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Judicial Review and the Political Question Doctrine: Reviving the Federalist Rebuttable Presumption Analysis

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JUDICIAL REVIEW AND THE POLITICAL QUESTION DOCTRINE: REVIVING THE FEDERALIST "REBUTTABLE PRESUMPTION" ANALYSIS

ROBERT J. PUSHAW, JR.*

Implementing Federalist theory, the Constitution established a presumption favoring judicial review, which could be rebutted only by a few constitutional provisions (such as those governing impeachment and appointments) that raised purely "political" questions. This "rebuttable presumption" approach held sway into the twentieth century.

Baker v. Carr replaced this Federalist political question doctrine with one that requires a prudential balancing of many vague factors. In practice, the Baker test has granted federal judges near-absolute discretion, which has generally been exercised to decide constitutional issues that implicate sensitive political matters. Because the modern political question doctrine lacks legal coherence, both in theory and as applied, the Court should reintroduce the "rebuttable presumption" model in order to reach more legally principled and consistent results.

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In Baker v. Carr, the Supreme Court purported to do no more 
than summarize and apply its precedent on political questions. In 
reality, however, Justice Brennan's opinion transformed this doctrine 
into a discretionary, case-by-case, six-factor inquiry based solely upon 
separation of powers, not federalism. This new analysis enabled the 
Court to achieve its immediate policy goal of restructuring every state 
legislative and congressional district in America based upon its 
discovery of a previously unnoticed "equal population" principle of 
representation lurking in various constitutional provisions such as the 
Equal Protection Clause.

Unfortunately, the long-term effects of Baker have been 
negative, as often happens when the Court unmoors itself from the 
Constitution's text, structure, political theory, history, and precedent. The traditional justification for judicial review is that federal courts 
must decide cases by upholding the fundamental "law" of the written 
Constitution against contrary government actions. But if the Justices 
can discard this law and impose their ideological preferences in an 
area as quintessentially and traditionally "political" as the states' 
apportionment of their legislatures, then it becomes pointless to try to 
distinguish "legal" from "political" questions.

A recent illustration is Bush v. Gore, in which the conservative 
Republican majority unconsciously paid homage to Baker by (1) 
ignoring classical principles of justiciability and federalism, which

2. Id. at 208–37.
3. Id. at 226.
4. See Robert F. Nagel, Political Law, Legalistic Politics: A Recent History of the 
Political Question Doctrine, 56 U. CHI. L. REV. 643, 657–64 (1989) (contending that 
modern constitutional decisions rest on political rather than legal principles, but that the 
Court refuses to acknowledge this fact because doing so would compel it to refrain from 
examining the political branches' judgments on policy questions).
counseled deference to states in electoral matters and (2) dictating a political result justified by freshly minted equal protection "standards." I say "unconsciously" because the Bush Court did not cite Baker, and indeed only fleetingly alluded to the political overtones of its decision. 

This cavalier attitude reflects the degree to which the political question doctrine has ceased to function as a meaningful jurisdictional restraint. After Baker, the Court has almost always exercised its unbridled discretion to intervene in even the most heavily politicized disputes. Examples include various electoral matters, Congress's procedures for enacting statutes, and the President's assertion of executive privilege. Such questions, however, are no less "political" than the only two issues found to be nonjusticiable—military training and impeachment. For instance, Article I provides that "[e]ach House shall be the Judge of the Elections, Returns and Qualifications of its own Members" and that Congress "shall have the sole Power" over impeachment prosecutions and trials. The Court has failed to explain persuasively why it concluded, under Baker, that the former clause is amenable to adjudication, but the latter is not.

Because Baker lacks a firm constitutional foundation and guarantees arbitrary results, no amount of tinkering can cure its defects. Therefore, this Article suggests abandoning Baker and substituting the Federalist approach to political questions, which served the Court well for over a century. Judges and scholars have routinely cited Alexander Hamilton's argument supporting judicial review, which the Marshall Court adopted: that only independent federal courts can impartially determine whether or not political branch officials have complied with the Constitution's written limits

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8. See infra notes 80–114 and accompanying text (citing cases).
12. U.S. CONST. art. I, § 2, cl. 5 (authorizing the House of Representatives to impeach); U.S. CONST. art. I, § 3, cl. 6 (empowering the Senate to try impeachments).
14. See Nixon, 506 U.S. at 226–38; see also infra notes 115–20 and accompanying text (discussing such inconsistencies).
on their power imposed by "We the People." But the Federalists' corollary claim has been undeservedly ignored: The "natural presumption" favoring judicial review can be rebutted by certain constitutional provisions, interpreted in light of basic principles of constitutional structure and theory. Far from being a relic of a bygone age, this "rebuttable presumption" approach is actually more logical and workable than the Baker test.

To establish this thesis, I will first try to demonstrate the intellectual bankruptcy of the Court's current political question jurisprudence. I will then describe the Federalist model and show how it can be applied to modern cases to reach more legally principled results rooted in the Constitution.

I. THE POLITICAL QUESTION DOCTRINE IN THE TWENTIETH CENTURY

A. The Prelude to Baker: A Strict Approach to Justiciability

During the first six decades of the twentieth century, the Court applied the political question doctrine rigorously to fence out many potential constitutional claims. For example, it declared in 1918 that "[t]he conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative—'the political'—Departments . . . , and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision." Similarly, in Coleman v. Miller, the Court ruled that


18. For other applications of this "Neo-Federalist" methodology, see generally Robert J. Pushaw, Jr., Article III's Case/Controversy Distinction and the Dual Functions of Federal Courts, 69 NOTRE DAME L. REV. 447 (1994) (demonstrating that Article III deliberately distinguishes between "cases" defined by subject matter, in which the federal judiciary's main role is expounding the law, and "controversies" between identified parties, which primarily require dispute resolution); Robert J. Pushaw, Jr., Congressional Power Over Federal Court Jurisdiction: A Defense of the Neo-Federalist Interpretation of Article III, 1997 BYU L. REV. 847, 847–97 (challenging the orthodox view that Congress has plenary authority to divest federal courts of jurisdiction); Robert J. Pushaw, Jr., Why the Supreme Court Never Gets Any "Dear John" Letters: Advisory Opinions in Historical Perspective, 87 GEO. L.J. 473, 477–97 (1998) (recovering the Federalist approach to advisory opinions).

19. Oetjen v. Cent. Leather Co., 246 U.S. 297, 302 (1918); see also Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948) ("[T]he very nature of executive decisions as to foreign policy is political, not judicial.").

questions under Article V concerning the validity of federal constitutional amendments (for example, whether they had been ratified within a reasonable time after their proposal) were "political" and entrusted exclusively to Congress.\textsuperscript{21}

Most pertinent to \textit{Baker} are the cases beginning in 1912 that deemed nonjusticiable all complaints arising under Article IV, Section 4, which provides that "the United States shall guarantee to every State in this Union a Republican Form of Government." To illustrate, the Court refused to consider claims that states had rendered their governments "unrepublican" by (1) passing certain laws by initiative rather than statute;\textsuperscript{22} (2) delegating legislative power to executive agencies\textsuperscript{23} or courts;\textsuperscript{24} (3) enacting worker's compensation laws;\textsuperscript{25} (4) permitting a rule that statutes could be invalidated only if every state court justice (or all but one) agreed;\textsuperscript{26} and (5) amending the state constitution through certain procedures.\textsuperscript{27}

The Court applied this precedent to the specific context of state apportionment schemes, starting in 1916.\textsuperscript{28} After World War II, constitutional challenges to such state laws intensified. In the landmark case of \textit{Colegrove v. Green},\textsuperscript{29} four of the seven participating Justices affirmed the dismissal of a complaint alleging that an Illinois statute had unconstitutionally established districts for federal congressional representatives that did not reflect population changes.\textsuperscript{30} In the plurality opinion, Justice Frankfurter and two colleagues ruled that "[v]iolation of the great guaranty of a republican form of government in States cannot be challenged in the courts."\textsuperscript{31}

In a concurrence, Justice Rutledge expressed his personal view that

\begin{enumerate}
\item Seven Justices, in three separate opinions, endorsed this view. \textit{See id.} at 450–55 (plurality opinion of Hughes, C.J.); \textit{id.} at 456–60 (Black, J., concurring); \textit{id.} at 460–70 (Frankfurter, J., concurring).
\item \textit{See} Pac. States Tel. Co. v. Oregon, 223 U.S. 118, 142–51 (1912); \textit{see also id.} at 139–41 (rejecting the plaintiff's attempt to evade this result by asserting a separate cause of action under the Fourteenth Amendment).
\item Highland Farms Dairy, Inc. v. Agnew, 300 U.S. 608, 612 (1937).
\item O'Neill v. Learner, 239 U.S. 244, 248 (1915).
\item Ohio \textit{ex rel.} Davis v. Hildebrant, 241 U.S. 565, 569–70 (1916) (holding nonjusticiable the claim that the invalidation of a state reapportionment statute by referendum violated the Republican Form of Government Clause).
\item 328 U.S. 549 (1946).
\item \textit{id.} at 550–56 (plurality opinion of Frankfurter, J.); \textit{id.} at 564–66 (Rutledge, J., concurring).
\item \textit{id.} at 556 (plurality opinion) (citing Pacific Tel. Co. v. Oregon, 223 U.S. 118 (1912)).
\end{enumerate}
Sections 2 through 5 of Article I conferred on Congress exclusive power over federal legislative districting, but declared himself bound by a previous decision that had found this issue justiciable.\textsuperscript{32} He concluded, however, that the district court had equitable discretion to decline to exercise jurisdiction in light of the delicate relationship between Congress and the states in determining congressional districts.\textsuperscript{33} Three dissenters saw no political question obstacle and would have struck down the statute on equal protection grounds.\textsuperscript{34}

In \textit{MacDougall} v. \textit{Green},\textsuperscript{35} Justice Rutledge in another concurrence urged the Court to refrain, in equity, from considering a constitutional attack on an Illinois law that gave sparsely populated counties disproportionate power in the nomination of candidates for statewide office.\textsuperscript{36} A bare majority of five Justices, however, reached the merits and held:

\begin{quote}
To assume that political power is a function exclusively of numbers is to disregard the practicalities of government. Thus, the Constitution protects the interests of the smaller against the greater by giving in the Senate entirely unequal representation to populations. It would be strange indeed, and doctrinaire, for this Court, applying such broad constitutional concepts as due process and equal protection of the laws, to deny a State the power to assure a proper diffusion of political initiative as between its thinly populated counties and those having concentrated masses...\textsuperscript{37}
\end{quote}

Two years later, in \textit{South} v. \textit{Peters},\textsuperscript{38} the Court cited \textit{Colegrove} and \textit{MacDougall} in tersely rejecting a Fourteenth Amendment challenge to Georgia's "county unit" system of primary voting, which significantly overweighted votes in rural counties: "Federal courts consistently refuse to exercise their equity powers in cases posing political issues arising from a state's geographical distribution of electoral strength among its political subdivisions."\textsuperscript{39} This analysis seemed to combine the "equitable discretion" approach of Justice Rutledge with the Frankfurterian "political question" paradigm.

\textsuperscript{32.} \textit{Id.} at 564–65 (Rutledge, J., concurring) (citing Smiley v. Holm, 285 U.S. 355 (1932)).
\textsuperscript{33.} \textit{Id.} at 565–66 (Rutledge, J., concurring).
\textsuperscript{34.} \textit{Id.} at 572–74 (Black, J., dissenting).
\textsuperscript{35.} 335 U.S. 281 (1948).
\textsuperscript{36.} \textit{See id.} at 284–87 (Rutledge, J., concurring in the judgment).
\textsuperscript{37.} \textit{Id.} at 283–84.
\textsuperscript{38.} 339 U.S. 276 (1950).
\textsuperscript{39.} \textit{Id.} at 277.
Between *South* and *Baker*, the Court dismissed every constitutional challenge to state apportionment laws, usually on political question grounds. The lone exception occurred when states racially discriminated in electoral matters, thereby violating individual and minority-group rights under the Fifteenth Amendment.

**B. Baker v. Carr**

1. The Court's Opinions

In *Baker v. Carr*, urban voters alleged that Tennessee's apportionment statute, which had not been amended for sixty years to account for the large migration away from rural areas, violated the Equal Protection Clause by diluting the weight of their votes. Like most states, Tennessee had always divided up legislative districts to reflect various factors (for example, demographics, geography, politics, economics, social classes, history, and efficiency), often with the aim of maximizing the electoral clout of conservative rural areas against the mushrooming (and predominantly liberal) cities and suburbs. Consequently, sparsely settled counties enjoyed representation grossly disproportionate to their populations.


41. For example, *Gomillion v. Lightfoot*, 364 U.S. 339 (1960), invalidated an Alabama statute which had redistricted a city in order to deprive blacks of their right to vote. *Id.* at 340-45. The Court distinguished this "sing[ing] out [of] a readily isolated segment of a racial minority for special discriminatory treatment" from the political question presented in *Colegrove*, where the plaintiffs "complained only of a dilution of the strength of their votes." *Id.* at 346.

42. 369 U.S. 186 (1962).

43. *Id.* at 187-95. The following discussion of *Baker* draws heavily upon *Pushaw*, *supra* note 6, at 364-67, and *Pushaw*, *supra* note 15, at 489-501.

44. See *Baker*, 369 U.S. at 188-95 (describing this allocation of legislative seats according to group interests); *id.* at 248-49 n.4 (Douglas, J., concurring) (stressing the
Longstanding law required dismissal of the complaint, as the district court held and Justices Frankfurter and Harlan argued in their dissenting opinions. They demonstrated that the Court had always refused to interfere with apportionment for two closely related reasons. First, federalism prohibited judicial second-guessing of state officials’ political judgment in balancing the numerous and complex policy considerations involved. Second, challenges to apportionment laws necessarily rested upon the claim that a state did not have a “Republican Form of Government” under Article IV, a constitutional clause that the Court had long deemed nonjusticiable. In the dissenters’ view, the plaintiffs could not avoid this uniform precedent simply by relabeling their complaint as alleging the violation of individual voting rights under the Equal Protection Clause. Nothing in the language or precedent of that Clause, or any other constitutional provision, required states to base representation solely on population, and the Constitution authorized several other electoral schemes that rested on different principles, such as the Senate. Thus, Justices Frankfurter and Harlan concluded that ordering all state legislatures to be reconstituted based upon the majority’s belief in the wisdom of “equal population” representation would destroy federalism and threaten the Court’s reputation as a nonpartisan enforcer of the law.

46. Id. at 208–09.
47. Id. at 266–330 (Frankfurter, J., dissenting); id. at 330–49 (Harlan, J., dissenting); see also id. at 284–85 (Frankfurter, J., dissenting) (distinguishing Smiley v. Holm, 285 U.S. 355 (1932), as involving not a broad constitutional challenge to the structure of state government, but rather a particular federal question that determined relationships within that existing framework).
48. Id. at 266–70, 277–80, 284–97, 300, 323–24 (Frankfurter, J., dissenting); id. at 332–33, 336–37 (Harlan, J., dissenting).
49. Id. at 266–70, 289–302 (Frankfurter, J., dissenting); id. at 333–34 (Harlan, J., dissenting).
50. Id. at 297–301 (Frankfurter, J., dissenting); id. at 331–34 (Harlan, J., dissenting).
51. Id. at 300–23 (Frankfurter, J., dissenting); id. at 332–39 (Harlan, J., dissenting).
52. Id. at 332–33, 338–40 (Harlan, J., dissenting); see also id. at 267–70, 284–86, 289, 298–301, 324 (Frankfurter, J., dissenting) (making this point and stressing the Court’s traditional unwillingness to interfere with state governments, absent violation of an
Confronted with the dissenters' irrefutable legal arguments, but unwilling to overrule its precedent explicitly, the majority dissembled. Most importantly for present purposes, Justice Brennan surveyed the major "political question" cases and reached two debatable conclusions.

First, he asserted that "it is the relationship between the judiciary and the coordinate branches of the Federal Government, and not the federal judiciary's relationship to the States, which gives rise to the 'political question.'" Hence, Justice Brennan deemed this doctrine inapplicable because the Court was not considering a question decided by a coequal branch, but rather "the consistency of state action with the Federal Constitution."

Second, Justice Brennan declared that the existence of a political question could be determined only through a "case-by-case inquiry" weighing six factors:

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53. Baker, 369 U.S. at 210; see also id. at 217 ("[A] political question ... [is] essentially a function of the separation of powers.").

54. Id. at 226.

55. Id. at 211; see also id. at 217 (stating that the political question cases "show the necessity for discriminating inquiry into the precise facts and posture of the particular case, and the impossibility of resolution by any semantic cataloguing").
Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.\textsuperscript{56}

Applying these criteria, the majority admitted that the voters' challenge, if made under the Guarantee Clause, would have raised a political question.\textsuperscript{57} Nonetheless, the Court held that (1) the Equal Protection Clause did provide manageable standards for reviewing state apportionment laws and (2) the other five factors were not implicated because the case did not involve a coequal federal branch.\textsuperscript{58} Instead of specifying concrete legal principles of constitutional equality in the districting context, however, Justice Brennan merely offered one cryptic sentence:

Judicial standards under the Equal Protection Clause are well developed and familiar, and it has been open to courts since the enactment of the Fourteenth Amendment to determine, if on the particular facts they must, that a discrimination reflects\textit{ no} policy, but simply arbitrary and capricious action.\textsuperscript{59}

\textsuperscript{56} Id. at 217.

\textsuperscript{57} Id. at 209–10, 217–29. Justice Brennan offered two qualifications, however. First, he asserted that, in certain unusual circumstances, the Court might be able to determine the "extreme limits" imposed by the Republican Form of Government Clause (thereby meeting the "judicially manageable standards" factor), but that other elements of a political question might still be present (e.g., commitment of the issue to political branch decisionmaking). Id. at 222–23 n.48 (citing Luther v. Borden, 48 U.S. (7 How.) 1, 45 (1849); Minor v. Happersett, 88 U.S. (21 Wall.) 162, 175–76 (1875); \textit{In re Duncan}, 139 U.S. 449, 461 (1891)). Second, he pointed out that a possible Guarantee Clause problem did not bar judicial review when some other constitutional provision had allegedly been violated. See id. at 226 n.53 (citing Coyle v. Smith, 221 U.S. 559 (1911)); see also infra notes 174–95 and accompanying text (analyzing the relevant Republican Form of Government cases).

\textsuperscript{58} Baker, 369 U.S. at 188, 208–10, 226–32, 237.

\textsuperscript{59} Id. at 226 (emphasis added); see Powe, supra note 40, at 202 ("[T]his statement is breathtaking. There were so few non-race equal protection cases that no one could confidently assert what the equal protection standard was. Yet Brennan said just the opposite . . . .")
In short, the Court pretended to honor, but effectively reversed, the long-established law governing political questions and equal protection in order to implement the Justices' personal vision of appropriate representation in a democracy.60

2. The Problem With Baker

Baker's six factors cannot meaningfully distinguish "political" questions from justiciable "legal" ones.61 For instance, the Court's exercise of jurisdiction over any case arising under the Constitution almost inevitably shows a "lack of the respect due coordinate branches of government," upsets a "political decision already made" that Congress or the President may believe demands "unquestioning adherence," or holds "the potentiality of embarrassment from multifarious pronouncements by various departments on one

60. Professor Schotland contends that the Baker Court did not explicitly overrule any cases in order to garner the crucial vote of Justice Stewart, who insisted on this condition. See Roy A. Schotland, The Limits of Being "Present at the Creation," 80 N.C. L. REV. 1505, 1508–10 (2002). He concludes that "Professor Pushaw, like Professor McConnell, is in denial about the fact that a majority opinion might be crafted to be supported by a majority." Id. at 1509 n.19.

On the contrary, I am fairly confident that Michael McConnell is aware (as I am) that Justices sometimes make compromises in writing opinions to gain their colleagues' acquiescence. Nonetheless, we expect the Court to display at least a minimum level of candor, particularly in characterizing its previous decisions. As Professor McConnell has convincingly argued, Baker and its progeny created a rigid one-person, one-vote principle that had no foundation in the Equal Protection Clause's language, history, or precedent. See Michael McConnell, The Redistricting Cases: Original Mistakes and Current Consequences, 24 HARV. J.L. & PUB. POL'Y 103, 103–13 (2000).

Professor McConnell refines the devastating contemporaneous critiques leveled at Baker by distinguished scholars such as Alex Bickel and Robert McCloskey. See supra note 52 (citing these and other commentators). Perhaps most telling, even the legal academics who applauded Baker did not do so on the ground that the majority had faithfully followed precedent. Indeed, many of them praised the Court for "abruptly reversing [its] whole position." See Thomas I. Emerson, Malapportionment and Judicial Power, 72 YALE L.J. 64, 79 (1962); see also Pushaw, supra note 6, at 368–69 (citing similar sentiments expressed by Charles Black, Louis Pollak, Robert McKay, and Carl Auerbach). Significantly, neither Professor Schotland nor anyone else has explained how Justice Brennan's opinion adhered to existing case law on the Equal Protection Clause.

Similarly disingenuous was the Court's treatment of the political question cases, particularly those involving apportionment. See supra notes 19–41 and accompanying text (discussing these decisions); supra notes 47–52 and accompanying text (summarizing the analysis of this precedent by Justices Frankfurter and Harlan); infra notes 72–78 and accompanying text (demonstrating that the Baker Court distorted prior political question cases); Powe, supra note 40, at 202 (lamenting the "confusion" that resulted from Justice Brennan's "cumbersome strategy" of recategorizing all preceding political question decisions (including Colegrove) to try to suggest that they did not cover apportionment).

The reason is simple: Horizontal judicial review requires a searching examination of an act of Congress or the executive branch, and a decision to strike down such an action necessarily implies that the political officials who took it either violated their oaths to uphold the Constitution or were ignorant of its meaning.

Likewise, many constitutional provisions, not just those the Court has deemed "political," appear to "lack judicially discoverable and manageable standards." Indeed, the Equal Protection Clause, intended to protect the civil rights of individuals and minorities rather than general political rights such as voting, did not contain any standards for measuring the myriad political judgments involved in state apportionment statutes. Undaunted, the majority "discovered" such principles and later found a way to "manage" them. Furthermore, *Baker* seemed to entail "an initial policy determination of a kind clearly for nonjudicial discretion" (as the dissenters strenuously argued), and the Court did not explain which policy decisions would "clearly" be left to the political branches. In fact, much of modern constitutional law arguably involves policy choices that should be resolved through the political process.

Finally, if "a textually demonstrable constitutional commitment of the issue to a coordinate political department" raised a political question, then federal courts could never decide any claims against Congress or the President because the text of Articles I and II commits to them all legislative and executive powers. Instead, the dispositive consideration is whether a constitutional issue must be entrusted to a political actor for a final, nonreviewable decision. That determination, however, cannot be made simply by consulting the words of the Constitution, which does not contain a specific clause authorizing judicial review, much less set forth exceptions to that

63. See id.; see also MARTIN H. REDISH, THE FEDERAL COURTS IN THE POLITICAL ORDER 122-26, 135 (1991) (arguing that the Court routinely creates and develops detailed standards to govern constitutional provisions that contain very general language).
65. See supra notes 58-60; infra notes 80-91, 102-03 and accompanying text (describing these cases).
67. See supra notes 47-52 and accompanying text.
69. See *Baker*, 369 U.S. at 217.
70. See Pushaw, *supra* note 15, at 500-01.
power. Rather, just as judicial review rests principally on the Constitution's structure and underlying political theory, so too must the political question doctrine.

Unfortunately, the Baker Court simply cast aside a core structural and theoretical principle—federalism. Contrary to the majority's assertions, many of the Court's political question opinions had expressed concerns for preserving federalism—including those that involved the precise issue of the constitutionality of state apportionment laws. Indeed, over the previous three decades every challenge (fifteen in all) to such legislative schemes had been dismissed. Justice Brennan attempted to distinguish these cases as grounded upon limits on the federal judiciary's equity power, not upon justiciability. Although this distinction explains a few of these decisions, others rested on the political question doctrine, and in all of them the Court declined to interfere out of respect for state autonomy in determining legislative representation plans.

Jettisoning federalism as a factor in the political question calculus, although helpful in enabling the Baker majority to rationalize its result, has had the long-range effect of opening up large new political vistas to judicial review. Nowhere has this phenomenon been more pronounced than in the electoral arena.

71. See Chemerinsky, supra note 61, at 146.
72. See supra notes 22–40 and accompanying text; infra notes 172–73, 181–83 and accompanying text (describing this precedent).
73. See supra notes 28–40 and accompanying text.
74. See Friedelbaum, supra note 52, at 673–88, 691 (discussing these cases).
77. See supra note 40 (citing cases).
78. Professor Lucas showed that the majority's attempt to distinguish these decisions was misleading. Lucas, supra note 52, at 711–48, 751–52, 803. He acknowledged, however, that the Court had considered the merits in a few of these cases, and thus that apportionment did not always involve political questions. Id. at 713–14. Lucas concluded that prior judicial rulings that apportionment raised "nonjusticiable" issues under the Guarantee Clause and the Fourteenth Amendment actually reflected substantive determinations that those constitutional provisions did not confer individual legal rights. Id. at 754–55.
79. Even if Baker and its progeny ultimately made state legislatures more responsive to the concerns of their urban areas, these cases surely did not "strengthen[] federalism," as Professor Schotland and others have contended. See Schotland, supra note 60, at 1509 n.19 (citing sources). To begin with, Justice Brennan himself expressly discarded federalism as a relevant factor in the political question equation. See Baker, 369 U.S. at 210, 226, discussed supra notes 53–54, 58 and accompanying text. Moreover, seven unelected Justices imposed their personal view (expressed nowhere in the Constitution) that representation had to be based entirely on population, and they gave federal district judges a roving commission to implement that vision by reconfiguring every state legislature in America. It is hard to imagine a more serious affront to federalism, which
C. The Application of Baker to Electoral Matters

The Court quickly consolidated the "gains" of Baker. Most importantly, it found justiciable a challenge by Alabama voters to the malapportionment of their legislature in Reynolds v. Sims. Specifically, the Justices concluded that Congress's admission into the Union of Alabama and other states with apportionments not based on population, and thus its implicit judgment that these states had a Republican Form of Government, did not prevent the Court from determining whether such schemes violated the Equal Protection Clause. On the substantive issue, the Court interpreted that Clause as requiring apportionment to be based on a "one-person, one-vote" principle. The majority rejected Justice Harlan's contention that the Fourteenth Amendment's text, legislative history, and implementing practice and precedent revealed that there were no judicially enforceable limits on the states' exclusive and plenary power over legislative apportionment—a crucial aspect of federalism.

Similarly, Justice Harlan argued in vain in Wesberry v. Sanders that a Georgia law establishing single-member congressional districts with unequal populations presented a political question under Article I, Section 4: "The Times, Places, and Manner of holding [congressional] Elections . . . shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations . . . ." He showed that the language of Section 4, considered in historical context, gave Congress alone the authority to review the states' exercise of their power to select their representatives according to any method of election they chose. The Court nonetheless concluded that Section 4 did not immunize state or

requires that the federal government respect the freedom of the states to structure and operate their governments, absent a genuine violation of the Constitution (such as racial discrimination).

80. For a detailed analysis of these post-Baker cases, see Pushaw, supra note 6, at 372–78.

82. Id. at 582.
83. Id. at 561–76. The Court first coined this slogan in Gray v. Sanders, 372 U.S. 368, 370–72, 379–80 (1963), which held that the Equal Protection Clause mandated an equally weighted vote for all who participated in an election. Accordingly, the Court invalidated Georgia's county-unit method of weighing votes in primary elections, even though it had upheld this same law in South v. Peters, 339 U.S. 276, 277 (1950), discussed supra notes 38–39 and accompanying text.
84. Reynolds, 377 U.S. at 589–624 (Harlan, J., dissenting).
86. Id. at 29 (Harlan, J., dissenting).
87. Id. at 22–24, 29–44, 48 (Harlan, J., dissenting).
congressional apportionment decisions from judicial review.\textsuperscript{88} It then struck down Georgia's law as violating the one-person, one-vote principle.\textsuperscript{89}

The Justices' intrusion into electoral matters has continued unabated. For example, in 1992 the Court relied upon \textit{Baker} and \textit{Wesberry} in unanimously permitting a challenge to Congress's selection of a method for apportionment of congressional districts among states under Article I, Section 2.\textsuperscript{90} Similarly, gerrymandering of legislative districts no longer raises a political question.\textsuperscript{91}

Most recently, in \textit{Bush v. Gore},\textsuperscript{92} the conservative Republican majority intervened to break the 2000 presidential election deadlock. Like a latter-day Justice Harlan, Justice Breyer railed that the Court had unnecessarily become entangled in a purely political process—selecting a President.\textsuperscript{93} He was on solid ground in insisting that the Constitution contemplates political rather than federal judicial resolution of presidential election disputes, at least in the first instance. Article II, Section 1, Clause 2 authorizes "the Legislature" of "[e]ach State" to "direct" the "manner" of "appoint[ing]...[presidential] electors." The Florida Legislature had done so by granting its citizens the right to vote for President and by setting forth elaborate procedures for counting those votes and certifying electors, including a system of administrative and judicial review to resolve any controversies.\textsuperscript{94} Moreover, Article II arguably empowers each state's legislature to appoint its own electors if it concludes that its courts ignored pre-election statutory directives.\textsuperscript{95} Finally, if a dispute over a

\textsuperscript{88} Id. at 5–7 (citing \textit{Baker v. Carr}, 369 U.S. 186, 232 (1962)).

\textsuperscript{89} Id. at 7–18. The majority discovered this principle in Article I, Section 2 of the Constitution, which provides that "[t]he House of Representatives shall be...chose...by the People of the several States" (Clause 1) and that Representatives must be apportioned "among the several States...according to their respective Numbers" (Clause 3). \textit{Id.} at 8–18. The Court omitted two facts that contradicted its holding. First, Clause 1 expressly authorizes each state to determine the qualifications needed to vote for congressional representatives. Second, Clause 3 exclusively concerns the apportionment of Representatives "among" the states, not within each state. \textit{See id.} at 25–32 (Harlan, J., dissenting).


\textsuperscript{92} 531 U.S. 98 (2000) (per curiam). For a more thorough discussion of this case, see \textit{Pushaw, supra} note 6, at 382–86.

\textsuperscript{93} \textit{Bush}, 531 U.S. at 152–58 (Breyer, J., dissenting).

\textsuperscript{94} \textit{Id.} at 100–03 (detailing the relevant statutory procedures and the case history).

\textsuperscript{95} \textit{See id.} at 104 (interpreting Article II as granting "plenary power" to state legislatures which could be exercised at any time). Hence, the Florida Legislature may have had the authority to review the state judiciary's decisions regarding the presidential election to ensure fidelity to its statutory commands, wholly independent of the United
state's electoral votes persists, the Twelfth Amendment authorizes Congress to count—and, by implication, to determine the validity of—each state's slate of electors.96

Before the Florida Legislature or Congress had acted, however, the Court held that the Florida Supreme Court had violated the Equal Protection Clause by ordering a recount of presidential ballots under the state statutory "intent of the voter" standard without specifying uniform rules to determine such intent.97 To justify its short-circuiting of the political process to impose its newly created "right" to nonvariable counting standards, the majority breezily explained:

None are more conscious of the vital limits on judicial authority than are the Members of this Court, and none stand more in admiration of the Constitution's design to leave the selection of the President to the people, through their legislatures, and to the political sphere. When contending parties invoke the process of the courts, however, it becomes our unsought responsibility to resolve the federal and constitutional issues the judicial system has been forced to confront.98

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96. The Twelfth Amendment provides that the Vice President "shall, in the presence of the Senate and House of Representatives, open all the certificates [transmitted by the state electors] and the votes shall then be counted." It is not clear whether this Amendment (1) authorizes the Vice President or Congress to do the counting, and (2) imposes a mere ministerial duty to count the votes or confers some discretion to regulate this process.

97. Bush, 531 U.S. at 103–11. Justices Stevens and Ginsburg agreed that the case was justiciable but condemned the majority for twisting equal protection precedent and ignoring federalism principles, which dictated deference to the Florida Supreme Court's interpretation of its state's laws. See id. at 123–28 (Stevens, J., dissenting); id. at 135–44 (Ginsburg, J., dissenting).

98. Id. at 111; see Larry D. Kramer, The Supreme Court, 2000 Term—Foreword: We the Court, 115 HARV. L. REV. 4, 153–58 (2001) (maintaining that the Rehnquist Court's refusal to follow the Constitution's specified political process for resolving presidential
Tellingly, neither the majority nor the dissenters cited Baker, thereby unwittingly highlighting its uselessness in distinguishing "political" from "justiciable" questions. For example, Justice Breyer implied that the Twelfth Amendment contains "a textually demonstrable constitutional commitment of the issue [presidential election disputes] to a coordinate political department [Congress]." The majority, however, could have responded that this Amendment says nothing about the Court's power to review state court interpretations of state law that allegedly violate the Constitution. Accordingly, the Court owed no more respect to Florida's attempted resolution of the election snafu than it did to Tennessee's decisions regarding apportionment. Indeed, federalism concerns cannot raise a political question, as Justice Brennan enlightened us. Moreover, the only Baker factor that did not necessarily implicate separation of powers—"a lack of judicially discoverable or manageable standards"—did not apply in Bush because seven Justices "discovered" a new equal protection "standard," exactly as their brethren did in Baker.

In short, the modern political question doctrine does not legally constrain the Court's ability to interfere in electoral matters, state or election contests illustrates its more general rejection of the role of democratic institutions in addressing constitutional problems); Tribe, supra note 96, at 275–92, 298–304 (making a similar argument).

99. Baker v. Carr, 369 U.S. 186, 217 (1962); see Bush, 531 U.S. at 153–57 (Breyer, J., dissenting); Tribe, supra note 96, at 277–80 (asserting that the Constitution plainly commanded the Court not to intervene and hence that it could not have invoked discretion to decide the case). An article published over three decades ago, and thus with no political ax to grind, concluded that the Court would probably apply Baker to rule that the Twelfth Amendment grants to Congress final power to resolve controversies concerning presidential electoral voting. Albert J. Rosenthal, The Constitution, Congress, and Presidential Elections, 67 MICH. L. REV. 1, 26–30 (1968).

100. See supra notes 53–54 and accompanying text.


102. See Bush, 531 U.S. at 103–11. But see id. at 124–27 (Stevens, J., dissenting) (noting the novelty of the majority's equal protection analysis); Robert J. Pushaw, Jr., The Presidential Election Dispute, the Political Question Doctrine, and the Fourteenth Amendment: A Reply to Professors Krent and Shane, 29 FLA. ST. U. L. REV. 603, 604–05, 610, 619–22 (2001) (agreeing with the many commentators who have demonstrated the weakness of this aspect of the Court's opinion).

103. Professor Schotland chides me for "attack[ing] all the opinions in Bush v. Gore . . . for the tiny point that they failed to cite Baker." Schotland, supra note 60, at 1509 n.19. It is hardly trivial, however, for the Justices to have neglected to explain why the political question doctrine (even in its watered-down Baker form) did not require the Court to respect the constitutional roles of the states and Congress in resolving electoral vote problems. See Tribe, supra note 96, at 277–81 (characterizing as "remarkable" the majority's failure to justify its seizure of jurisdiction in the face of a political question doctrine that seemed squarely applicable).
federal. In fact, it imposes no meaningful limits on judicial discretion in any area, as the following cases illustrate.

D. Other “Justiciable” Congressional and Presidential Powers

The Court has chosen to adjudicate seemingly political challenges to Congress’s exercise of various powers. For instance, in Powell v. McCormack, it allowed a Representative-elect to contest the House’s decision to refuse to seat him. Powell reveals the infinite manipulability of the Baker criteria. Most importantly, Article I, Section 5, Clause 1, which provides that “[e]ach House shall be the Judge of the Elections, Returns, and Qualifications of its own Members,” demonstrably commits this issue to Congress and does not lend itself to judicially manageable standards. The Court in Powell also refused to “adher[e] to a political decision already made,” showed a “lack of respect” for Congress, caused the House “embarrassment,” and made a discretionary “policy determination.” Through impressive intellectual gymnastics, however, the Justices avoided finding a political question.

Similarly, in cases like INS v. Chadha, the Court has inquired into Congress’s procedures for enacting statutes, despite separation-of-powers objections and precedent to the contrary.

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105. See Baker, 369 U.S. at 217.
106. Id.
107. The Court held that Congress’s power to judge its members’ “qualifications” under Section 5, Clause 1 was limited to the age, citizenship, and residency qualifications listed in Section 2, Clause 2. Powell, 395 U.S. at 512–50. The opinion cited no evidence, however, that anyone during the previous 173 years had ever thought that federal courts could review congressional determinations concerning membership. Moreover, the Court conceded that Congress had often excluded members-elect for failure to meet “qualifications” other than the three categories contained in Section 2, Clause 2. Id. at 541–48.
109. See id. at 940–43 (concluding that the Court could review the Article I provisions requiring bicameral approval of all statutes and presentment of every bill to the President); see also United States v. Munoz-Flores, 495 U.S. 385, 389–96 (1990) (permitting a criminal defendant to assert that a federal statute had not been enacted pursuant to Article I, Section 7, Clause 1, which provides that “[a]ll Bills for raising Revenue shall originate in the House of Representatives”).
110. See, e.g., Field v. Clark, 143 U.S. 649, 672–80 (1892) (refusing to allow a party to question the assurance by Congress and the President that a federal statute had been properly authenticated and enrolled). Professor Schotland criticizes my treatment of these two cases by arguing that Field “involved nothing but the finality of official representations, but Chadha involved both aggrandizement of Congress’s power and encroachment on the executive.” Schotland, supra note 60, at 1509 n.19. Although I admit that these two decisions can be distinguished on various grounds, justiciability is not
Likewise, Congress’s exercise of its formerly plenary authority over Indian Tribes has been deemed justiciable.\textsuperscript{111}

Presidents have fared little better in asserting immunity from judicial review. Most famously, the Court rejected Richard Nixon’s claim of an absolute executive privilege to refuse to obey a subpoena ordering him to reveal confidential communications with subordinate executive officials.\textsuperscript{112} Nixon’s argument for nonjusticiability had strong support in Article II and in practice from the beginning of the Republic,\textsuperscript{113} yet the Justices intervened in the most politically explosive controversy in decades, Watergate. Similarly, even though executive branch determinations regarding another nation’s compliance with treaties had been considered a political question for two centuries, the Court applied \textit{Baker} to hold otherwise in \textit{Japan Whaling Ass’n v. American Cetacean Society}.\textsuperscript{114}

\begin{itemize}
\item one of them: Either federal courts have power to review whether Congress has complied with Article I formalities (as \textit{Chadha} held) or they do not (as \textit{Field} ruled). Ultimately, I conclude that the ordinary presumption favoring judicial review applies here, and that therefore the Court in \textit{Chadha} correctly intervened. \textit{See infra} notes 214–15 and accompanying text.
\item \textsuperscript{113} Before \textit{Nixon}, the Court had never suggested that federal judges could compel disclosure of confidential communications between the President and other executive officials. Moreover, the text and history of Article II indicate that the Framers created a “unitary executive” which rests upon the President’s exclusive control over his subordinates in the executive branch. \textit{See} Steven G. Calabresi \& Kevin H. Rhodes, \textit{The Structural Constitution: Unitary Executive, Plural Judiciary}, 105 HARV. L. REV. 1153, 1165–71, 1204–15 (1992).
\end{itemize}

Professor Schotland defends the Court’s holding that recognition of an absolute executive privilege would impede the “primary constitutional duty of the Judicial Branch to do justice in criminal prosecutions [under] Article III.” Schotland, \textit{supra} note 60, at 1509 n.19 (citing \textit{Nixon}, 418 U.S. at 707). In my view, the Court created a balancing test because enforcing the Constitution (which protects private executive branch communications) would have been unpalatable under the circumstances, in which President Nixon had little incentive to aggressively prosecute himself and his political appointees. Nonetheless, the federal judiciary’s “duty . . . to do justice in criminal prosecutions” is not unlimited, but rather is constrained by the Constitution. \textit{For example}, Article II grants the executive department complete discretion to dismiss (or to decline to institute) criminal proceedings, and a federal court cannot countermand that decision because it concludes that otherwise criminal justice would not be served.

\textsuperscript{114} \textit{478 U.S. 221,} 229–30 (1986) (ruling justiciable a claim that the Secretary of Commerce had improperly exercised his statutory power to decline to certify Japan as a result of its alleged violation of an international whaling treaty).
E. Two Questions Deemed Political

Since Baker, the Court has found only two questions to be “political.” First, Gilligan v. Morgan\textsuperscript{115} held nonjusticiable claims that the elected branches had been negligent in military training and procedures.\textsuperscript{116} Second, in Walter Nixon v. United States,\textsuperscript{117} the Court ruled impeachment to be a political question. Thus, it dismissed a complaint by a federal judge that the Senate had violated its Article I, Section 3, Clause 6 power to “try” impeachments by convicting him based on a committee report, rather than after a trial in front of the full Senate.\textsuperscript{118}

But what makes these two questions so different from others not deemed “political”? Why are military affairs more intractable to judicial resolution than treaties? Why does Article I commit impeachment exclusively to Congress, but not the seating of its own members?\textsuperscript{119} These questions cannot be answered by consulting the delphic and protean Baker. Indeed, the only legitimate criticism that can be leveled against the Court in any particular decision applying Baker is that it acted imprudently, not inconsistently with the “law.”\textsuperscript{120}

Could the Framers possibly have intended such an unprincipled approach to political questions? The answer is a resounding no. Moreover, the system the Founders did contemplate, and that the Federalist Justices implemented, remains superior to the one concocted in Baker.

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\item \textsuperscript{115} 413 U.S. 1 (1973).
\item \textsuperscript{116} See id. at 5-12 (dismissing a complaint arising out of the National Guard’s shooting of students during the Kent State protests).
\item \textsuperscript{117} 506 U.S. 224 (1993).
\item \textsuperscript{118} Id. at 226-38.
\item \textsuperscript{119} Indeed, Professor Wechsler, writing before Baker, argued that Congress’s Article I powers over its membership and impeachment were the two most clear-cut political questions. See Herbert Wechsler, Toward Neutral Principles of Constitutional Law, 73 Harv. L. Rev. 1, 8 (1959).
\item \textsuperscript{120} But see Mark Tushnet, Law and Prudence in the Law of Justiciability: The Transformation and Disappearance of the Political Question Doctrine, 80 N.C. L. Rev. 1203, 1204 (2002) (contending that Baker changed the Court’s formerly flexible and prudential approach to political questions into a rule-based legal analysis). The malleability that characterizes the modern political question doctrine can be seen in other jurisprudential areas. For example, the Court has authorized federal judges to assert “inherent authority” to manage litigation and impose sanctions for misconduct—an almost entirely discretionary judgment call subject to only the vaguest legal “limits.” See Robert J. Pushaw, Jr., The Inherent Powers of Federal Courts and the Structural Constitution, 86 Iowa L. Rev. 735, 792–93 (2001).
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II. THE FEDERALIST APPROACH: POLITICAL QUESTIONS AS REBUTTING THE PRESUMPTION OF JUDICIAL REVIEW

A. Constitutional Theory, Judicial Review, and Political Questions

The Constitution, on its face, does not specifically confer on federal courts the authority to examine the constitutionality of the conduct of political officials (federal or state), and therefore obviously does not tell us which such actions are immune from this power. Rather, both judicial review and the exceptions to it (i.e., "political questions") derive from the Constitution's underlying structure and political theory. Focusing on these constitutional elements reveals that the Baker Court misunderstood separation of powers, explicitly eliminated federalism as a consideration, and failed even to mention the central idea of a written Constitution that establishes a limited government based upon popular sovereignty.

Recovering the original constitutional understanding would greatly clarify the political question doctrine. In Hamilton's words, the Constitution created a "natural presumption" of judicial review that could be rebutted only by a few "particular provisions." To fully grasp Hamilton's crucial insight, it is necessary to summarize the Constitution's animating theory.

The Federalists' enduring contribution to political science was the relocation of sovereignty from the government (as in England) to "the People" collectively. The People could write constitutions that delegated certain specified powers to their representatives in either the state or national governments, whether in the legislative, executive, or judicial departments.
In our Constitution, "We the People" reserved the bulk of governmental powers to the states, yet established a federal government strong enough to control truly national matters like foreign affairs. The Constitution separated this government into three independent departments and gave each primary responsibility for exercising one of the three types of governmental power—"legislative" (making general, prospective laws), "executive" (administering the laws), and "judicial" (interpreting and applying the law as necessary to decide a specific case and render a binding judgment). Although Congress controlled its lawmaking agenda, any laws it enacted could be executed only by the President and expounded authoritatively solely by the judiciary—the coextensiveness principle. Even though federal judges were not elected, then, they represented the People by impartially exercising their Article III "judicial power."

The Founders complemented separation of powers with a system of checks and balances. First, the Constitution's structure—featuring autonomous branches with different methods of selection, constituencies, functions, and modes of action—was designed to keep each part of the government within its bounds. Second, the Framers gave each department the ability to resist encroachments through "checks" (i.e., specific authority to share in, or interfere with, the primary function of another branch). To illustrate, the Constitution authorizes the President to take part in the legislative


126. The Tenth Amendment simply confirms this fundamental tenet of constitutional structure.

127. See, e.g., 1 ELLIOT'S DEBATES, supra note 124, at 496–98 (John Jay).


129. See 2 ELLIOT'S DEBATES, supra note 124, at 445, 461, 464 (James Wilson); 3 id. at 532 (James Madison); THE FEDERALIST No. 80, at 535 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

130. Perhaps the Federalists' most radical claim was that federal courts represent the People. The People decided to appoint judges through a selective process, rather than have them elected, to ensure their quality and their independence from direct political pressure. See Pushaw, supra note 15, at 420–22 (setting forth the Federalist view that federal judges represented the People even though they were not elected).

131. The classic analysis of these issues is found in THE FEDERALIST NOS. 47–51 (James Madison).


133. See, e.g., id. at 349; THE FEDERALIST No. 48, at 332 (James Madison) (Jacob E. Cooke ed., 1961); 2 ELLIOT'S DEBATES, supra note 124, at 302 (Alexander Hamilton); 2 id. at 510–11 (James Wilson).
process through the veto. Similarly, the House can exercise the "executive" power of impeaching executive or judicial officials, and the Senate the "judicial" power of trying impeachments and rendering a final judgment. Third, the Framers required the President to share with the Senate several powers that in England had been treated as exclusively "executive," such as appointing executive officers and judges and conducting foreign affairs.

By contrast, the Philadelphia Convention delegates deliberately declined to require federal judges to participate in making or executing federal law, thereby avoiding judicial entanglement in partisan policymaking and preserving impartiality. Hence, courts could restrain unconstitutional conduct by Congress or the President only by exercising "judicial power."

Hamilton nicely encapsulated the foregoing political theory in *The Federalist Number 78* and related essays. Initially, he stressed that the Constitution ensured the quality of federal judges through a

134. *See* U.S. CONST. art. I, § 7, cl. 2. For discussion of the President's qualified veto, see *The Federalist No. 73* (Alexander Hamilton); 2 *Elliott's Debates*, *supra* note 124, at 446–47 (James Wilson).

135. *See* U.S. CONST. art. I, § 2, cl. 5; U.S. CONST. art. I, § 3, cl. 6. All the available historical evidence indicates that the Framers deliberately assigned the impeachment power exclusively to Congress and intended to foreclose judicial review. *See* Michael J. Gerhardt, *Rediscovering Nonjusticiability: Judicial Review of Impeachments After Nixon*, 44 DUKE L.J. 231, 234, 251–61, 271–73 (1994); Pushaw, *supra* note 15, at 429–30, 504–05 (citing sources). Most significantly, it would violate basic rule-of-law principles to give Congress authority to impeach and try judges—the only direct check against judicial misconduct—and then allow those same judges to determine the appropriate impeachment standards or to review convictions. *See* *The Federalist Nos. 79, 81* (Alexander Hamilton). Moreover, the Supreme Court was too small to be entrusted with discretion over impeachment and might not have the credibility to enforce a judgment reversing a congressional conviction. *See* *The Federalist No. 65* (Alexander Hamilton).


137. For example, Article I, Section 8 gave Congress the power to declare war (Clause 11) and to establish, finance, and regulate the armed forces and militia (Clauses 12–16). However, Article II, Section 2 designated the President as Commander-in-Chief. Similarly, the President was authorized to make treaties, but only with the Senate's "advice and consent" and the approval of two-thirds of its members. *See* U.S. CONST. art. II, § 2, cl. 2. The Framers' goal was to ensure cooperative and deliberative action. *See*, e.g., *The Federalist No. 75* (Alexander Hamilton); 2 *Elliott's Debates*, *supra* note 124, at 466, 505–07 (James Wilson).

138. *See* Pushaw, *supra* note 15, at 431–32 (describing the delegates' rejection of numerous proposals to involve federal judges in councils to review legislative bills and to advise the President).

selective appointment process and guaranteed their independence by granting them permanent tenure and an undiminished salary. Only distinguished jurists insulated from direct political pressure could properly exercise the "judicial power" of deciding cases according to the law—most importantly, those arising under the Constitution, the People's fundamental and supreme law. Therefore, Hamilton continued, the Constitution had to control over clearly inconsistent acts of the legislature or executive. Furthermore, the rule of law dictated that only independent federal judges could impartially determine whether political actors had complied with the written constitutional limits on their power; otherwise, those restrictions would "amount to nothing."

Overall, then, Hamilton concluded that the Constitution created a "natural presumption" favoring judicial review:

It is not ... to be supposed that the Constitution could intend to enable the representatives of the people to substitute their will to that of their constituents. It is far more rational to suppose that the courts were designed to be

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140. See U.S. CONST. art. II, § 2 (providing that the President would appoint judges with the Senate's advice and consent). Hamilton argued that this elite selection process, rather than popular election, would produce judges with the greatest knowledge, ability, and integrity. See THE FEDERALIST NOs. 76 & 77 (Alexander Hamilton); THE FEDERALIST NO. 78, supra note 16, at 529-30; THE FEDERALIST NO. 79, at 531-32 (Alexander Hamilton) (Jacob E. Cooke ed., 1961); see also THE FEDERALIST NO. 51, supra note 132, at 348 (to the same effect).

141. See U.S. CONST. art. III, § 1 (assuring life tenure during "good behavior" and providing that judicial salaries could be increased but not decreased). Hamilton maintained that such provisions would secure consistent and impartial adjudication. THE FEDERALIST NO. 78, supra note 16, at 522-29. He emphasized that "[t]he complete independence of the courts of justice is peculiarly essential in a limited constitution." Id. at 524. For similar arguments, see THE FEDERALIST NO. 79 (Alexander Hamilton); 2 ELLIOT, supra note 124, at 480-81, 489 (James Wilson).


143. The People declared that "[t]his Constitution" is "the supreme Law" and specifically directed state judges to apply it over conflicting state laws. U.S. CONST. art. VI. If those judges did not do so, it seems plain that the Supreme Court (or perhaps inferior federal courts established by Congress) can exercise federal question jurisdiction to correct such errors. More subtly, Article VI also makes federal laws and treaties passed "in Pursuance" of the Constitution supreme over state laws, thereby suggesting that federal courts can review such federal laws to ensure that they complied with constitutional formalities. See Wechsler, supra note 119, at 2-5. Hamilton described independent federal courts as "the bulwarks of a limited [C]onstitution" who could ensure the supremacy of the People's fundamental law by "guard[ing] the [C]onstitution and the rights of individuals." THE FEDERALIST NO. 78, supra note 16, at 524-27.

144. See, e.g., THE FEDERALIST NO. 78, supra note 16, at 524 (Federal courts must "declare all acts contrary to the manifest tenor of the [C]onstitution void."); see also id. at 524-27 (elaborating this position).

an intermediate body between the people and the legislature, in order ... to keep the latter within the limits assigned to their authority. The interpretation of the laws is the proper and peculiar province of the courts. A [C]onstitution is in fact, and must be, regarded by the judges as a fundamental law. It therefore belongs to them to ascertain its meaning as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought of course to be preferred; or in other words, the [C]onstitution ought to be preferred to the statute, the intention of the people to the intention of their agents.

Nor does this conclusion by any means suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both; and that where the will of the legislature declared in its statutes, stands in opposition to that of the people declared in the [C]onstitution, the judges ought to be governed by the latter, rather than by the former. They ought to regulate their decisions by the fundamental laws... 146

Yet Hamilton recognized that this presumption could be rebutted:

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

Elsewhere in The Federalist, Hamilton left little doubt about some of the "particular provisions" he had in mind. Most obviously, Congress had unreviewable discretion in exercising its impeachment power.148 Similarly immune from judicial examination were the

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146. Id. at 525. Other leading Federalists echoed Hamilton's argument that the Constitution's structure and theory supported the exercise of judicial review. See, e.g., 2 Elliot, supra note 124, at 445-46, 478, 489 (James Wilson); 2 Farrand, supra note 136, at 73-78 (James Madison).
147. THE FEDERALIST No. 78, supra note 16, at 524-25.
148. See, e.g., THE FEDERALIST No. 79, supra note 140, at 532-33. Perhaps most significantly, Hamilton identified impeachment as an "important constitutional check"—indeed, "a complete security" against judicial usurpation. THE FEDERALIST No. 81, at 545-46 (Alexander Hamilton) (Jacob E. Cooke ed., 1961). This statement would make no sense if he thought that federal courts could review congressional impeachment determinations. See also supra note 135 and accompanying text (describing the consensus on this point among the Framers and Ratifiers).
constitutional provisions authorizing Congress to declare war\textsuperscript{149} and the Senate to give the President advice and consent on treaties and appointments.\textsuperscript{150} And although Hamilton confined his analysis in \textit{The Federalist Number 78} to judicial review of legislative acts, his rationale applies equally to the President's conduct, and his analysis of various executive powers (for example, the veto and the President's role as Commander-in-Chief and in foreign affairs) suggests unmistakably that they are political questions.\textsuperscript{151}

The Hamiltonian approach to judicial review and political questions was faithfully implemented by the Federalist Justices who dominated the Supreme Court during its first several decades.\textsuperscript{152} Indeed, this model lasted until the early twentieth century.\textsuperscript{153}

\textbf{B. The First Century of the Supreme Court's Political Question Doctrine}

\textit{1. Early Decisions}

The Jay and Ellsworth Courts often simply exercised power to review the constitutionality of the actions of federal and state officials, thereby implicitly concluding that they did not raise political questions. For instance, in \textit{Hollingsworth v. Virginia},\textsuperscript{154} the Justices rejected the argument that the Eleventh Amendment's adoption had violated Article I, Section 7 because of the failure to present it to the President for his approval. The Court ruled that this approval/veto power applied only to ordinary legislative bills, not to constitutional amendments.\textsuperscript{155} Obviously, the Justices would not have rendered this opinion if they had thought that the amendment process involved political issues that the judiciary was incompetent to entertain. In fact, during its first decade the Court explicitly recognized only one nonjusticiable area: federal political officials' determinations as to

\begin{itemize}
\item 149. U.S. CONST. art. I, § 8, cl. 11.
\item 150. U.S. CONST. art. II, § 2, cl. 2. For a defense of shared political-branch control over appointments and treaties, see THE FEDERALIST NOS. 75 & 76 (Alexander Hamilton).
\item 151. \textit{See} THE FEDERALIST NO. 73 (Alexander Hamilton) (veto); \textit{id.} NOS. 69, 74 (Alexander Hamilton) (Commander-in-Chief); \textit{id.} NO. 75 (Alexander Hamilton) (foreign affairs). Hamilton never mentioned any possibility of judicial review of such executive decisions, and it is fair to say that such a prospect would have been unimaginable to him.
\item 152. \textit{See infra} notes 154–73 and accompanying text.
\item 153. \textit{See infra} notes 174–96 and accompanying text.
\item 154. 3 U.S. (3 Dall.) 378 (1798).
\item 155. \textit{Id.} at 381 n.1.
\end{itemize}
whether a foreign country had breached a treaty and/or taken hostile actions that constituted war.156

The Marshall Court supplied a more systematic analysis of judicial review and political questions. Most significantly, Marbury v. Madison157 adopted the Hamiltonian position.158 Chief Justice Marshall argued that judges had to decide particular cases by expounding the law, that the Constitution contained the supreme and fundamental law, and that therefore the Court had to enforce the Constitution and not a plainly unconstitutional act of Congress.159 In another part of the opinion, the Court held that the judiciary could examine whether executive officials had complied with particular “ministerial” (i.e., nondiscretionary) statutory obligations in order to remedy any violation of vested legal rights, despite possible political implications.160

Chief Justice Marshall acknowledged, however, that “[q]uestions in their nature political, or which are, by the Constitution and laws, submitted to the executive, can never be made in this court.”161 Two examples were the President’s nomination of executive officers and foreign policy decisions that did not abridge individual legal rights.162 The Court made it clear that, in such situations, the President’s exercise of discretion is necessarily “legal” and hence cannot infringe anyone’s “rights”—not that certain violations of legal rights cannot be remedied.163

Similarly, Martin v. Mott164 sustained a law authorizing the President to determine whether an emergency required mobilizing the militia to defend against an invasion.165 The Court then held that judicial review of the President’s decision would unduly compromise his Article II power as Commander-in-Chief and might jeopardize national security, and therefore deemed the matter a political question.166

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156. See Ware v. Hylton, 3 U.S. (3 Dall.) 199, 221–96 (1796).
157. 5 U.S. (1 Cranch) 137 (1803).
158. Although the Marbury Court did not use Hamilton’s “rebuttable presumption” language, it incorporated his analytical framework almost exactly. See supra note 147 and accompanying text (citing Hamilton’s terminology).
160. Id. at 154–73.
161. Id. at 170.
162. Id. at 166–67.
163. Id. at 164–71.
165. Id. at 28–29.
166. Id. at 29–32.
The Marshall Court also recognized that Congress had exclusive discretion in exercising certain powers, such as declaring war\textsuperscript{167} and related matters (for instance, interpreting America’s treaty obligations and determining the rights of foreigners during wartime).\textsuperscript{168} In Gibbons \textit{v.} Ogden,\textsuperscript{169} the Court held that its review under the Commerce Clause was restricted to ensuring that Congress had actually regulated “commerce” (i.e., trading and transporting goods and related market transactions) “among the several states” (i.e., commerce that concerned more than one state, as opposed to purely internal state transactions).\textsuperscript{170} Otherwise, Chief Justice Marshall declared:

\begin{quote}
[Power over commerce ... is vested in Congress ... absolutely.... The wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at election, are, in this, as in many other instances, as that, for example, of declaring war, the sole restraints on which they have relied, to secure them from its abuse. They are the restraints on which the people must often rely solely, in all representative governments.\textsuperscript{171}
\end{quote}

Finally, the Court often considered federalism issues in declining to become entangled in political disputes. For instance, in Cherokee Nation \textit{v.} Georgia,\textsuperscript{172} the Court held that it lacked original jurisdiction to enjoin Georgia’s assertion of power to abolish the Cherokee Tribe—an interpretation heavily influenced by the delicate political situation in that state.\textsuperscript{173}

In sum, during its formative years the Supreme Court routinely asserted power to review the constitutionality of actions of political officials, except when the Constitution’s text, structure, and theory

\textsuperscript{167.} Talbot \textit{v.} Seeman, 5 U.S. (1 Cranch) 1, 28 (1801).
\textsuperscript{169.} 22 U.S. (9 Wheat.) 1 (1824).
\textsuperscript{170.} \textit{Id.} at 189–99.
\textsuperscript{171.} \textit{Id.} at 197. For an extensive treatment of Gibbons, see Grant S. Nelson & Robert J. Pushaw, Jr., \textit{Rethinking the Commerce Clause: Applying First Principles to Uphold Federal Commercial Regulations but Preserve State Control Over Social Issues}, 85 IOWA L. REV. 1, 57–63, 119–31 (1999) [hereinafter Nelson & Pushaw, \textit{Rethinking the Commerce Clause}] (contending that the original meaning of the Article I power “to regulate commerce among the several states,” as correctly interpreted by the Marshall Court, was to give Congress broad authority to regulate all activities intended for the interstate marketplace, and that this understanding can be applied today to salvage most legislation enacted under this Clause); see also Robert J. Pushaw, Jr. & Grant S. Nelson, \textit{A Critique of the Narrow Interpretation of the Commerce Clause}, 96 NW. U. L. REV. 695, 696–719 (2002) (defending this thesis against a challenge by Professor Randy Barnett).
\textsuperscript{172.} 30 U.S. (5 Pet.) 1 (1831).
\textsuperscript{173.} \textit{Id.} at 15–20.
indicated that a particular question had to be left exclusively to elected governmental officials for final determination (for example, congressional and presidential decisions concerning military and foreign affairs, the President's appointment power, and Congress's evaluation about the need for interstate commercial regulations). When the exercise of otherwise purely political powers allegedly invaded individual legal rights, however, the Court typically would hear the injured party's claim but show extraordinary deference to the political branches.

2. Luther and its Progeny

The post-Marshall Court continued this pattern. The seminal case is Luther v. Borden.174 Luther involved the Rhode Island government, which had existed continuously since being granted a royal charter in 1663 and had refused to reapportion its legislature to recognize the great population shift from rural areas to cities such as Providence.175 In 1841, a special convention drafted, and a majority of the state's citizens ratified, a new state constitution, under which a competing government was elected.176 The charter government refused to recognize the new regime and declared temporary martial law to fight it.177 In 1842, a sheriff of the charter government (Borden) broke into the home of an official of the new one (Luther) to search for evidence of rebellious activity.178 Luther brought a trespass action against Borden, who defended his search as authorized by his government. Luther then claimed that Borden had lacked legal power to act because the charter government violated the Republican Form of Government Clause.179 The Rhode Island courts had uniformly ruled that the legitimacy of the charter government was a question for political rather than judicial resolution.180

The U.S. Supreme Court held that the Guarantee Clause did not empower it to decide Luther's claim.181 The opinion began by emphasizing two federalism concerns. First, the Court should respect the Rhode Island judiciary's interpretation of state law.182 Second,

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174. 48 U.S. (7 How.) 1 (1849). For further discussion of this decision, see Pushaw, supra note 6, at 361–62; Pushaw, supra note 15, at 453–54.
175. See Luther, 48 U.S. (7 How.) at 35.
176. Id. at 35–36.
177. Id. at 34–38.
178. Id. at 34–35.
179. Id. at 34–38.
180. Id. at 38–39.
181. Id. at 39–45.
182. Id. at 39–40.
the Justices cautioned that declaring the charter government unconstitutional would invalidate all of its actions—a chaotic result to be avoided unless the Constitution clearly compelled it. Turning to separation-of-powers considerations, the Court ruled that it had to yield to Congress’s judgment that the charter government was the legitimate one and hence “republican.” Moreover, as Congress had given the President sole discretion to decide when exigencies required calling out the militia to suppress an insurrection, and as he had exercised this power by recognizing the charter government, the Court must defer to him, just as it had acceded to the President’s analogous recognition of a foreign government.

In short, Luther’s finding of nonjusticiability rested upon both federalism and separation-of-powers grounds, and it was limited to the unique situation where the state courts and the federal political branches had already determined that one of two rival state governments was valid. The Court did not hold that all complaints under the Guarantee Clause raised political questions. For example, it accepted the validity of Rhode Island’s temporary declaration of martial law to meet threats to its very existence, but declined “to inquire to what extent, [or under what circumstances, that power may be exercised by a State] before a Guarantee Clause violation would occur.” This qualifier would be incomprehensible if the Justices believed they never could consider whether a state’s actions offended that Clause.

Indeed, the Court thereafter adjudicated many such cases. For example, in Minor v. Happersett, it did not mention any political question bar in hearing the claim, which ultimately proved unsuccessful, that a state’s failure to grant its female citizens the right to vote ran afoul of the Republican Form of Government Clause. Similarly, In re Duncan held on the merits that a particular state court interpretation of a state statute to ascertain whether it had been duly enacted did not violate this Clause. Likewise, in Forsyth v. Hammond, the Court treated as justiciable (although it rejected)

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183. Id. at 38–39.
184. Id. at 42.
185. Id. at 43–45.
186. Id. at 45. The Baker Court’s failure to mention this sentence is inexplicable, given its intent to limit the scope of the political question doctrine.
187. 88 U.S. (21 Wall.) 162 (1875).
188. Id. at 175–76.
189. 139 U.S. 449 (1891).
190. Id. at 461–62.
191. 166 U.S. 506 (1897).
the complaint that a state could not, consistent with this Clause, leave the determination of the territorial boundaries of municipalities to its courts rather than its legislature.192 As late as 1905, the Court rendered two substantive decisions involving this Clause, again declining to declare state governments unconstitutional.193

Overall, Luther and its progeny established that the Guarantee Clause did not automatically raise a political question, but that it would be interpreted with great deference to the states' actions. Other cases, however, began to intimate that claims under this Clause were nonjusticiable, particularly when Congress had already determined that a state's government was republican.194 Those decisions eventually metamorphosed into a full-blown ban on Republican Form of Government claims beginning in 1912.195

During the nineteenth century, however, the Court followed the Luther approach—exercising jurisdiction but with due deference to elected officials—in other areas. For instance, the Court always adjudicated cases implicating foreign affairs when individual legal rights were at stake, but it usually accepted as the governing rule the legal interpretation previously proffered by the political branches.196

As described earlier, however, the Court in the twentieth century gradually lost sight of the Federalist model of judicial review and political questions.197 Indeed, the doctrine was in such intellectual

192. Id. at 519.
193. See Michigan ex rel. Kies v. Lowrey, 199 U.S. 233, 239 (1905) (concluding that a state legislature did not render its government non-republican by creating, altering, and dividing the property of school districts); South Carolina v. United States, 199 U.S. 437, 454 (1905) (finding no violation under this Clause). Other examples of the justiciability of such claims include Foster v. Kansas ex rel. Johnson, 112 U.S. 201 (1884), and Kennard v. Louisiana ex rel. Morgan, 92 U.S. 480 (1875).
194. See, e.g., Downes v. Bidwell, 182 U.S. 244, 278–79 (1900) (avoiding the question of whether Congress must establish republican governments in the territories before they become states). The earliest case applying this analysis was Georgia v. Stanton, 73 U.S. (6 Wall.) 50, 71–77 (1867), wherein the Court refused to second-guess Congress's abolition of Georgia's government during Reconstruction. Given the situation, where Congress had made it clear it would impeach any federal official, judicial or executive, who interfered with Reconstruction, this precedent is not terribly persuasive. See also Taylor & Marshall v. Beckham, 178 U.S. 548 (1899) (holding nonjusticiable a complaint that Kentucky's resolution of a contested election for governor deprived voters of a republican government).
195. See supra notes 22–31, 35–40 and accompanying text.
197. See supra notes 22–41 and accompanying text; see also Kramer, supra note 98, at 13, 110–20 (demonstrating that, before the twentieth century, the Court adhered to an
disarray by 1962 that it was fairly easy for the Warren Court to cherry-pick material in various cases to support its result. As we have seen, however, the Baker analysis depends almost entirely on the discretion of the majority of the Justices, untethered to any legal principles rooted in the Constitution's structure, theory, history, or early precedent. Surely the Court can do better than this.

III. REVIVING THE "REBUTTABLE PREJUSMPTION" ANALYSIS

Critics might respond to my proposal by claiming that "you can't turn the clock back" and that Americans should not be legally bound by the "dead hand" of the Federalists. That argument might be persuasive if we were dealing with a subject on which the original understanding has been thoroughly repudiated and would therefore provide no useful legal guidance (for example, the Framers' ideas concerning race and gender). But here we are addressing fundamental issues of constitutional structure and political theory, and I submit that on such matters the Founders had certain insights that are timeless and uniquely valuable, despite the massive changes in America's government over the past two centuries.198

Specifically, I believe that the Hamilton/Marshall approach to political questions still makes sense: The Constitution creates a powerful yet rebuttable presumption in favor of judicial review199 This presumption can be overcome only when government officials exercise certain powers (e.g., the veto, impeachment, appointments, and military and foreign policy decisions) that do not fit within the usual framework of making, executing, and judging the law—the triad that undergirds the coextensiveness principle, which in turn provides a key justification for horizontal judicial review.200 Because "We the

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198. I recognize that the Civil War and Reconstruction, the New Deal, and the Warren Court's jurisprudence have virtually destroyed the original conception of federalism, which contemplated a relatively limited role for the federal government. Obviously, the elimination of the racist "states' rights" strain of federalism is an incontestable improvement. Nonetheless, uniform federal rules, whether imposed by Congress or the Court, have undercut the healthy diversity of approaches that results when states control their own political systems and laws reflecting their citizens' social, moral, and cultural norms. See Nelson & Pushaw, Rethinking the Commerce Clause, supra note 171, at 115-19. Thus, I do not accept the contention that Baker supplies the correct approach to political questions because it follows the modern trend of ignoring all concerns for the states' ability to operate their governments.

199. The following argument is a condensed version of that presented in Pushaw, supra note 15, at 497-511.

200. See supra notes 121-51 and accompanying text.
People" entrusted their federal government representatives with complete latitude in these areas, by definition the exercise of such discretion cannot violate the Constitution.201

The clearest illustrations of true political questions are the Constitution's two classical checks. First, the President has absolute discretion in deciding whether to veto or approve a bill,202 and this exception to the Constitution's otherwise exclusive delegation of "legislative power" to Congress would be vitiated if federal courts also asserted the authority to share in the lawmaking process. Second, impeachments are the sole grant of "judicial power" to Congress. Again, this explicit exception to the judiciary's core constitutional function would be difficult to comprehend if courts could exercise their normal judicial review power in the context of impeachment.203 Therefore, the Court reached the right result in Walter Nixon v. United States,204 albeit through the application of Baker's amorphous factors (especially the "textual commitment" one) rather than through an explanation grounded in constitutional structure and theory.205

The Framers fully grasped the inherently political nature of vetoes and impeachments, and in conferring these checks accepted the possibility of their abuse and counted on the political process alone to curb any excesses: A President who repeatedly thwarts the popular will expressed by Congress, or a Congress that impeaches unwisely, will pay a heavy political price.206 The Founders' faith has been vindicated by over two hundred years of practice, which has generally featured a restrained exercise of such checks and has never required judicial review to police the occasional misguided veto or impeachment.

Another type of political question involves the constitutionally mandated sharing between the President and Congress of certain powers that before 1787 had been considered "executive." For instance, the President appoints federal executive and judicial officers, but only with the Senate’s advice and consent.207 A disappointed office-seeker cannot obtain judicial review of the

201. See supra notes 131–51 and accompanying text.
202. U.S. CONST. art. I, § 7, cl. 2; see supra notes 134, 151 and accompanying text.
203. See supra notes 135, 148 and accompanying text. Moreover, the Anglo-American maxim that court judgments must be final applies even where the tribunal is composed of legislators.
205. See supra notes 135, 148 and accompanying text.
207. U.S. CONST. art. II, § 2, cl. 2; see supra notes 136, 150, 162 and accompanying text.
political branches' decision, however unfair it may seem, because he has no legal "right" to the office.\textsuperscript{208}

Other shared powers concern military and foreign affairs. For example, only Congress can declare war and raise and support armies, but the President is Commander-in-Chief.\textsuperscript{209} Likewise, although the President negotiates treaties, they require the Senate's advice, consent, and approval.\textsuperscript{210} The early Supreme Court recognized that the allocation of these discretionary powers to the political departments excluded judicial review, except in very rare circumstances when their exercise plainly violated an individual's vested legal rights.\textsuperscript{211} The modern Court has correctly continued to hold that the process of making foreign and military policy, which affects all Americans equally, raises political questions.\textsuperscript{212} To illustrate, the negotiation, ratification, and termination of treaties are nonjusticiable issues.\textsuperscript{213}

Except for vetoes, impeachments, and foreign policy, all other constitutional provisions enjoy an irrebuttable presumption of reviewability. For example, in cases such as \textit{INS v. Chadha},\textsuperscript{214} the Court has properly entertained claims that Congress failed to enact laws according to Article I formalities.\textsuperscript{215} Instead of its ritualistic incantation and application of the \textit{Baker} factors, the Court should simply have held that Article I's provisions delineating the procedures for enacting statutes are as amenable to judicial review as any other part of the Constitution, and that nothing in the Constitution's structure, theory, or history rebuts this presumption. For similar reasons, the allegation that a constitutional amendment did not comply with the requirements of Article V should have been

\textsuperscript{208} See \textit{Erwin Chemerinsky, Interpreting The Constitution} 102 (1987) (concluding that the only truly discretionary political questions are appointments and vetoes).

\textsuperscript{209} U.S. CONST. art. I, § 8; U.S. CONST. art. II, § 2; \textit{see supra} notes 137, 149, 151, 165-68 and accompanying text.

\textsuperscript{210} U.S. CONST. art. II, § 2, cl. 2; \textit{see supra} notes 137, 150, 156, 168 and accompanying text.

\textsuperscript{211} \textit{See supra} notes 156-73 and accompanying text (citing cases).

\textsuperscript{212} \textit{See}, e.g., \textit{Gilligan v. Morgan}, 413 U.S. 1 (1973) (refusing to grant an injunction requiring judicial review of military training); \textit{see also supra} note 116 and accompanying text (discussing \textit{Gilligan}).

\textsuperscript{213} \textit{See Goldwater v. Carter}, 444 U.S. 996, 1002-06 (1979) (plurality opinion) (concluding that Senators cannot judicially challenge the President's termination of a treaty). Of course, individuals granted rights by treaties may seek redress for infringement of those rights pursuant to statutes enacted under Article III, which confers federal jurisdiction over all cases arising under treaties. \textit{See} U.S. CONST. art. III, § 2, cl. 1.

\textsuperscript{214} 462 U.S. 919 (1983).

\textsuperscript{215} \textit{See supra} notes 109-10 and accompanying text.
deemed justiciable in *Coleman v. Miller.* Because the amended Constitution is the People's supreme law, and because federal courts must uphold that law, they cannot allow Congress total power over amendments, as the early Justices recognized but their modern counterparts have forgotten.

Finally, and most pertinently for present purposes, certain constitutional provisions are justiciable but should be interpreted with extraordinary deference to the elected branches. To illustrate, military or foreign affairs decisions that allegedly violate individual legal rights (as contrasted with those that concern all Americans) are judicially reviewable, but under standards that resolve every doubt in favor of the validity of the government's action. Similarly, the Constitution gives Congress vast authority over federal electoral matters and generally grants states free rein over their internal governmental systems. Therefore, the Court should not upset federal or state electoral determinations unless they violate established constitutional rights. For instance, in *Bush v. Gore,* the Court should have waited until the Florida Legislature had discharged its Article II duty to appoint its state's presidential electors and Congress had fulfilled its obligations under the Twelfth Amendment to count

217. See supra notes 154–55 and accompanying text; see also Chemerinsky, supra note 208, at 103–04 (arguing that "judicial review is necessary to ensure that the political process does not disregard the restrictions of Article V"). The contrary conclusion in *Coleman* lacks a foundation in traditional constitutional theory, history, and precedent. See supra notes 20–21, 154–55 and accompanying text (citing sources).
218. See supra p. 1193 and notes 186–96, 211 and accompanying text.
219. In practice, the Court has shown almost blind deference to political-branch judgments about military and foreign policy, even when those decisions seemed to contravene the most fundamental constitutional rights and liberties. The most sobering example is *Korematsu v. United States,* 323 U.S. 214 (1944), in which the Court ruled on the merits that the federal government's internment of Japanese-Americans during World War II did not infringe their due process or equal protection rights. *Id.* at 216–18. In my view, the Court properly found the claim justiciable, but took a course of abdication rather than deference in upholding a clear-cut violation of the Constitution, as several dissenters argued. See id. at 225–33 (Roberts, J., dissenting); id. at 233–42 (Murphy, J., dissenting); id. at 242–48 (Jackson, J., dissenting).
220. See, e.g., U.S. Const. art. I, § 4 (empowering Congress to "make or alter" state regulations concerning "[t]he Times, Places, and Manner" of congressional elections); U.S. Const. art. I, § 2, cl. 3 (authorizing Congress to apportion seats in the House of Representatives); see also Wechsler, supra note 119, at 8–9 (contending that these provisions granted Congress a power to draw election districts that is immune from judicial review).
221. Specifically, the Fifteenth Amendment protects members of minority groups from discrimination by a state in the exercise of their voting rights. See supra notes 41, 52 and accompanying text.
and certify each state’s electoral votes. At that point, the Court should have asserted jurisdiction but deferred to the decisions of the political officials, absent a plain violation of an existing constitutional right—as opposed to minting a new equal protection “right” to be applied to that case only.

The foregoing analysis suggests that the Court in *Baker* did have the power to exercise judicial review, although its explanation for doing so was unpersuasive. The majority should have candidly admitted that the plaintiffs’ claim—that a state apportionment statute diluted urban votes—did not arise under the Equal Protection Clause, but rather under the Republican Form of Government Clause. The Court reached the opposite conclusion because it incorrectly assumed that all complaints under the latter Clause raised political questions. Instead, Justice Brennan should have acknowledged that *Luther v. Borden* did not create such a prohibition, that the Court had decided many Guarantee Clause claims until 1912, and that since then it had misinterpreted *Luther* in many cases—including those involving challenges to state apportionments.

As in *Luther* and its progeny, however, the Court should have construed the Republican Form of Government Clause with tremendous deference to both the states and the federal political departments, whose judgments should not be overturned except in the most compelling circumstances (such as a state’s establishment of martial law or a theocracy). Although these possibilities may seem farfetched, that is precisely the point: Federal courts would be warranted in invalidating governments as “unrepublican” only in egregious situations, which would be highly unlikely to arise because of the political ramifications for elected officials who dared to take

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223. See id. at 152-58 (Breyer, J., dissenting) (detailing this argument).

224. See Pushaw, supra note 6, at 392-402 (developing this thesis); see also Frank I. Michelman, Suspicion, or the New Prince, 68 U. CHI. L. REV. 679, 684-85 (2001) (describing the novelty and implausibility of the Court’s equal protection holding).

225. See John Hart Ely, Democracy and Distrust 122 (1980); see also McConnell, supra note 60, at 106 (maintaining that the Court should have rested its decision on the Guarantee Clause and invalidated only those apportionment laws, like Tennessee’s in *Baker*, that thwarted republican government by preventing majority rule).


227. See supra notes 22-40, 174-97 and accompanying text (citing this precedent); see also New York v. United States, 505 U.S. 144, 184-85 (1992) (recognizing that scholars had convincingly demonstrated that the Court before 1912 had often decided cases involving this Clause).

228. Recall that the Court in *Luther* held that a state’s temporary declaration of martial law had not violated the Republican Form of Government Clause, but intimated that permanent martial law would. *Luther*, 48 U.S. (7 How.) at 45, discussed supra notes 177, 186 and accompanying text.
such actions. Thus, the Court in *Baker* should have upheld the implicit determination of Congress and the President that state apportionment laws which reflected geography and interest-group influence (for example, favoring agricultural over urban areas) did not run afoul of the Guarantee Clause.\textsuperscript{229} Although a "democratic" government might require that representation rest solely on population, a "republican" government does not; otherwise, the Senate and the Electoral College would be unconstitutional.\textsuperscript{230}

That is not to say, however, that federal judges should accede to political-branch interpretations of the Republican Form of Government Clause that violate recognized individual constitutional rights. For instance, the Court properly struck down state electoral laws that discriminated against black voters in contravention of their Fifteenth Amendment rights.\textsuperscript{231} Nothing in the text, history, or precedent of the Fourteenth Amendment's Equal Protection Clause, however, prevented states from establishing legislative districts based upon non-invidious considerations such as geography.\textsuperscript{232}

Consequently, the Court in *Baker* should have taken jurisdiction, deferred to the state and federal government's determination that Tennessee had a republican government, and held that the plaintiffs had failed to state a claim under the Equal Protection Clause.

**CONCLUSION**

Although the majority in *Baker* correctly found the case to be justiciable, they did so by creating and applying an ahistorical, totally discretionary multifactor approach that has not produced, and cannot yield, legally consistent results. By contrast, my proposed Hamiltonian model has deep historical roots, a sound legal basis, and the potential to make sense out of the political question doctrine. Thus, I suggest that the Court go "back to the future" and adopt a strong presumption that the power of judicial review should be exercised, absent persuasive evidence that the Constitution's structure, political philosophy, history, and formative precedent make a question suitable for political resolution only.

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\textsuperscript{229} See supra notes 28–60 and accompanying text.
\textsuperscript{230} See supra note 51 and accompanying text.
\textsuperscript{231} See supra note 41 and accompanying text.
\textsuperscript{232} See supra notes 37–52 and accompanying text.