman* case, noted that he had suspended the writ in response to an existential threat to the United States.²⁶⁵

I emphasize, however, that it is not part of my project here to resolve the debates that have long surrounded *Merryman*. My present interest lies more in establishing a point of constitutional

²⁶³ Mehrdad Payandeh, *Constitutional Review of EU Law After Honeywell: Contextualizing the Relationship Between the German Constitutional Court and the EU Court of Justice*, 48 Common Mkt L Rev 9, 14–16 (2011).

²⁶⁴ See Richard H. Fallon Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 Harv L Rev 1189, 1195–1209 (1987). For alternative typologies of modalities of constitutional argument, see Jack M. Balkin, *Arguing About the Constitution: The Topics in Constitutional Interpretation*, 33 Const Comm 145, 182–84 (2018); Philip Bobbitt, *Constitutional Fate: Theory of the Constitution* 9–92 (Oxford 1982).

²⁶⁵ Abraham Lincoln, *Message to Congress in Special Session* at 253 (“To state the question more directly, are all the laws, *but one*, to go unexecuted, and the government itself go to pieces, lest that one be violated?”) (emphasis in original).

and moral principle than in determining how that principle should have been applied in the secession crisis. For that purpose, two observations will suffice. First, *Merryman* involved the unprecedented and so far unrepeated circumstances of an impending civil war. Second, Chief Justice Taney issued his ruling in *Merryman* in his capacity as a circuit justice, not on behalf of the Supreme Court as an institution. Under an appropriately deferential standard, I believe that the Supreme Court may never have issued a decision that conscientious officials should have thought themselves entitled to defy.

C. Political Questions and Ultimate Political Questions

If questions about whether particular judicial rulings are ultra vires and not deserving of obedience are constitutional questions to be resolved by institutions other than the judiciary, they constitute the ultimate political questions within our system of government. Ultimate political questions differ from judicially identified political questions. Their status as such does not require judicial designation, nor does it depend on the judicially identified criteria outlined in *Baker v Carr* and subsequent cases.²⁶⁶ What makes ultimate political questions political is that nonjudicial actors must resolve them. What makes them ultimate is that they define the outer boundaries of judicial power to say which questions are political questions and which are judicial questions.

Ultimate political questions also have a further connection to the judicially defined political question doctrine: they directly implicate, and constitute a response to, the ultra vires conundrum. Ultimate political questions arise, if they arise at all, when nonjudicial officials believe that a purported judicial resolution of conflicting claims of judicial and extrajudicial jurisdiction is itself ultra vires. In a showdown between the judicial and nonjudicial branches of government about which is intra and which is ultra vires, it would be important to distinguish normative from empirical questions.

As a normative matter, it would be impossible to say categorically whether the courts or a nonjudicial institution ought to prevail. The law should rule, even when authority to speak in the

²⁶⁶ For a similar point, see Seidman, 37 *John Marshall L Rev* at 480 (cited in note 29) (“[O]ur own choice between judicial and political constitutionalism poses a secret political question.”).

name of the law is contested. And if the law were underdeterminate, then those who had to decide whom to obey should do so based on considerations of moral legitimacy. Either way, analysis would need to be case specific.

If we turn from normative issues to empirical projections, the outcome of a showdown over whether the judiciary had acted *ultra vires* would almost certainly depend on the balance of respect and support for the clashing institutions among relevant constituencies. Seeking to offer simultaneous explanations of the existence of judicial review and the recognized limits on its scope, political scientists maintain that judicial power operates within politically constructed bounds.²⁶⁷ A simplified summary of that thesis posits that the Supreme Court's authority to resolve constitutional issues conclusively exists only insofar as its decisions are ones that Congress, the president, and ultimately the bulk of the American public will accept as lying within the Court's jurisdiction to render. When a roughly defined balance of power between courts and political actors has emerged, the prevailing equilibrium will support rules of recognition under which political officials know that if they disobey judicial judgments, they will face condemnation and sanctions, either by Congress, including through its power over impeachment, or by the American public, voting in elections. Correspondingly, if courts were perceived as going too far, and if Congress and the public backed a president who defied a judicial order, then politics would mark a practical limit on judicial power.²⁶⁸

Once the dynamics of power come into view, neither logic nor normative political theory nor my proposed standards of deference to judicial rulings on the limits of judicial power can exclude the possibility that every judicial ruling might give rise to an ultimate political question. But conditions in which claims of *ultra vires* judicial action became routine or even recurrent would be

²⁶⁷ See, for example, Keith E. Whittington, *Political Foundations of Judicial Supremacy: The Presidency, the Supreme Court, and Constitutional Leadership in US History* 4, 9 (Princeton 2007) (describing “judicial supremacy” as resting on “political foundations”); Mark A. Graber, *Constructing Judicial Review*, 8 *Ann Rev Pol Sci* 425, 446–48 (2005) (reviewing the emerging body of political science literature that frames judicial review as an institution constructed by the political branches). See also Corinna Barrett Lain, *Soft Supremacy*, 58 *Wm & Mary L Rev* 1609, 1679 (2017) (“Within the world of political science, the point is well established—judicial supremacy is a political construct built over time by the representative branches to further ends that they would find difficult, if not impossible, to accomplish on their own.”).

²⁶⁸ See Fallon, *Law and Legitimacy* at 108–20 (cited in note 99).

pathological. If such conditions should ever develop, fault might lie with political officials, with the courts, or with both. If the conditions for cooperative governance collapsed, the electorate would likely also bear some responsibility. One way or another, the rule of law would have broken down.

Nevertheless, short of that unhappy state, not every isolated overreach of judicial power—whether actual or mistakenly attributed—would evidence a legal system that had run incorrigibly off the rails. Actual or threatened defiance of judicial rulings could function as a corrective to judicial overreach. In addition, recognition that ultimate political questions could arise, and that they would signify constitutional crises that all should wish to avoid, may help to keep our constitutional order in a tolerably functioning condition. The relative continuing success of constitutional government under law depends on the humility and good sense of a multitude of actors.

In sum, the concept of political questions—in both its doctrinal and its ultimate senses—begins and ends with apprehensions of, and responses to, *ultra vires* action by one or another branch of government, including the judiciary. Where to draw the relevant bounds—defining the jurisdiction of the courts, on the one hand, and the authority of other institutions, on the other hand—is in the first instance a judicial question. But once the Supreme Court has pronounced its judgment, it is always possible that a political question might arise about whether the Court's decision was *ultra vires*. The rarity with which that question has presented itself historically does not signal that it could not arise, nor that the possibility of the question's arising lacks either theoretical or practical importance. Rather, contemplation of the possibility of *ultra vires* judicial action should teach a lesson about the foundations of our, and possibly any other, constitutional regime. Responsibility for upholding the minimal requirements of the rule of law—including by respecting and enforcing the boundaries of constitutionally empowered institutions' lawful jurisdiction—must be shared among a network of accountability-holding institutions that centrally includes, but is not limited to, the judiciary.²⁶⁹

²⁶⁹ See Fallon, 96 *Tex L Rev* at 520–30 (cited in note 260).

CONCLUSION

The political question doctrine highlights both the limits of judicial power and the potential vulnerability of claims of judicial authority. If any single concept furnishes a key to understanding the doctrine, it is that of ultra vires action. The political question doctrine acknowledges that judicial efforts to resolve some questions would be ultra vires. But in recognizing that other branches have the authority to make conclusive determinations regarding the proper resolution of political questions, courts, willy-nilly, retain a responsibility to ensure that the other branches do not act ultra vires, either.

As formulated and applied in cases such as *Nixon v United States* and *Rucho v Common Cause*, the political question doctrine is a judicial construction. Its contours are vague and disputed. In this Article, I have tried to explain why the Supreme Court so rarely invokes the political question doctrine, despite the breadth of the doctrine's supporting rationales. Among other relevant factors, the arguments that would support identifying a question as political frequently overlap indistinguishably with arguments for upholding a challenged action on the merits.

This Article has also identified previously unrecognized connections between judicially identified political questions and what I have called ultimate political questions. The latter are questions about the validity of judicial pronouncements that claim to mark the permissible limits of judicial authority. Though courts may attempt to resolve issues about the outer reaches of their own power, judicial answers that are ultra vires, as gauged by an appropriately deferential measure, would have no legal title to obedience. The disobedience of a judicial order could have terrifying, quasi-anarchic consequences. But the theoretical possibility of disobedience should occasion no regret. Political questions in the ultimate sense—which provide the backdrop against which courts recognize political questions in the doctrinal sense—occupy the conceptual terrain that separates constitutional government under law from government by judiciary.