

Links to other recent work by Professor Weinberg appear at the conclusion of this article.

**Ira C. Rothgerber, Jr. Conference on Constitutional Law:
Guaranteeing a Republican Form of Government**

Political Questions and the Guarantee Clause
65 U. COLO. L. REV. 849 (1994)

*Louise Weinberg**

TABLE OF CONTENTS

I. POLITICAL QUESTIONS	889
A. <i>The True Position</i>	889
1. An Unworkable Distinction	889
<i>United States v. Munoz-Flores</i>	890
<i>INS v. Chadha</i>	891
2. The Legitimacy Bogey	892
B. <i>The Three Difficulties</i>	893
1. Standing	893
a. The Public Action and the Claim of Right	893
b. Complaints About Allocations of Power	894
c. Complaints About Procedure	895
<i>Dalton v. Specter</i>	895
d. What Difference Would the “Individual Rights’ Thesis Make?	897
2. Equity: Herein of Crisis, Confrontation and Chaos	899

*. Wynne Professor in Civil Jurisprudence, The University of Texas. This essay was written in preparation for a talk given at the Rothgerber Conference on Constitutional Law, University of Colorado Law School, Boulder, Colorado, March 18, 1994. This was in response to a thoughtful draft paper by Professor Erwin Chemerinsky. Cf. Erwin Chemerinsky, *Cases Under the Guarantee Clause Should Be Justiciable*, 65 U. COLO. L. REV. 849 (1994) (this issue). My thanks to Dean Gene Nichol and the Conference hosts and participants.

I am grateful to Hans Baade, Philip Bobbitt, Douglas Laycock, Sanford Levinson, and Jordan Steiker for helpful comments and conversations.

a.	Noncompliance and Hasty Compliance.	900
	<i>Powell v. McCormack</i>	901
b.	Law and Morals	905
c.	The “Institutional Capital” Concern and the Pusillanimous Court	906
	<i>Ex Parte McCardle</i>	908
3.	Powers “Confided” to a Political Branch	910
a.	On Being Above the Law.	911
	(1994) 65 U. Colo. L. Rev. 888	
b.	Distinguishing the Judicial from the Political Function	913
	<i>Nixon v. United States</i>	913
II.	THE GUARANTEE CLAUSE	920
A.	<i>The Regrettable Instability of Baker v. Carr</i>	920
B.	<i>Looking Backward: Luther v. Borden.</i>	923
1.	<i>Luther</i> in Hindsight: The “Chaos” Argument and the Fear of Litigation	924
2.	More on <i>Luther</i> in Hindsight: What <i>Luther</i> Was Really About	928
3.	The Exception That Proves the Rule: <i>Georgia v. Stanton.</i>	931
C.	<i>The Right Complaint in the Right Court at the Right Time</i>	934
1.	A Revived Political Question Doctrine?	936
D.	<i>Do We Need A Political Question Doctrine?</i>	937
1.	Deciding by Default.	937
2.	Current Adjudication.	939
	<i>Marks v. Stinson.</i>	939
	<i>New York v. United States.</i>	940
3.	Spurious State Power: The Logic of <i>Sabbatino</i>	941
III.	ENVOI	946

(1994) 65 U. COLO. L. REV. 889 *The province of the court is, solely, to decide on the rights of individuals Questions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court*

Chief Justice Marshall in *Marbury v. Madison*

I. POLITICAL QUESTIONS

A. *The True Position*

The argument of this essay is that the interpretation of issues of constitutional law, or of federal law generally, cannot be confided exclusively to a political branch. I hasten to agree with the reader that the interpretation of law cannot be confided exclusively to the judiciary, either. No, ours is a government of co-equal powers—each branch makes law. I say only that a question requiring the interpretation of federal law or the Constitution cannot be taken from the judiciary and confided exclusively to either political branch. The interpretation of law is the essential judicial function.

1. An Unworkable Distinction

We hear of so many attempts to draw a finer line between what in *Marbury v. Madison*¹ Chief Justice Marshall called questions in their nature “political,” and questions touching upon the “rights of individuals.”² I have before me a proposal by Professor Chemerinsky,³ a writer of stature and an expert on federal courts.⁴ Professor (1994) 65 U. COLO. L. REV. 890 Chemerinsky proposes a presumption favoring adjudication;⁵ the proposed presumption would be most difficult to overcome in cases of individual right, weakest in cases raising only questions of allocation of power. The immediate intellectual provenance of this formulation seems to me to be a 1980 proposal by Professor Choper.⁶ This, with many

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

2. *Id.* See also *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 401 (1819) (Marshall, C. J.):

But it is conceived, that a doubtful question, one on which human reason may pause, and the human judgment be suspended, in the decision of which the great principles of liberty are not concerned, but the respective powers of those who are equally the representatives of the people, are to be adjusted; if not put at rest by the practice of the government, ought to receive a considerable impression from that practice.

3. Erwin Chemerinsky, *Cases Under the Guarantee Clause Should Be Justiciable*, 65 U. COLO. L. REV. 849 (1994) (this issue).

4. Professor Chemerinsky’s recent work includes, *inter alia*, ERWIN CHERMERINSKY, *FEDERAL JURISDICTION* (2d ed. 1994); Erwin Chemerinsky, *The Supreme Court and the Fourteenth Amendment: The Unfulfilled Promise*, 25 LOY. L.A. L. REV. 1143 (1992); Erwin Chemerinsky, *Rationalizing Jurisdiction*, 41 EMORY L.J. 3 (1992); Erwin Chemerinsky, *Ending the Marathon: It Is Time To Overrule Northern Pipeline*, 65 AM. BANKR. L.J. 311 (1991); Erwin Chemerinsky, *A Unified Approach to Justiciability*, 22 CONN. L. REV. 677 (1990).

5. Chemerinsky, *supra* note 3, at 859-60, 866-69.

6. JESSE H. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS* (1980). For contemporaneous critiques of Professor Choper’s position, see John M. Farago, *The Asymmetrical*

qualifications, exceptions, and nuances, would bar judicial review of allocations of governmental power to the nation, in cases raising the interests of states; or, for the most part, to the executive, in cases raising the interests of the legislature.⁷

But it is a mistake to imagine that there is some simple way to sort out “public actions” challenging structural allocations of power from claims of individual right. The Supreme Court said as much in 1989, in *United States v. Munoz-Flores*.⁸ In that case, the Government, in effect, adopted an unnuanced version of Professor Choper’s position and argued that, as a prudential matter, the line between justiciability and nonjusticiability be drawn with individual rights on one side, and issues bearing on the allocation of governmental power on the other. This the *Munoz-Flores* Court rejected.⁹ As the late Justice Marshall explained for the Court, individuals must have rights to challenge misallocations of governmental power.

In *Munoz-Flores* itself, for example, the plaintiff had been convicted of aiding and abetting the illegal entry of aliens into the United States, a federal misdemeanor. He moved to correct his sentence, challenging his \$25 fine, a special assessment authorized by the law then applicable. He alleged that the law providing for the special assessment had originated in the Senate; the assessment therefore was in violation of the constitutional requirement that all **(1994) 65 U. COLO. L. REV. 891** bills for revenue originate in the House of Representatives.¹⁰ The Court, reversing the Court of Appeals and remanding for a decision on the merits, held that *Munoz-Flores*’s motion did not present a political question.¹¹ Of special interest to us is that the Court rejected the view that *Munoz-Flores*’s claim of individual right was too remote from the alleged constitutional violation to

Hermeneutics of Jesse Choper, 15 VAL. U. L. REV. 605 (1981); Henry P. Monaghan, Book Review, 94 HARV. L. REV. 296 (1980).

7. Choper, *supra* note 6, at 205, 315. For current commentary endorsing Choper’s proposal, see John J. Gibbons, *The Court’s Role in Interbranch Disputes Over Oversight of Agency Rulemaking*, 14 CARDOZO L. REV. 957, 969-73 (1993).

8. 495 U.S. 385, 393-96 (1990) (rejecting the Government’s position that separation of powers issues should not be reviewable unless implicating individual rights).

9. There were separate concurrences by three Justices in two opinions, but neither concurrence took issue with the Court on this point. 495 U.S. at 401 (Stevens, J., joined by O’Connor, J., concurring); *id.* at 408 (Scalia, J., concurring).

10. U.S. CONST. art. I, § 7, cl. 1.

11. 495 U.S. at 401.

support adjudication:¹² “[T]he Court has repeatedly adjudicated separation of powers claims brought by people acting in their individual capacities.”¹³

Recently Judge (now Professor) Gibbons, a distinguished authority on federal courts,¹⁴ also following Dean (now Professor) Choper, has offered,¹⁵ among other instances, the example of *INS v. Chadha*.¹⁶ *Chadha*, in which the Court struck down the one-house veto, in Judge Gibbons’s view should have been dismissed as a nonjusticiable political question. *Chadha*, he argues, was an action contrived to enable the administration to make a challenge to the one-house veto, and “had virtually nothing to do with whether an obscure ethnic East Indian . . . should be deported. . . .”¹⁷

But, with respect, I take an opposing view. I think that once a complaint is filed on behalf of an aggrieved plaintiff, however obscure, and the complaint properly pleads a claim arising under federal law, it becomes somewhat metaphysical if not unfair to argue that the case does not involve a claim of individual right—even if the political branches have made an undue fuss over it. Some such insight lies behind the Court’s rejection of the “individual rights” position in *Munoz-Flores*.

Nevertheless we cannot help remembering the enigmatic distinction (1994) **65 U. Colo. L. Rev. 892** drawn by Chief Justice Marshall in *Marbury v. Madison*, between questions political in nature and claims of individual right. I want to come back to the question of what Chief Justice Marshall meant by this distinction,¹⁸ but it will be convenient first to consider another question.

2. The Legitimacy Bogey

12. *Id.* at 393-94.

13. *Id.* (citing *Mistretta v. United States*, 488 U.S. 361, 371-79 (1989), which held that Congress did not make an unconstitutional delegation of legislative power to the Federal Sentencing Commission in the Sentencing Reform Act of 1984, and that Congress did not breach the separation of powers when it composed the Commission of members of the federal judiciary).

14. Judge Gibbons’s writings include: John J. Gibbons, *The Court’s Role in Interbranch Disputes Over Oversight of Agency Rulemaking*, 14 CARDOZO L. REV. 957, 969-73 (1993) [hereinafter *The Court’s Role*]; John J. Gibbons, *Intentionalism, History, and Legitimacy*, 140 U. PA. L. REV. 613 (1991); John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889 (1983).

15. Gibbons, *The Court’s Role*, *supra* note 14.

16. 462 U.S. 919 (1983) (striking down the one-house veto as a violation of the principle of separation of powers).

17. Gibbons, *The Court’s Role*, *supra* note 14, at n.69 and accompanying text.

18. See *infra* notes 95-104 and accompanying text.

What led Professor Choper to make this unworkable proposal? Rightly valuing Americans' reverence for the Court, concerned for the legitimacy of the Court in Americans' eyes, dismayed by the early opposition to school busing decrees and alarmed by continuing widespread noncompliance with the Supreme Court's school prayer cases, Choper tried to fashion a modern "neutral principle"¹⁹ of judicial restraint.²⁰ What emerged was his proposal that courts should preserve their institutional capital for claims of individual right.²¹ Indeed, under Choper's 1980 proposal, individual rights remain adjudicable even in cases presenting a political question, and nonadjudicable political questions arise even in judicial review of legislation. But Choper felt strongly that courts should not expend their institutional capital on certain²² arguably political questions, structural issues of separation of powers or of federalism.

On the face of it, this seems an odd position for one who has been fretting about noncompliance with the school prayer and busing **(1994) 65 U. COLO. L. REV. 893** cases. It is the quintessential right of every individual American to be free from government-imposed prayer, and it is the right of every individual American to enjoy the equal protection of the laws. Professor Choper's proposal, limiting judicial review for the most part to cases of individual right, would not have spared us the persistent noncompliance that distresses him in the school prayer cases and distressed him in the school desegregation cases.

In any event, the proposal seems ill-tailored to preserve Americans' reverence for the Court. Structural issues are a very small and technical part of judicial business. To the extent they do come to the attention of the public, the

19. For a cornerstone of "neutral principles" theory, see Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959). Other exemplars of this now much less influential prong of the legal process school's thinking included ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* (1962); LEARNED HAND, *THE BILL OF RIGHTS* (1958). See also ROBERT G. McCLOSKEY, *THE AMERICAN SUPREME COURT* (1960). Professor Wechsler's view on judicial review distances him from the others; he believed that judicial review was not discretionary, but required by Article III and the Supremacy Clause.

20. Professor Chemerinsky rightly distances himself from Professor Choper's line of reasoning on this issue.

21. CHOPER, *supra* note 6; *cf.* *Marshall v. Dye*, 231 U.S. 250, 257 (1913) (holding that the Court adjudicates only claims of individual right when the question is political). This view would help to explain the Court's reaching the merits in such cases as *Dames & Moore v. Regan*, 453 U.S. 654 (1981) (sustaining, against challenges by American litigants, the shifting of their pending claims to the Iran Claims Tribunal).

22. Under Professor Choper's proposal, claims of individual right remain adjudicable. CHOPER, *supra* note 6, at 195-202, 326-30. Questions of judicial power also remain adjudicable, *id.* at 380-415, as do claims of encroachment upon national power by a state, *id.* at 205-11.

public tends, I think, to look to the Court to resolve such issues, not to duck them. These remarks are introductory only; I will return also to this “institutional capital” argument.²³

B. *The Three Difficulties*

The coldness of the judicial welcome to the case thought to raise a “political question” traces to three independent sources of difficulty. The first of these is, at root, in our time, the problem of standing: we do not want courts making advisory pronouncements. The second of these boils down to a problem of equity: we do not want courts making matters worse. The third of these is the problem of distinguishing between judicial and political power: we do not want courts making the ultimate governmental choices we confide to the political branches. Let me take up each of these problems in turn.

1. Standing

a. The Public Action and the Claim of Right

Behind whatever is moving professors and judges to distinguish claims of individual right from merely political questions there lurks the old-fashioned apparition of “the public action.” A “public action” is somehow suspect; it is not necessarily justiciable. In a public action the plaintiff raises a generalized grievance belonging to the whole public, not a claim specific to herself.²⁴ Public actions come in (1994) 65 U. COLO. L. REV. 894 myriad shapes and sizes; in what follows I deal only with the public action categories that seem most relevant to the “individual rights” proposals of Professors Chemerinsky and Choper.

b. Complaints About Allocations of Power

In a public action raising an issue of allocation of power, the plaintiff is saying, “I am hurting, but the gist of my complaint is only that the wrong tortfeasor is hurting me. I am perfectly content to go on hurting if the right sovereign or the right branch of the government is doing the hurting.” This

23. See *infra* text accompanying notes 50-53, 77-91.

24. See, e.g., *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208 (1974) (holding that the plaintiff citizens lacked standing to challenge the constitutionality under the Incompatibility Clause of the commissioning of members of Congress in the armed forces reserve but arguably reaching the merits); *but see id.* at 235 (Brennan, J., dissenting) (arguing that a good faith allegation of injury in fact establishes standing). For the intriguing suggestion that Article III contemplates a form of action not involving disputes over private rights, see Robert J. Pushaw, Jr., *Article III's Case/Controversy Distinction and the Dual Functions of Federal Courts*, 69 NOTRE DAME L. REV. 447 (1994).

plaintiff finds it hard to convince us that she is hurting at all. Hers is simply the claim of a troublemaker, or so it may seem—an officious interferer with the smooth functionings of government. The claim, in short, is not a claim of private right but a public action.

In particularly difficult cases, the plaintiff is not an individual or even a business entity, but a state. We see that a state has standing—a claim of “individual” right, as it were—to challenge liabilities imposed upon it in its corporate capacity. But we are not clear why the state is aggrieved if Congress imposes the liabilities under the state’s own law, when Congress could impose the same liabilities as a matter of federal law,²⁵ just as we are not clear why a private bank should be able to challenge an executive order requiring nondiscriminatory lending, a directive that it would obey if Congress enacted it.²⁶

When we are skeptical in such cases we are not being trivial. For federal courts, at least, such complaints may seem beyond their Article III adjudicatory power, a power invocable exclusively by “cases” or “controversies.” But we can see that the issue, however **(1994) 65 U. COLO. L. REV. 895** serious, today boils down to one of standing.

I do not pretend that we have tidy doctrine on standing. But there may well be times when even the sort of plaintiff we have been talking about has good grounds for believing that a proper allocation of power as to her would redress her injury. She might well believe that a proper allocation of power would change the substantive outcome of the application of power that is hurting her. Concededly, it is a further question whether that speculation on her part should make a difference.

c. Complaints About Procedure

There is an analogous sort of public action, not noted by the individual rights theorists, that does not necessarily depend on separation of powers or federalism arguments. In this sort of case, the plaintiff complains that the wrong procedure is being applied in her case. The implication is that the plaintiff would not be complaining at all if the right procedure were followed and she was still hurting. Again, she finds it hard to convince us that she is hurting at all.

25. *Cf.* *New York v. United States*, 112 S.Ct. 2408 (1992). *New York* was not a “standing” case; but the rule of the case, stated very broadly, is that a state has a valid Tenth Amendment claim if the nation attempts to force it to govern itself, because the nation should govern it directly. For the 19th century view of the standing of a state, see *infra* note 161 and accompanying text.

26. Monaghan, *supra* note 6, at 296-97, gives this example.

Take, for example, a case recently argued before the Supreme Court, *Dalton v. Specter*,²⁷ the Philadelphia Shipyard case. There, a United States Senator (dragging in his train a union and its employees who might be more likely than he to have standing) sued the Secretaries of Defense and of the Navy for an injunction against carrying out a presidential decision to close down the Philadelphia Naval Shipyard. The decision of the President to close the base was reached with the advice of the Defense Base Closure Commission, an independent agency to which Congress has delegated advisory powers concerning the current round of military base closings. Under temporary legislation, the rounds of closings are processed in groups in order to avoid the political struggle and delay associated with closing bases one by one.

Senator Specter's complaint alleged that the decision to close the Philadelphia Naval Shipyard was in violation of relevant statutory law and the Fifth Amendment's Due Process Clause. The District Court dismissed, finding, in view of the purposes of the temporary base-closing laws, a clear legislative intention to preclude judicial review. In the alternative, the District Court held that the case **(1994) 65 U. COLO. L. REV. 896** was one which would be "impossible for the court to resolve independently without expressing lack of respect due the coordinate branches of government,"²⁸ and therefore one that presented a nonjusticiable political question.²⁹ The Court of Appeals, too, read the law as absolutely committing to the President the discretion to decide which bases to close. But the Court of Appeals reversed nevertheless. The appeals court saw that judicial review of the legality or constitutionality of the process employed could not be foreclosed, either under the Administrative Procedure Act (APA)³⁰ or the Constitution.³¹ The court held that Senator Specter's claim of illegality could proceed in the District Court, and stuck to its guns³² despite a vacatement of judgment in the Supreme Court on the APA issue, accompanied by a remand for reconsideration.³³ The Court of Appeals, ruling on remand, rejected the proposition that a presidential decision was unreviewable. If the APA

27. No. 93-289, 62 U.S.L.W. 3620 (Mar. 2, 1994). For the decision, see Note added in press, *infra* note 35.

28. *Specter v. Garrett*, 971 F.2d 936, 953 (3d Cir. 1992) (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)).

29. *Specter v. Garrett*, 777 F.Supp. 1226, 1227-28 (E.D. Pa. 1991).

30. *Specter*, 971 F.2d at 944. The Court of Appeals, it should be noted, rejected the employees' claims on the merits. 971 F.2d at 955-56.

31. *Id.* at 945.

32. *Specter v. Garrett*, 995 F.2d 404 (3d Cir. 1993).

33. *O'Keefe v. Specter*, 113 S.Ct. 455 (1992).

foreclosed relief at this juncture the Constitution did not.³⁴ Yet at oral argument in the Supreme Court, the Justices' questions suggested to observers that the Court ultimately would hold the case nonjusticiable, as presenting a "political question."³⁵

A challenge to procedure is a singularly unappealing strategy. That Senator Specter's complaint was about the procedures followed in the decision to close the Philadelphia Naval Shipyard helps to account for the observed impatience of the Justices at oral argument. (1994) 65 U. COLO. L. REV. 897 The *Specter* plaintiffs appeared to sue simply to delay, not to change, their destiny.³⁶ Perhaps they did. But this, too, boils down to a question of standing.

An interplay between the concepts of "standing" and "political question" seems a chronic feature of public law litigation.³⁷ Such litigation often reflects our hesitancy to allow plaintiffs to complain that the wrong sovereign has governed or that the wrong procedure has been applied in their case. We do not

34. *Specter*, 995 F.2d 404, 408-409 (3d Cir. 1993).

35. Linda Greenhouse, *High Court Hears a Senator Argue for Right to Sue on a Base Closing*, N.Y. TIMES, Mar. 3, 1994, at A8.

Note added in press: On May 23, 1994, the Supreme Court held unreviewable the President's decision to close the Philadelphia Naval Base, because whatever the process employed, the ultimate decision was confided to the discretion of the President. *Dalton v. Specter*, 114 S.Ct. 1719 (1994). The Court was unanimous on this essential holding. The Court did not advert to the "political question" doctrine in terms, nor did it refer to *BAKER V. CARR* or other source of modern political question law. Writing for the Court, Chief Justice Rehnquist seemed in part to be making a surprising ruling on the sufficiency of the complaint. "[C]laims simply alleging that the President has exceeded his statutory authority are not 'constitutional' claims, subject to judicial review . . ." *Id.* at 1726.

36. Litigating with such a motive is what courts tend to characterize as litigation in bad faith; the sanctions can be severe. *Cf. Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 258 (1975) (preserving from the general proscription against shifted liability for attorney's fees the common-law exception for litigation in "bad faith").

37. *See, e.g., Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 215 (1974): "The more sensitive and complex task of determining whether a particular issue presents a political question causes courts, as did the District Court here, to turn initially, although not invariably, to the question of standing to sue." *Id.* at 215. "The requirement of 'standing' to sue is a judicially created instrument [that] . . . sometimes is used to bar from the courts questions which by the Constitution are left to the other two coordinate branches to resolve, viz., the so-called political question." *Id.* at 229 (Douglas, J., dissenting). *But see Mistretta v. United States*, 488 U.S. 361, 371-79 (1989) (reaching the merits and sustaining the Sentencing Reform Act as not breaching the separation of powers); *Morrison v. Olson*, 487 U.S. 654, 685-96 (reaching the merits and holding that the legislative provision for an independent counsel did not usurp judicial or executive functions).

see how they make a claim of individual right. My own view is that the plaintiff who has standing and alleges a violation of the Constitution or federal law causing harm to her does have a cognizable cause of action, whether or not she can be said in some further, technical sense to be making a claim of individual right.

d. What Difference Would the “Individual Rights” Thesis Make?

Even if our insistence on a claim of individual right is grounded at a deep level in Article III, this concern is much less substantial today than in the past. Our current rules of standing to sue in federal courts are such that it would be a very rare case indeed in which the plaintiff had standing and a cause of action and yet made no claim of individual right.³⁸ It is very hard for a plaintiff *with* a colorable claim of individual right to gain access to federal court, if her complaint suggests an assertion of some more generalized grievance than her own.³⁹

And after *Lujan v. Defenders of Wildlife*,⁴⁰ Congress seems to have lost its power, previously presumed, to confer “standing” upon “citizen” plaintiffs who

38. Consider the employees in *Dalton v. Specter*, 114 S.Ct. 1719 (1994), discussed *supra* notes 27-36 and accompanying text. Although these plaintiffs will lose their jobs when the Naval Shipyard is closed, they might not have had standing under current jurisprudence. Consider the problem of “redressability” that their case presents. It cannot confidently be assumed that the constitutional and legal procedures Senator Specter seeks would lead to a reversal of the President’s decision to close the base. *See also*, *Linda R. S. v. Richard D.*, 410 U.S. 614 (1973) (denying a mother standing to obtain a court ordered prosecution of her children’s father for violation of the child support laws, reasoning that prosecuting the father would not necessarily produce the wanted child support); *but see, e.g.*, *Regents of the Univ. of California v. Bakke*, 438 U.S. 265 (1978) (permitting a white student to challenge a state university’s preferential minority admissions policy, although an injunction against the policy would not necessarily mean that he would be admitted).

39. *See, e.g.*, *Allen v. Wright*, 468 U.S. 737 (1984), which held that parents of black schoolchildren lacked standing to challenge the Internal Revenue Service’s illegal failure to deny tax-exempt status to racially discriminatory private schools, because the children had not been denied access themselves to such tax-exempt schools. Thus, the black parents did not have a stake in the controversy distinct from that of members of the public generally.

The taxpayer suits fare particularly badly. For a notably stringent application of the taxpayer standing rules in a politically sensitive case, *see United States v. Richardson*, 418 U.S. 166 (1974), holding that a taxpayer lacked standing to seek an accounting of disbursements by the Central Intelligence Agency.

An analogous problem arises in cases seeking to challenge legislation restrictive of First Amendment rights “on its face” rather than simply “as applied” to the plaintiff. For a late example, *see Renne v. Geary*, 501 U.S. 312 (1991).

40. 112 S.Ct. 2130 (1992).

otherwise would not have it—at least within the current Court’s understandings of the limits of Article III.⁴¹ We seem not to have very many old-fashioned public actions any more. With the death—if that is what it is—of the old-fashioned “public action,” the “individual rights” thesis turns out not to exclude very much.⁴²

I leave to others the unending argument about whether the current rules of standing impose prudential barriers to access unwarrantedly steeper than those Article III properly can be read as requiring. My point is only that, to the extent that standing is the obstacle, **(1994) 65 U. COLO. L. REV. 899** courts will require plaintiffs to surmount the obstacle. There is no need for a “political question” barrier to cases already barred by the rules of standing.

2. Equity: Herein of Crisis, Confrontation and Chaos

A second source of trepidation in adjudication of cases arguably “political” is that things could go wrong. The interesting question about a case held nonjusticiable on political question grounds, presumably, always has been, Why? What could go wrong if a court decided it on the merits? Dismissal of a meritorious claim on political question grounds might be pointless, not to say pernicious, if we did not fear that adjudication could go very wrong indeed.

And a great deal can go wrong. No greater disaster has ever struck this nation than the Civil War. It is widely believed⁴³ that that catastrophe was made

41. Professor Sunstein gives us this view in Cass R. Sunstein, *What’s Standing After Lujan? Of Citizen Suits, “Injuries,” and Article III*, 91 MICH. L. REV. 163 (1992).

42. The editors of the current Hart & Wechsler casebook on Federal Courts, PAUL M. BATOR ET AL., HART & WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 81 (3d ed. 1988), give as an example of a case in which the plaintiff has standing and a cause of action but no claim of individual right a case in which the original plaintiff dies before the question of federal law is decided, and the plaintiff is a substituted party. Of course the problem of individual right vs. personal right is quite different from the problem of individual right vs. political question.

43. See Justice Scalia’s dissenting opinion in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 112 S.Ct. 2791, 2885 (1992):

There comes vividly to mind a portrait by Emanuel Leutze that hangs in the Harvard Law School: Roger Brooke Taney, painted in 1859, the 82d year of his life, the 24th of his Chief Justiceship, the second after his opinion in *Dred Scott*. He is all in black, sitting in a shadowed red armchair, left hand resting upon a pad of paper in his lap, right hand hanging limply, almost lifelessly, beside the inner arm of the chair. He sits facing the viewer, and staring straight out. There seems to be on his face, and in his deep-set eyes, an expression of profound sadness and disillusionment . . . [T]hose of us who know how the lustre of his great Chief Justiceship came to be eclipsed by *Dred Scott* cannot help believing that he had that case—its already apparent consequences for

inevitable by the decision in *Dred Scott v. Sandford*.⁴⁴ *Dred Scott* held, among other things, that Congress had no power to enact the Missouri Compromise of 1820,⁴⁵ because (1994) 65 U. COLO. L. REV. 900 Congress had no power to take the property of slaveholders by declaring free territory. It would be hard to argue that there was a direct causal relationship between *Dred Scott* and southern secession;⁴⁶ but we can say that this tragic decision rendered Congress impotent to effect a political compromise that would satisfy northern interests.⁴⁷

Now, Professor Choper is very persuasive that the Court's worst decisions, like *Dred Scott*, have involved allocations of power. But I find it much more difficult than he does to derive general proscriptions against adjudication from the fact that the Supreme Court has made tragically wrong decisions. Courts *will* make tragically wrong decisions. It remains true nevertheless that courts must decide cases. It seems to me realistic to suppose that if the Court is determined to make a tragically wrong decision, the ingenuity of humankind cannot devise a "neutral principle" that will stop it from doing so without denying access to a host of future meritorious claims the nature of which we cannot begin to predict.

the Court, and its soon-to-be-played-out consequences for the Nation—burning on his mind.

44. 60 U.S. (19 How.) 393 (1856).

45. *Dred Scott* loosely is said to have struck down the Missouri Compromise, Act of Mar. 6, 1820, ch. 22, § 8, 3 Stat. 545, 548, by which Congress had outlawed slavery in the Louisiana Purchase territories north of 36 degrees 30' of latitude (the latitude of the southern border of Missouri), while admitting Missouri itself as a slave state. Actually, Congress had already repealed the Compromise in 1854, with the Kansas/Nebraska Act, Act of May 30, 1854, ch. 59, 10 Stat. 277. The latter Act allowed the issue of slavery to be settled by popular vote in the territories of Kansas and Nebraska, both above 36 degrees 30' latitude. But the Missouri Compromise had been in force at the time of the events reviewed in *Dred Scott*, and the argument in *Dred Scott* was that Scott had become free when taken into "free" territory.

By implication, *Dred Scott* struck down the Kansas/Nebraska Act as well as the Missouri Compromise. If it would be an impermissible "taking" of private property in slaves for Congress to create "free" territory by law, it would remain impermissible even if Congress did so by purporting to delegate the power to create "free" territory to the electorate in that territory.

46. The linkage would have been clearer had it been the North that seceded. The North did succeed in getting Abraham Lincoln elected, and then the South seceded. Lincoln inveighed against the decision in *Dred Scott* in his campaign speeches. Abraham Lincoln, *Speech: A House Divided Against Itself* (1858), in *THE POLITICAL THOUGHT OF ABRAHAM LINCOLN* 101 (Richard N. Current ed., 1967).

47. *Dred Scott* forced legalization of slavery in the territories, and, as a matter of logic, also would have denied power to Congress to regulate slavery within a state. In Lincoln's "House Divided" speech, *supra* note 46, he warned that after *Dred Scott* the states themselves might be shorn of effective power to outlaw slavery within their own borders.

Finally, I am not sure that we need a separate political question doctrine to take account of those cases courts should not decide because things could go wrong,⁴⁸ when we already have rules of equity that require consideration of the public interest.

a. Noncompliance and Hasty Compliance

A peculiar problem of administration of politically sensitive cases, whether those cases present “political questions” as a technical matter or not, is the problem of predicting what the political (1994) 65 U. COLO. L. REV. 901 branches might do in their wake.⁴⁹

It might be argued that in a political question case in which the Court nevertheless does authorize judicial review, an explanation for the Court’s liberality might be found in the likelihood that a decision would be without significant consequences. Perhaps one might try to explain in this way the great Warren Court case of *Powell v. McCormack*.⁵⁰ In *Powell*, the Court rejected the view that qualification for membership in the House of Representatives presented a nonjusticiable political question. Reaching the merits, the Court held that in the 90th Congress the House of Representatives had unconstitutionally prevented the plaintiff, Representative Adam Clayton Powell, from taking his seat. But by the time of decision Representative Powell had been seated by the 91st Congress. One writer argues⁵¹ that the Court would not have reached the merits if it had decided the case during the 90th Congress; a judicial order to seat a member under active exclusion by Congress might have caused a “constitutional crisis:”

All the [Powell] Court . . . ordered the District Court to do . . . was declare that the House had acted unconstitutionally in excluding Powell. It did not involve itself in the issues of seniority, back pay, and the \$25,000 fine [imposed on Powell by the 90th Congress]. Thus, on the basis of the Court decision alone, there was nothing to enforce—and hence no enforcement problem.⁵²

48. For discussion of the “chaos” problem in *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849), see *infra* notes 138-48 and accompanying text.

49. Cf. *Georgia v. Stanton*, 73 U.S. (6 Wall.) 50 (1867), discussed *infra* notes 156-69 and accompanying text.

50. 395 U.S. 486 (1969).

51. PHILIPPA STRUM, *THE SUPREME COURT AND “POLITICAL QUESTIONS”*: A STUDY IN JUDICIAL EVASION 126-27 (1974).

52. *Id.* at 127. Powell ultimately did seek enforcement. The District Court stalled; the Supreme Court denied mandamus, *Powell v. Hart*, 396 U.S. 1055 (1970); and the case fizzled out when Powell retired and left the country. STRUM, *supra* note 51.

The implications of this argument are that a District Court should not expect defendants, when they are officials and members of Congress, to obey injunctions ordering them to perform certain non-legislative acts, and that a District Court would be unable to deal with the recalcitrance of such defendants. The further implications of the argument are that, if it becomes necessary for Congress to appropriate funds for any necessary restitution, Congress might refuse to do so, however small the sums. (1994) 65 U. COLO. L. REV. 902 The historical record is that Congress has appropriated moneys for liabilities imposed on the nation. But even if all the fears of a *Powell* decided during the 90th Congress are credible, it seems to me that those fears would not diminish Adam Clayton Powell's right to a declaratory judgment, nor diminish the district court's duty to furnish remedies as far as its powers permitted it to do in the circumstances. In other words, to the extent that we are talking about real problems, they are problems of equity.

Do courts lose institutional capital when they decide a case like *Powell* in a situation in which a ruling *would* have consequences, and the political branch involved indeed does not cooperate? I fail to see how courts are compromised when they declare and even enforce the rights of individuals. Any opprobrium in a case like our hypothetical variant of *Powell* should attach to the uncooperative political branch.

Rather than suggesting a rule of nonjusticiability, these sorts of fears suggest to me the need for a tough-minded, independent, and principled judiciary. Judge Sirica comes to mind. When Judge Sirica ordered President Nixon to produce the White House tapes of oval office conversations about Watergate,⁵³ President Nixon, albeit under threat of impeachment, might have thought to save his presidency by ignoring the order and plunging the country into a constitutional crisis. In a showdown between the two men, the President had the armed forces. What could Judge Sirica have done? What would President Nixon have done? It is not a very satisfying answer to these questions that judges face the possibility of noncompliance in every case.⁵⁴ Truly scary scenarios seem implicit in Judge Sirica's order. Yet Judge Sirica's duty was clear; I have no doubt he was right to order production of the tapes. In other words, the fact that a decision could be confrontational is not a good enough reason for dismissal of a meritorious claim. Rather, the fact that a decision could be confrontational is one reason we have an independent judiciary.

53. See *United States v. Nixon*, 418 U.S. 683 (1974) (sustaining the order). I do not suggest that *Nixon* was a political question case; the issue was framed as one of presidential privilege.

54. *But see* Wayne McCormack, *The Political Question Doctrine—Jurisprudentially*, 70 U. DET. MERCY L. REV. 793 (1993).

If courts had declared the war in Southeast Asia to be unconstitutional,⁵⁵ it might have been feared that the administration would not have obeyed an injunction. But disobedience is not invariably beyond the control of courts. Disobedience even by the President or a member of the Cabinet can ground a judgment of contempt,⁵⁶ and can justify whatever imaginative sanctions and enforcement efforts may seem within the power of equity to impose.⁵⁷

55. *Cf.* Holtzman v. Schlesinger, 414 U.S. 1304 (1973) (opinion of Marshall, J., refusing as single justice to stay an order of the United States Court of Appeals for the Third Circuit staying a district court's injunction ordering a halt to United States bombing in Cambodia); *id.*, 414 U.S. at 1316 (Douglas, J., sole justice vacating the Third Circuit's stay order); *id.* at 1321 (Marshall, J., dissolving Justice Douglas's vacatement of the Third Circuit's stay order). *See, e.g.*, Atlee v. Laird, 347 F.Supp. 689 (E.D. Pa. 1972), and cases cited therein (refusing on political question grounds to decide the constitutionality of the war in Southeast Asia). But *see* Orlando v. Laird, 443 F.2d 1039 (2d Cir. 1971) (holding justiciable the question whether Congress need take some action to authorize the war). On the merits, the Orlando court held Congress's participation adequate. For background, *see* John H. Ely, *The American War in Indochina, Part II: The Unconstitutionality of the War They Didn't Tell Us About*, 42 STAN. L. REV. 1093 (1990).

56. I am intrigued by *M. v. Home Office and Another*, [1993] 3 All E.R. 537 (H.L.), the first case in which a minister of the Crown ever has been found to be in contempt of a court. The Law Lords affirmed the Court of Appeal and held that the court below had power to hold the Home Office in contempt. But the Lords reversed the judgment of the Court of Appeal insofar as it contemplated sanctions against the Home Secretary personally. Because he acted in official capacity, the House of Lords held that it was only the Home Office itself that should be triable in contempt. This solution is similar to the current American position, *cf.* *Spallone v. United States*, 493 U.S. 265 (1990), holding that a federal court should seek compliance with its orders first by sanctioning a local governmental entity rather than the individual local officials. But it diverges markedly from *Ex parte Young*, 209 U.S. 123 (1908), implicitly sustaining a contempt sanction against the state's attorney general for failure to comply with a federal court order restraining him from acting in his official capacity, in the course of sustaining the power of the federal court to issue the order. The House of Lords did not refer to *Ex parte Young*. But both the *Spallone* and *M. v. Home Office* courts ultimately acknowledge the power of courts to enjoin officials acting in their official capacities.

57. After *Nixon v. Fitzgerald*, 457 U.S. 731 (1982), holding the President immune in *Bivens* actions for damages (*Bivens v. Six Unknown Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388 (1971)), I doubt that cumulative fining of the President—left available in last resort in *Spallone*, *supra* note 56—would be an option; nor, given the practical needs of the country, that a court would fling the President of the United States into a dungeon. But with the object of ending an unconstitutional war “with all deliberate speed,” equity well might have powers of appointment, attachment, receiving, deeming, and so forth, the uses of which in this context we do not begin to contemplate even in our time. (This sort of thinking can carry one into very rough terrain. Suppose a court put the civil control over the military into receivership, the receiver to carry out the court's orders. Who would the Armed Forces obey: the receiver, or the President? But my point is only that problems of relief are traditional problems of equity and should not bar adjudication or decision).

This is not to say that the powers of war or peace are lodged in **(1994) 65 U. COLO. L. REV. 904** the judiciary as well as the political branches. Rather, it is to reason that the duty to interpret what the Constitution requires in the exercise of those powers is lodged in the judicial department.

A too precipitate obedience might seem an even more serious risk of adjudication of a case reviewing an exercise of the war powers. Suppose the Commander in Chief and the Secretary of Defense had been ordered to withdraw American forces from Viet Nam on the ground that the war in Viet Nam was unauthorized by Congress. American forces might have been withdrawn so hastily as to put in danger the last troops to disengage.⁵⁸ But as others have pointed out, today courts enter judgments that are declaratory only, or prospective, or even temporarily stayed.⁵⁹ A federal court has discretion to do these things no matter what relief the complaint requests. Courts can consider the dangers of over-zealous compliance or other undesirable impacts upon the public interest in shaping their decrees.

It might even be argued that declared but unenforced law is more conducive to chaos than the administration of law under court order. *Luther v. Borden*,⁶⁰ for example, might be perceived as a more dangerous case to adjudicate than *Baker v. Carr*.⁶¹ *Baker*, an action for injunctive relief against legislative malapportionment, seems to call only for a revised election process in the future. On the other hand, an award of damages in *Luther*, a trespass claim against an arresting official whose conduct was allegedly not authorized by a **(1994) 65 U.**

58. See *infra* text accompanying note 167.

59. Professor Chemerinsky makes this last point, reminding us of the stay order that accompanied *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 88 (1982), Chemerinsky, *supra* note 3 at 24.

60. 48 U.S. (7 How.) 1 (1849). *Luther* arose as an action in trespass against an arresting official, whose defense was one of authorization. The reply to the defense raised the issue of want of authorization, challenging the legitimacy of the existing state government under the Guarantee Clause of art. I, § 4 (in which the United States guarantees to every state “a Republican Form of Government”). Justice Taney, writing for the Court, held the case nonjusticiable, in part because, as he thought, a ruling in favor of the plaintiff would have put in doubt the validity of all the state’s past and continuing acts and taxes. 48 U.S. at 38-39. For further discussion, see *infra* notes 138-48 and accompanying text.

61. 369 U.S. 186, 217 (1962). *Baker* made cognizable under the Equal Protection Clause of the Fourteenth Amendment a challenge to a malapportioned state legislature, and authorizes declaratory and injunctive relief. This was notwithstanding that, had the claim been brought under the Guarantee Clause, the Court would have had to reconsider *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849). *Luther* is the classic case holding Guarantee Clause claims nonjusticiable under the political question doctrine. For further discussion see *infra* notes 123-55 and accompanying text.

COLO. L. REV. 905 legitimately elected state government, might seem retroactively to delegitimize past acts and even taxes of the existing government—to invite, in a word, “chaos.”⁶² Actually, as I argue later, there are reasons for concluding that this fear would have been just as unfounded in *Luther* as in *Baker*.⁶³

The reader no doubt can think of even harder cases than the cases I have drawn upon for examples. My point is only that the duty of courts does not evaporate because there are obstacles to enforcement, or threats of crisis or “chaos.”

Of course, courts of equity must weigh dangers to the public interest. But the availability of the modern declaratory judgment and carefully fashioned decree means that there is scant excuse in our time for courts to deny access at the threshold on the ground that relief might be unenforceable. The nature and extent of enforcement is properly understood as raising only a problem of equity.

b. Law and Morals

I do not mean to be understood as resting wholly, with others, on the availability of declaratory judgment, stay, and limited decree. When the time does come for enforcement of declared law, the expedients of declaratory judgment, stay, and limited decree only postpone or narrow the hard questions; they do not answer them. Sooner or later one must face up to the extreme case. There comes a time when courts must be willing to enforce declared law.⁶⁴

Dissenting in *Powell v. McCormack*,⁶⁵ the case in which the House was held to have acted unconstitutionally in excluding Representative Adam Clayton Powell, Justice Stewart pointed out that the named defendants were not the right parties, if right parties existed. None of the named defendants in that case—the Speaker of the House, the Sergeant at Arms, the Clerk of the House, the Doorkeeper, the five Members—could serve as effectual instruments of court orders redressing Powell’s injury, in the absence of uncompelled compliance by Congress. Justice Stewart therefore could see little potency in any injunctive relief the Court might approve. But **(1994) 65 U. COLO. L. REV. 906** the majority in *Powell* dismissed such arguments, pointing out tersely that declaratory

62. *Baker*, 369 U.S. at 219.

63. *See infra* notes 138-48 and accompanying text.

64. For further consideration of the necessity of enforcement of law and of supervision of the defendant in equity, *see infra* notes 166-73 and accompanying text.

65. 395 U.S. 486 (1969).

relief could be given.⁶⁶ Yet without judicial willingness eventually to back up declaratory relief with enforcement, given recalcitrant defendants, what help is declaratory relief?

In his great 1897 essay, *The Path of the Law*, Holmes set out to argue that law must be understood as a thing apart from morals.⁶⁷ While he thought that “The law is the witness and external deposit of our moral life,” his point was that law imposes only damages, not *duties*.⁶⁸ Damages are simply a buyout by a wrongdoer. But almost on the heels of this thought, Holmes saw, as a corollary to it, that when an injunction issues, law and morals become one: “[T]here are some cases in which a logical justification can be found for speaking of civil liabilities as imposing duties in an intelligible sense. These are the relatively few in which equity will grant an injunction. . . .”⁶⁹

Perhaps Holmes was right in this. Notwithstanding the failures of the school desegregation cases,⁷⁰ perhaps the first *Brown v. Board of Education*⁷¹ might not have produced, by itself, without *Brown II*,⁷² the moral revolution in public feeling that has become its real legacy.

c. The “Institutional Capital” Concern and the Pusillanimous Court

Some writers trace concerns of the kind we have been discussing to one overriding concern, the need to preserve the prestige and authority of the Supreme Court. It is thought that the Court must **(1994) 65 U. COLO. L. REV. 907** husband these priceless assets for the historic occasions when they must be deployed. Though we associate these views today with the “neutral principles”

66. *Powell*, 395 U.S. at 498.

67. Oliver W. Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897).

68. *Id.* at 459.

69. *Id.* at 462.

70. The story can be gleaned from LOUISE WEINBERG, *FEDERAL COURTS: CASES AND COMMENTS ON JUDICIAL FEDERALISM AND JUDICIAL POWER* ch. VII, § 2 (1994) and authors there cited; *see generally* GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (1991). For the earlier views from the political right, *see* LINO A. GRAGLIA, *DISASTER BY DECREE: THE SUPREME COURT DECISIONS ON RACE AND THE SCHOOLS* (1976); Nathan Glazer, *Is Busing Necessary?*, 53 COMMENTARY 39 (1972).

71. 347 U.S. 483 (1954) (striking down under the Equal Protection Clause state laws requiring racial segregation in public schools).

72. 349 U.S. 294 (1955) (authorizing federal district court supervision in equity of public school desegregation).

theorists of another day,⁷³ about whose teachings we have become skeptical,⁷⁴ these are not trivial concerns. Insofar as the rule of law depends on courts, and especially on the Supreme Court, it depends too on our reverence for the Court and our continuing consent to be governed by its decisions. There are those in every generation who oppose judicial review and do not comprehend it as an organic feature of the Constitution. But I think most Americans do share such reverence and consent. It is, perhaps, a civic religion.⁷⁵ It might be that this shared faith is essential to the survival of the republic under the Constitution.⁷⁶ Perhaps when President Nixon obeyed Judge Sirica's order even though it made inevitable his resignation from his presidency, it was in part this faith that informed his understanding of the importance to the country of his obedience.

I doubt very much that the prudential principles of judicial restraint which an earlier generation of writers urged upon us are what keep this faith alive, as they imagined. To the contrary, I think Americans are stirred to believe in the courts because the courts have the courage to act and do act, not because they deny action.

Recall the Supreme Court's effort to protect the rights of individuals in the wake of the Civil War, days of martial law and bills of attainder.⁷⁷ Recall how the Radical Republicans in Congress tried to bring articles of impeachment against President Andrew Johnson, failed, and reacted by cutting back to seven the number of Justices of the Supreme Court, and thus—killing two birds with one stone—carving back as a practical matter the President's power of nomination. In this atmosphere of crisis and confrontation, the question became whether the Court would stick to its guns in opposing the

73. See *supra* note 19.

74. The ideas of the "neutral principles" theorists have come under serious criticism. See Gerald Gunther, *The Subtle Vices of the "Passive Virtues": A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1 (1964). More recently, Gary Peller, *Neutral Principles in the 1950's*, 21 U. MICH. J.L. REF. 561 (1988), has argued that the "neutral principles" critique of the Warren Court was not, in fact, neutral. Cf. Mary Brigid McManamon, *Felix Frankfurter: The Architect of "Our Federalism,"* 27 GA. L. REV. 697 (1993).

75. For a recent examination of the phenomenon, see SANFORD LEVINSON, *CONSTITUTIONAL FAITH* (1988).

76. For an expression of something of this feeling, see *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 112 S.Ct. 2791, 2816 (1992) (joint opinion of Justices O'Connor, Souter and Kennedy): "If the Court's legitimacy should be undermined, then, so would the country be in its very ability to see itself through its constitutional ideals." The Chief Justice characterized this assertion as "mystical." *Id.* at 2882 (Rehnquist, C. J., dissenting).

77. *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866) (holding that civilians could not be tried in military courts as long as civil courts were open—decided before the Reconstruction Acts).

forcible “Reconstruction” of the South. The significant test probably was the famous case of *Ex parte McCardle*.⁷⁸

McCardle first came to the Court as an appeal from a denial of habeas corpus. McCardle was a Mississippi newspaper editor, held in military custody for writing bad things about Reconstruction. By challenging the authority of his military custodians to deprive him of a civil trial by jury, he challenged the validity of the new Reconstruction Acts.⁷⁹

The Attorney General argued for an expedited appeal in McCardle’s case, advising—perhaps on the instructions of President Andrew Johnson—that in his opinion the Reconstruction Acts were unconstitutional, and that he had so instructed the military commanders.⁸⁰ The Court did grant expedited review in McCardle’s case, and heard four days of oral argument, making unusual allowances of time in appreciation of the importance of the case. Interestingly, the Johnson administration itself now backed off, as it had in *Mississippi v. Johnson*.⁸¹ Now the Government argued that the Court should not decide McCardle’s case because it presented a political question.

Congress placed no bets on the government’s position. Rather, Congress famously changed the Supreme Court’s jurisdictional statutes,⁸² over President Johnson’s veto, in order to deny the Court the possibility of using McCardle’s case to pronounce on the validity of Reconstruction. The issue in McCardle’s case now became the one for which we remember it: whether Congress had power to strip the (1994) 65 U. COLO. L. REV. 909 Court of its statutory jurisdiction over a pending, argued case awaiting decision.

At this crucial juncture the Court simply took an early adjournment—early by a few days—without decision. Thus, the Court put *McCardle* off for a year.⁸³

78. 73 U.S. (6 Wall.) 318 (1867) (*McCardle I*).

79. Act of Mar. 2, 1867, ch. 153, 14 Stat. 428; Act of Mar. 23, 1867, ch. 6, 15 Stat. 2.

80. CHARLES WARREN, II *THE SUPREME COURT IN UNITED STATES HISTORY* 465 (1922).

81. 71 U.S. (4 Wall.) 475 (1867). *Johnson* was another challenge to the constitutionality of Reconstruction. President Andrew Johnson reluctantly decided on principle to act to preserve the prerogatives of his office. He therefore instructed the government to argue in *Johnson* that a president could not be sued in an action for an injunction, notwithstanding that his sympathies were with the plaintiff state. The Court accepted the government position. *Id.* For the current return to *Johnson* see *infra* note 162.

82. Act of Mar. 27, 1868, ch. 34, § 2, 15 Stat. 44.

83. *McCardle* was put over on April 6, 1868. See CHARLES FIARMAN, 6 *HISTORY OF THE SUPREME COURT OF THE UNITED STATES: RECONSTRUCTION AND REUNION, 1864- 1888*, at 476-77 (1971).

This seemingly discreet retirement probably was as inglorious⁸⁴ as its numerous critics would have us understand. The Court in this way avoided decision until after the elections of April 14-16, 1868. Charles Fairman takes the position that, if there ever was a historical moment for invalidation of the first Reconstruction Acts, this was it—and the Court let it slip by. In Fairman’s view, a decision on the merits in the following year would have been without practical consequences, coming “too late to interfere with the Congressional program.”⁸⁵ In the event, the Court avoided the merits in the following year as well, sustaining the power of Congress to strip it of the particular head of jurisdiction.⁸⁶ This, in effect, was a decision to leave Reconstruction in place. But it was the earlier adjournment without decision, as Professor Fairman suggests, that was perceived by contemporary observers as the decision to leave Reconstruction in place. Thus, in a famous letter, McCardle’s counsel, Jeremiah Black, wrote of this quiet adjournment that the Court had “knuckled under,” adding: “The Court stood still to be ravished and did not even hallo while the thing was being done.”⁸⁷

This sort of strategic withdrawal, far from preserving the Court’s institutional capital, seems to me to squander it. Some will always be found to praise the Court for its prudence when it backs away from the judicial duty to decide even a sensitive issue; but others will recognize the circumspect retreat for what it is: pusillanimity. Professor (1994) 65 U. Colo. L. Rev. 910 Choper, a proponent of judicial discretion to refuse to decide, seems to share this recognition himself, when he gives us, in no tone of admiration, the sorry record of confrontations in which the Court has backed down.⁸⁸

84. At that time Chief Justice Chase was presiding over President Johnson’s impeachment trial, but the Court was deciding other cases right up to its somewhat early adjournment. In their correspondence, Justice Davis and Chief Justice Chase both maintained that the Court merely had felt it unseemly to run a race with Congress, while the legislature and executive had not yet acted on the Repeal Bill. Although this may have been a factor in preliminary conferences, the Court’s postponement of *McCardle* on April 6, 1868, occurred after the bill had been vetoed by the President and the veto overcome. FAIRMAN, *supra* note 83, at 467-68.

85. *Id.* at 478.

86. *Ex parte McCardle*, 74 U.S. (7 Wall.) 506 (1869) (*McCardle II*).

87. William H. Rehnquist, *The Supreme Court: The First Hundred Years Were the Hardest*, 42 U. MIAMI L. REV. 475, 488 (1988).

88. CHOPER, *supra* note 6, at 161. To be sure, Choper attributes such retreats to cumulative losses to the Court’s institutional capital, occasioned by needless decisions on allocations of power. His most powerful example is *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856). For an interesting discussion of an example of misguided backing off by the early Warren court, see Del Dickson, *State Court Defiance and the Limits of Supreme Court Authority: Williams v. Georgia Revisited*, 103 YALE L.J. 1423 (1994).

In *Baker v. Carr*, a central concern of Justice Frankfurter's dissent was that requiring reapportionment of the legislature of Tennessee could compromise the Court's authority. Effective relief might prove impossible, and the Court's mandate would be flouted.⁸⁹ But the Court seems to have come unbruised out of its intervention in state legislative malapportionment, and Congress authorized judicial enforcement for the brunt of the job in the Voting Rights Act of 1965. Indeed, in 1992, in *United States Department of Commerce v. Montana*,⁹⁰ the Supreme Court held unanimously, in an opinion written by Justice Stevens, that when Congress reapportions seats to a state after a fresh census, the validity of that reapportionment is not a political question confided to Congress, but is judicially examinable under Article I, Section 2. The Court relied, in part, on *Baker v. Carr*.⁹¹

It is time to recognize that the Court's "legitimacy" never was a real issue. The Supreme Court, and the judicial power of the United States, are established by the Constitution of the United States. In deciding cases under federal law, courts usurp nothing. Rather, they conform to their oaths of office and the Supremacy Clause. It is time to understand that it is the Supreme Court itself that legitimizes and delegitimizes. That is what we pay it to do.

3. Powers "Confided" to a Political Branch

The trouble is that in thinking about political questions we tend to frighten too easily. We do not even ask the question whether things could go wrong if such claims were adjudicated. At least that **(1994) 65 U. COLO. L. REV. 911** is a functional question. When we do calm down and resort to ordered thinking, we have been trying to draw the imagined line between what is justiciable and what is a political question by referring to the tests worked out in Justice Brennan's celebrated opinion in *Baker v. Carr*.⁹² Lawyers and judges *like* the various passages of useful language offered by Justice Brennan in *Baker v. Carr*. Justice Brennan labored in them to transmute into a rule of reason what, before *Baker*, had been a harsh *per se* rule. The trouble with the *Baker* tests is that to the extent they reveal what courts should not do, they replicate judicial processing of problems of standing or equity, ironically making these doctrines even more formidable barriers to adjudication.

89. *Baker*, 369 U.S. at 269-70 (Frankfurter, J., dissenting).

90. 112 S.Ct. 1415 (1992).

91. *Id.* at 1416. *See also* *Wesberry v. Sanders*, 376 U.S. 1 (1964) (holding that the principle of equality should be applied to apportionment of congressional seats among the states).

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

To the extent the *Baker* tests are intended to help draw the line between matters “confided” to the political branches and matters capable of adjudication, they are subject to grave misinterpretation. In a case brought by a plaintiff with standing and a cause of action, there is no such line to be drawn. The distinction between the political and judicial functions is to be found at a much deeper level.

a. On Being Above the Law

To begin with, the notion that a case should be dismissed on political question grounds because it presents an issue which is “confided” or “committed” to the legislature or the executive seems to me counter-intuitive. Ours is a government of co-equal powers, and as an initial proposition we cannot say that the Constitution “confides” any power to either of the political branches in the sense that it removes issues of law arising from the exercise of that power from the jurisdiction of courts. More fundamentally, to place a governmental action beyond the scrutiny of courts is to place it to that extent above the law,⁹³ in the sense Coke intended when he rebuked **(1994) 65 U. COLO. L. REV. 912** the King.⁹⁴

In this light, the “individual rights” theories, it seems to me, reflect a pervasive misreading of *Marbury*. It is only superficially that the “individual rights” position seems in tune with the appealing Blackstonian views expressed by Chief Justice Marshall there. Marshall started all the trouble when he famously sought to distinguish between questions that are *in their nature political* and questions involving the *rights of individuals*.⁹⁵ Rather wonderfully—to those of us who have a lifelong romance with the common law—Marshall set it down that it is emphatically the province and duty of the judicial department to say what

93. “Judicial deference ignores the evident truth that in our system a law that is not enforceable by adjudicatory process is no law at all.” THOMAS M. FRANCK, *POLITICAL QUESTIONS/JUDICIAL ANSWERS: DOES THE RULE OF LA APPLY TO FOREIGN AFFAIRS?* 8 (1992); see also James G. Wilson, *American Constitutional Conventions: The Judicially Unenforceable Rules That Combine With Judicial Doctrine and Public Opinion to Regulate Political Behavior*, 40 *BUFF. L. REV.* 645 (1993); Robert F. Nagel, *Political Law, Legalistic Politics: A Recent History of the Political Question Doctrine*, 56 *U. CHI. L. REV.* 643, 649 (1989). But see J. Peter Mulhern, *In Defense of the Political Question Doctrine*, 137 *U. PA. L. REV.* 97 (1988).

94. Chief Justice Coke was quoting Bracton to King James I when he said, “The King ought not to be under any man, but he is under God and the Law.” *Youngstown Sheet & Tube Co. v. Sawyer* (The Steel Seizure Case), 343 U.S. 579, 655 (1952) (Jackson, J., concurring). See the nice echo of this principle in *United States v. Lee*, 106 U.S. 196, 260-61 (1882) (Nelson, J.): “But why should not the . . . lawfulness of the authority be made the subject of judicial investigation? . . . No man in this country is so high that he is above the law.” But see *Franklin v. Massachusetts*, 112 S.Ct. 2767 (1992), discussed *infra* note 162.

95. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803).

the law is. The common law would protect the vested rights of individuals. But *Marbury's* was an action against the Secretary of State, and Marshall, for the Federalist Court, hastened to forestall, or to try to forestall, the wrath of the Anti-Federalists, then in political power. He acknowledged that there were questions which in their nature were essentially political, and thus unsuitable for adjudication.

Lawyers have been misunderstanding him ever since. Where—they ask themselves—between these apparent poles, would Chief Justice Marshall draw the line? Somehow lawyers have come generally to agree⁹⁶ that the great Chief Justice was preserving from judicial review only the discretionary governmental choices of high officials.⁹⁷ Indeed, lawyers have come generally to agree also that something more needs to be preserved from review than the narrow **(1994) 65 U. COLO. L. REV. 913** discretion they suppose Chief Justice Marshall to have been describing.

Let me take a deep breath and ask the very brash question whether the generally agreed position holds water even as to the discretionary governmental choices of high officials. Even the discretionary governmental choices of high officials can, in the words of Marshall's warning, "sport away the vested rights of individuals."⁹⁸ More brashly yet, let me say flatly that there is *no* sphere of discretionary political choice by high government officials which the great Chief Justice was attempting in *Marbury* to insulate from judicial review in the sense attributed to him.

b. Distinguishing the Judicial from the Political Function

96. See, e.g., Michael Stokes Paulsen, *A General Theory of Article V: The Constitutional Lessons of the Twenty-Seventh Amendment*, 103 YALE L.J. 677, 707 n.100 (1993), assuring the reader that Marshall in *Marbury* meant by "political questions" only genuine political questions in the sense of policy questions on which the Constitution supplies no legal rule and therefore leaves to the discretion of the political branches.

97. See, by the way, the interesting English case of *R. v. Secretary of State for the Home Dep't, ex parte Bentley*, [1993] 4 All E.R. 442 (Q.B.), sustaining jurisdiction to review an exercise of the royal prerogative of mercy by the Home Secretary. The court took the straightforward view that when a decision by the Home Secretary is infected with legal errors it ought not to be immune from legal challenge merely because it involves an element of policy or is made under the prerogative.

98. *Marbury*, 5 U.S. at 166. Cf. *Youngstown*, 343 U.S. at 579; *United States v. Lee*, 106 U.S. 196 (1882).

We had good theory and good law on this point with the 1969 case of *Powell v. McCormack*.⁹⁹ The broad lesson one took away from that case was that when a power is confided by the Constitution exclusively to a political branch, the judiciary has power to adjudicate the regularity, under the Constitution and laws, of the exercise of that power. While Congress is the sole authority on all matters exclusively confided to it by the Constitution, the courts—and ultimately the Supreme Court—must retain power to review the constitutionality of Congress’s proceedings and choices even as to those matters.

Yet now we have the 1993 Supreme Court pronouncement on political questions in *Nixon v. United States*.¹⁰⁰ This was the case about the impeachment of Walter L. Nixon, Jr., Chief Judge of the United States District Court for the Southern District of Mississippi. In the Supreme Court, the substantive issue was whether it was constitutional for the Senate to have delegated trial of Judge Nixon’s impeachment to a mere Senate committee—whether, that is, the delegation fulfilled the Senate’s constitutional obligation to “try” the impeachment.

Now, until Judge Nixon’s case was decided, we thought we had the black-letter position of *Powell v. McCormack* to hang on to. And **(1994) 65 U. COLO. L. REV. 913** behind *Powell* shone the luminous beacon of the great case of *Baker v. Carr*,¹⁰¹ with which the Warren Court, we supposed, had chased the political question specter into shadowy corners, undefined but remote. Think of it. By declaring a state legislature unconstitutionally apportioned, *Baker*, in a sense, had adjudicated *the legality of an existing state government*, the very question¹⁰² the Court previously had held to be a nonjusticiable political question in the foundation case of *Luther v. Borden*.¹⁰³

99. 395 U.S. 486 (1969).

100. *Nixon v. United States*, 113 S.Ct. 732 (1993).

101. 369 U.S. 186 (1962).

102. The magnitude of the event may be appreciated if one looks at *Baker* from the point of view of Chief Justice Taney, as exhibited in *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849). Taney would have perceived *Baker*, as he did *Luther*, as threatening to put all the past acts and taxes of the existing state government under a cloud. *Luther*, 48 U.S. at 38-39. It may help to explain Taney’s fears that the defendant in *Luther* offered in evidence all the Rhode Island legislature’s past acts and proceedings. *Luther*, 48 U.S. (7 How.) at 8. Lawyers continued for some time to argue that adjudication of the legitimacy of an election would topple the whole state as an institution. See the argument of the defendant in *Pacific States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118, 122 (1912).

103. 48 U.S. (7 How.) 1 (1849); see also *Georgia v. Stanton*, 73 U.S. (6 Wall.) 50 (1867); *infra* notes 156-69 and accompanying text.

In this state of the law, then (I almost said, “thrilling state of the law”), the natural thing for the Supreme Court to have done in Judge Nixon’s case would have been to pass over the government’s unconvincing political question argument, reach the merits, and sustain the impeachment.¹⁰⁴ The result would have been the same. The difference would have been only that the issue of what the Senate may or may not do would have been aired openly, in a more thorough, orderly way, with full briefing and argumentation. The Justices’ deeper and more focused analyses would have been available to the Senate in the future should it ever consider any more disturbing flexing of its adjudicatory muscle.

So it came as a shock when the Court in *Nixon* held—this late in the day—that the constitutionality of impeachment proceedings in **(1994) 65 U. COLO. L. REV. 915** the Senate was a nonjusticiable political question.

How did the Court get from here to there, from *Powell* to *Nixon*? Chief Justice Rehnquist, writing for the *Nixon* Court, cheerfully colored his arguments by number, staying in the lines, as it were, of the tests worked out by Justice Brennan in *Baker v. Carr*. But somehow the tests did not work.

The Chief Justice cannot have been wearing a very straight face when in *Nixon* he insisted, citing *Baker*, that there were no “judicially manageable standards” by which courts could say *whether a case had been “tried.”*¹⁰⁵ If courts do not know whether or not a case has been tried, nobody knows. It hardly helps when Chief Justice Rehnquist attempts to prove his point by finding alternative meanings of the word “try” in those revered legal authorities, obsolete dictionaries.

Nor are we persuaded by the Chief Justice when in *Nixon* he argues, under *Baker*, that the Constitution makes a “textually demonstrable Constitutional commitment”¹⁰⁶ of impeachments to the legislative branch. It is true that the

104. The experience has been that courts tend to defer to a challenged practice on the merits if they do not defer at the threshold on political- question grounds. See, e.g., *Dames & Moore v. Regan*, 453 U.S. 654 (1981); see, e.g., *Orlando v. Laird*, 443 F.2d 1039 (2d Cir. 1971) (holding justiciable the question whether Congress need take some action to authorize the war; and holding, on the merits, that Congress had participated appropriately); other federal governmental cases cited *supra* note 37; state governmental cases cited *infra* notes 126, 185. The reapportionment cases, of course, have gone the other way; see also *Quinn v. Millsap*, 491 U.S. 95 (1989) (reversing the state court and striking down under the Equal Protection Clause as arbitrary and irrational a Missouri law imposing a qualification of ownership of real property upon appointment to a government board).

105. *Nixon*, 113 S.Ct. at 736 (emphasis added).

106. *Baker*, 369 U.S. at 217; *Nixon*, 113 S.Ct. at 735.

House has “sole” power to impeach, and the Senate “sole” power to try impeachments. Lower courts, analogously, generally have exclusive jurisdiction to try cases, but the propriety of the judicial review of their judgments is not questioned; indeed, appellate courts sit precisely to review judgments. Legislatures have exclusive power to pass bills, but judicial review of legislation has been a legitimate function of courts in this country at least since *Marbury*.

Nor do we have to believe Chief Justice Rehnquist’s foxes-guarding-the-henhouse argument, that it is somehow improper for the judiciary to become involved in the impeachment of a judge.¹⁰⁷ Judges are tried by judges routinely in criminal cases.¹⁰⁸

More serious, perhaps, is Chief Justice Rehnquist’s suggestion in *Nixon* that judicial review of impeachment could “expose the country (1994) 65 U. COLO. L. REV. 916 to months, or perhaps years, of chaos.”¹⁰⁹ But the only example that legitimately could give rise to such a fear is that of impeachment of a President, and that was not the case before the Court. The presidential impeachment case, if it is ever presented, could be managed speedily, or treated as a necessary exception to the more general rule.¹¹⁰

Nor should I pass over the Chief Justice’s flawed reading of the constitutional language giving the Senate “sole power to try” impeachments.¹¹¹ Justice White’s

107. *Nixon*, 113 S.Ct. at 738.

108. *Cf. Pulliam v. Allen*, 466 U.S. 522, 536 (1984) (holding judges open to suits in equity, and noting that judicial immunity also does not extend to criminal liability). Professor Chemerinsky argues, Chemerinsky, *supra* note 3, at 855 n.24, that there is an “obvious self-interest of the judiciary in limiting . . . impeachments.” The argument seems serious only to the extent we are willing to presume that a majority of the appellate judges in cases like *Nixon* will have reason to fear impeachment themselves.

109. *Nixon*, 113 S.Ct. at 739 (quoting from the opinion of the Court of Appeals, 938 F.2d 239, 246 (D.C. Cir. 1992)). It seems unreal to me to imagine that our beleaguered presidents are not already hors de combat for “months” or “years” defending themselves against accusations of impropriety and cover-up. The country for some reason does not experience this condition as “chaos.”

110. Obvious reasons of public policy would prevent equity from attempting to reinstate a successfully removed president. Arguably the exception suggested in the text is otherwise unwarranted. U.S. CONST. art. I, § 3, cl. 7, implicitly contemplates an outcome inconsistent with, if not a collateral attack upon, a successful impeachment, because it contemplates a subsequent criminal case. But if there has been an arbitrary impeachment, it is unlikely that a subsequent criminal prosecution can be brought in good faith. The differences between the constitutionally contemplated prosecution forum and a civil action would seem not to put the successor in office under a sufficiently deeper cloud to justify barring a civil action.

111. *Nixon*, 113 S.Ct. at 736.

separate opinion on the point, a nice piece of purposive reasoning, makes clear that the utility of this language is not to preclude judicial review of the regularity of the proceedings, but only to sort out the power to try an impeachment from the power to bring articles of impeachment in the first place, which is lodged exclusively (“sole[ly]”) in the House.¹¹²

It might be argued in support of the Chief Justice’s reading that the Senate’s judgment in an impeachment proceeding becomes *res judicata*, and thus that litigation of errors of law in that proceeding in a subsequent federal lawsuit would constitute an impermissible collateral attack.¹¹³ But of course this argument was unavailable to a Court relying on the proposition that there were no judicially discoverable standards for ascertaining whether or not one who has been successfully impeached has been “tried,” and Chief Justice Rehnquist did not make such an argument. Quite to the contrary, as federal courts widely understand, judicial review of adjudications by the political branches and their agencies should be and is available (1994) 65 U. COLO. L. REV. 916 under the Constitution.¹¹⁴

This misreading of the “sole power” language is an important part of what I can only call the *abstractness* of *Nixon*. Misinterpretation, perhaps deliberate misinterpretation, is a chronic feature of abstract focus upon text—a process Justice Brennan’s “textually demonstrable commitment” language in *Baker* seems to invite. The invitation is peculiarly unfortunate here; one need not be a legal realist to see that courts are not deterred by the absence of a “textually demonstrable commitment” from finding a political question,¹¹⁵ or by apparent¹¹⁶ text to the contrary from finding no commitment at all.¹¹⁷

112. *Id.* at 742 (White, J., concurring in the judgment).

113. I am indebted to Akhil Amar for arguing this point to me.

114. This is so whether or not review also is available under the Administrative Procedure Act. *Cf.* *Franklin v. Massachusetts*, 112 S.Ct. 2767, 2776 (1992) (O’Connor, J.): “Although the reapportionment determination is not subject to review under the standards of the APA, that does not dispose of appellees’ constitutional claims.” (citing *Webster v. Doe*, 486 U.S. 592, 603-05 (1988)).

115. *See, e.g.*, *O’Brien v. Brown*, 409 U.S. 1 (1972). Until *Cousins v. Wigoda*, 419 U.S. 477 (1975), *O’Brien* was thought to have undercut the White Primary Cases, or at least to have limited them to their own facts. This although the Constitution allocates no specific authority to either political branch over political parties. (It had been supposed, under the White Primary Cases, and it is assumed today, that the right to vote in a primary election is adjudicable under both the Fifteenth Amendment, *Smith v. Allwright*, 321 U.S. 649 (1944), and the Equal Protection Clause of the Fourteenth Amendment, *Nixon v. Herndon*, 273 U.S. 536 (1927)). *See also, e.g.*, *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964), in which the Court, per Justice Harlan, held that the validity of acts of foreign sovereigns present nonjusticiable political

So the special vice of abstraction in *Nixon* is its malleability, letting the Court play ducks and drakes with a great Warren Court case. What makes *Nixon v. United States* so searingly wrong is that (1994) 65 U. COLO. L. REV. 918 at its level of abstraction it is able to bury the message of *Powell v. McCormack*: that the Constitution has confided to federal courts (and, under the Supremacy Clause, to all courts) the duty to review the constitutionality of the exercise even of non-legislative powers textually committed to Congress.

Chief Justice Rehnquist does purport to distinguish *Powell*, but he cannot do it—and does not want to do it—in a way that would save that message. Chief Justice Rehnquist confines *Powell* to a little cage, fit for a *rara avis*:

Our conclusion in *Powell* was based on the fixed meaning of “[q]ualifications” set forth in Art. I, § 2. The claim by the House that its power to “be the Judge of the Elections, Returns and Qualifications of its own Members” was a textual commitment of unreviewable authority was defeated by the existence of this separate provision specifying the only qualifications which might be imposed for House membership. The decision as to whether a member satisfied these qualifications was placed with the House, but the decision as to what these qualifications consisted of was not. . . .¹¹⁸

Powell is distinguishable, then, says the Chief Justice, because:

questions; this although the Constitution nowhere suggests a final “commitment” of such an issue to either political branch. The Court relied on pre-*Erie* cases to the same effect, *Oetjen v. Central Leather Co.*, 246 U.S. 297, 302-304 (1918) (after reaching the merits); *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897). But see *Dames & Moore v. Regan*, 453 U.S. 654 (1981) (sustaining on the merits an executive agreement to shift jurisdiction over American citizens’ private claims to an international claims tribunal); *United States v. Pink*, 315 U.S. 203 (1942) (sustaining on the merits an exercise of foreign relations power by the President); *Missouri v. Holland*, 252 U.S. 416 (1920) (Holmes, J.) (holding, in a case involving migratory birds, that in the absence of specific Article I power, the nation must have power to deal by treaty with overriding issues of food supply notwithstanding the general police power of the state to deal with migratory birds; and reaffirming that a treaty is the supreme law of the land).

116. I say “apparent” because, as *Powell v. McCormack*, 395 U.S. 486 (1969), makes plain, a textual commitment of a power to a political branch should not strip courts of their power to review the constitutionality of the exercise of that power.

117. See, e.g., *Powell v. McCormack*, 395 U.S. 486 (1969), reviewing, despite an apparent textual commitment to Congress of the power to judge the qualification of its members, the constitutionality of the proceedings purporting to exclude a member.

118. *Nixon*, 113 S.Ct. at 740.

[In] the case before us, there is no separate provision of the Constitution which could be defeated by allowing the Senate final authority to determine the meaning of the word “try” in the Impeachment Trial Clause.¹¹⁹

Chief Justice Rehnquist seems to be saying here that acts of Congress *inconsistent* with its express constitutional authority are judicially reviewable, but that acts of Congress *exceeding* its express constitutional authority are not. But no such confining condition as that¹²⁰ was thought requisite by Chief Justice Warren in *Powell* to an assertion of constitutional rights.

In *Powell*, the Court, citing *Baker v. Carr*, struck down as unconstitutional a vote of the House to “exclude” one of its Members for financial improprieties. The Court fixed on the fact that the Constitution gives the House only the power to “expel” for such a reason. The Constitution does not give Congress power to exclude from entering Congress and taking her seat one who, being duly elected, meets the qualifications of age, citizenship and residence set forth in Article I, Section 2. The House’s vote purporting to exclude Adam Clayton Powell in fact met the constitutional two-thirds standard for expulsion. But the vote had not been framed in advance as a vote to “expel,” but rather as one to “exclude.” There was real doubt whether the vote would have succeeded if it had been framed as a vote to “expel.” These were the irregularities that the Supreme Court would not let pass. Chief Justice Warren, reminding us of the people’s fundamental right to choose whom they please to govern them, wrote, “[T]his principle is undermined as much by limiting whom the people can select as by limiting the franchise itself.”¹²¹ Although Article I, Section 5, is a commitment to Congress of the power to judge the qualifications of its members, the Court concluded, Congress may judge only the qualifications set forth in Article I, Section 2. After *Powell*, in other words, though Congress remains the judge of the qualifications of its members, it becomes clear that the Court retains the right to review Congress’s nonlegislative proceedings or choices for their constitutionality or legality, together with its established power to review Congress’s legislative choices.

119. *Id.*

120. Of course, the Court may strike down as unconstitutional actions beyond the power of Congress without reference to any specific express constitutional limit on the power of Congress. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938) comes to mind; *Erie* holds that Congress lacks, and therefore federal courts lack power to displace otherwise applicable state law by making law that is not federal law. But *Erie* relies on no specific provision of constitutional text

121. *Powell*, 395 U.S. at 547.

I should clarify that, inevitably, there will be some irregularities courts will not sit to correct. For example, if Powell had sought an *ex parte* restraining order in the midst of the House fight over whether or not to “exclude” him, he would have been most unlikely to have succeeded. Courts do not like to disrupt ongoing proceedings to try their regularity piecemeal.¹²² But, again, this is a conclusion that courts sitting in equity traditionally reach; we do not need a political question doctrine in addition to this tradition.

It seems doubtful, after *Nixon*, that constitutional review of the regularity of the proceedings of Congress, within the meaning of *Powell*, is still available. Revival of the political question doctrine was this easy for the current Court, in my view, precisely because (1994) 65 U. COLO. L. REV. 920 the Court had saved the political question doctrine in *Baker*, when it conceded that Guarantee Clause claims remained nonjusticiable political questions. That puts the nonjusticiability of the Guarantee Clause at the center of the political question controversy.

II. THE GUARANTEE CLAUSE

A. *The Regrettable Instability of Baker v. Carr*

Whatever purposes underlie the sweeping but ambiguous¹²³ guarantee of Article IV, Section 4,¹²⁴ to the states¹²⁵ of a “Republican Form of Government,”

122. See, e.g., *Stefanelli v. Minard*, 342 U.S. 117 (1951) (federal equity will not restrain the introduction of unconstitutionally seized evidence during the course of state criminal proceedings).

123. See, e.g., *Georgia v. Stanton*, 73 U.S. (6 Wall.) 50 (1867), in which both the plaintiff state and the defendant Secretary of War relied on the Guarantee Clause. *Stanton* is discussed *infra* notes 156-69 and accompanying text.

Story argued that the guarantee was against political or mob tyranny within the state: “Without a guaranty, the assistance to be derived from the national government in repelling domestic dangers, which might threaten the existence of the state constitutions, could not be demanded, as a right, from the national government” JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 677 (1987 ed.). But here Story was importing into the guarantee proper the Clause’s separate provision of authority to the President to suppress civil disorders at the request of the state. It would have been like Story to have found some such way to play down the Framers’ fears of national tyranny or of a restoration of national monarchy.

On the question whether the Guarantee Clause may be too vague to be actionable, see Ann Althouse, *Time for the Federal Courts to Enforce the Guarantee Clause?—A Response to Professor Chemerinsky*, 65 U. COLO. L. REV. 881 (1994); G. Edward White, *Reading the Guarantee Clause*, 65 U. COLO. L. REV. 787 (1994) (this issue).

124. “The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the

the Guarantee Clause of Article IV has long been held to be unenforceable in federal courts.¹²⁶ (1994) 65 U. COLO. L. REV. 921 *Baker v. Carr* ought to have changed all that. Some of us may have thought that it had. To be sure, in *Baker*, the Court used the Equal Protection Clause, not the Guarantee Clause, to strike down Tennessee's malapportioned legislature; but it was widely perceived at the time that the political question doctrine ought not to have survived *Baker*: whatever political questions inhered in the malapportionment issue in *Baker* would continue to do so under whatever clause a court held the malapportionment unconstitutional.

Yet Justice Brennan insisted on the difference between the Guarantee Clause and the Equal Protection Clause for this purpose.¹²⁷ Perhaps he could not have

Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence" U.S. CONST. art IV, § 4.

125. The constitutional language gives the guarantee to the states. But in *Texas v. White*, 74 U.S. (7 Wall.) 700 (1869), the Supreme Court took the view that the beneficiaries of the guarantee were the people.

126. *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849), is conventionally cited as holding the Guarantee Clause to present a nonjusticiable "political question." But it should be observed that the Court thereafter did process several Guarantee Clause cases on their merits, deferring to the state practice in each case as not in breach of the guarantee. *See, e.g.*, *Kies v. Lowery*, 199 U.S. 233 (1905) (state-level districting of schools); *Taylor & Marshall v. Beckham*, 178 U.S. 548 (1900) (state legislative panel determining contested elections for the office of governor); *Forsyth v. Hammond*, 166 U.S. 506 (1897) (state judiciary setting city boundaries); *In re Duncan*, 139 U.S. 449 (1891) (state legislature enacting certain criminal statutes); *Minor v. Happersett*, 88 U.S. (21 Wall.) 162 (1875) (state retaining exclusively male suffrage). Dissenting in *Plessy v. Ferguson*, 163 U.S. 537, 563-64 (1896), the first Justice Harlan challenged the majority's approval of de jure separation of the races as "inconsistent with the guarantee given by the Constitution to each State of a republican form of government."

Thus, the Guarantee Clause became unenforceable only when the Court restated the position, citing *Luther*, in *Pacific States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118 (1912) (holding nonjusticiable a claim that the initiative and referendum violated the guarantee of a republican form of government); *see also* *Marshall v. Dye*, 231 U.S. 250 (1913) (holding that the Guarantee Clause presents a nonjusticiable political question under *Pacific States Tel. & Tel.*); *Colegrove v. Green*, 328 U.S. 549 (1946) (same, plurality view).

127. *Baker*, 369 U.S. at 222, n.48. *See also* *Elrod v. Burns*, 427 U.S. 347 (1976) (plurality opinion by Brennan, J., holding that a cause of action was stated in a complaint challenging, on First Amendment grounds, the state's party patronage rules). In *Baker*, Justice Brennan went so far as to note that the Guarantee Clause could not ground a challenge to a permanent military government in the state, although such a government obviously would not be a republican form of government.

This may suggest a concern on Justice Brennan's part to avoid delegitimizing Reconstruction, and, ultimately, the Fourteenth Amendment. Reconstruction, of course, entailed federal military occupation of certain of the ex-rebel states, and conditioned readmittance of those

obtained the votes needed for *Baker* had he not done so. Or perhaps he genuinely believed that the Guarantee Clause remained a nonadjudicable political question. My own guess is that Justice Brennan was trying to avoid the possibility of opening Reconstruction, and ultimately the Fourteenth Amendment, to late-blooming challenge.¹²⁸ Whatever Justice Brennan's reasons, this saving of the political question doctrine in *Baker* is the knot at the center of the tangle. Justice Brennan maintained that *Luther v. Borden*,¹²⁹ the classic case holding the Guarantee Clause nonjusticiable, was a case that a court could not have decided. He would only distinguish *Luther*, not overrule it. **(1994) 65 U. COLO. L. REV. 922** This is why *Baker* failed to bury the political question doctrine. Justice Brennan's struggle in *Baker* to generalize the doctrine away instead dissolved the doctrine into its supposed constituent elements. These would continue to block litigation, whether applied with integrity or manipulated, as *Nixon v. United States* demonstrates. *Baker*, then, notwithstanding high hopes, may have given us only an exception for reapportionment cases to the general rule of nonjusticiability of "Republican Form of Government" claims, an exception as to which in any event Congress has stolen the Court's thunder.¹³⁰ We have arrived at this anticlimactic position despite the fact that under Article IV, Section 4 of the Constitution, the United States guarantees to the states a republican form of government.¹³¹ Relying largely upon its Article IV powers, including the Section 3 power to admit a state to the Union, the Reconstruction Congress was able to condition the

states to the Union upon ratification of the Fourteenth Amendment. See *infra* note 179 and accompanying text.

128. See *supra* note 127; see also *infra* note 179 (discussing *Coleman v. Miller*, 307 U.S. 433 (1939)).

129. 48 U.S. (7 How.) 1 (1849).

130. Voting Rights Act of 1965, 42 U.S.C. §§ 1971, 1973; cf. *Shaw v. Reno*, 113 S.Ct. 2816 (1993); *Davis v. Bandemer*, 478 U.S. 109 (1986).

131. We cannot be confident that we know what "a Republican Form of Government" means. A republican form of government, in the minds of the Framers, was not simply one without a monarch. Representative democracy was important to them, as Article I shows. But how representative a democracy, and how participatory the rights of those represented, we do not know. At the time of the Constitutional Convention, all of the colonies boasted elected legislatures. But colonial suffrage was severely and disuniformly constrained by property and other qualifications. Venice was still a "republic" in the Framers' day, yet its franchise was even less inclusive than the Athenians' "democracy," limited as Venetian suffrage was to a hereditary aristocracy.

But it is a mistake to describe the guaranteed political rights as "participatory." See, e.g., Chemerinsky, *supra* note 3, at 868. To do so is to suggest a legitimate basis for such phenomena as the pervasive but questionable statewide initiative and referendum. For the argument, with which I agree, that such end runs around representative democracy may be unconstitutional, see authorities cited *infra* note 207.

readmission to Congress of the rebellious southern states upon ratification of the Fourteenth Amendment.¹³² It was against the background of these broad national powers that in the classic case of *Luther v. Borden*¹³³ the Court, per Chief Justice Taney,¹³⁴ refused to review the legitimacy under the Guarantee Clause of the existing government of Rhode Island. Since the *Baker* (1994) 65 U. COLO. L. REV. 923 Court held itself so circumscribed by *Luther*, it is worth turning for a moment to that case.

B. *Looking Backward: Luther v. Borden*

Luther v. Borden is conventionally read to have presented the question which of two rival governments was the legitimate government of Rhode Island. This was the question, we are told, that in *Luther* was held confided exclusively to the political branches. As Chief Justice Taney pointed out in *Luther*, Congress has the power of judging the qualifications of the state's elected representatives; and Congress indeed had seated the representatives of the existing government of Rhode Island. In *Luther* it was also true that, in the turmoil of the Dorr Rebellion, President Tyler had voiced support for the existing government of Rhode Island, although he stopped short of sending in troops. Thus, powers confided by the Constitution to the political branches, to the extent exercised by them, had been exercised in favor of the existing government.¹³⁵

In holding the Guarantee Clause nonadjudicable, the *Luther* Court relied, in part, on textually demonstrable commitments of relevant power to the political branches: The Constitution makes Congress the judge of the qualifications of the elected representatives of the state, and, under Article IV, Section 3, Congress has the power to admit a state to the Union. The situation in *Luther* was that representatives of the existing Rhode Island government had been seated by

132. For the view that a state could not leave the Union, *see infra* note 158.

133. 48 U.S. (7 How.) 1 (1849).

134. *See also* by Chief Justice Taney, *Kennett v. Chambers*, 55 U.S. (14 How.) 38 (1852) (holding that the right of a foreign government to recognition presents a nonjusticiable political question); *Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657, 752 (1838) (Taney, C. J. dissenting, to make the point that jurisdictional disputes between states not involving property should be unadjudicable political questions). For background on Taney's Chief Justiceship, *see* G. EDWARD WHITE, *THE AMERICAN JUDICIAL TRADITION: PROFILES OF LEADING AMERICAN JUDGES* 64-83 (1976).

135. *Luther*, 48 U.S. (7 How.) at 42-43. For background, *see* STRUM, *supra* note 51, at 11-35; MARVIN E. GETTLEMAN, *THE DORR REBELLION, A STUDY IN AMERICAN RADICALISM: 1833-1849* (1973); WILLIAM A. WIECEK, *THE GUARANTEE CLAUSE OF THE U.S. CONSTITUTION* (1972); ARTHUR M. MOWRY, *THE DORR WAR: OR, THE CONSTITUTIONAL STRUGGLE IN RHODE ISLAND* (1901).

Congress. Once Congress had received those representatives, it was not for the Court, Chief Justice Taney reasoned, to take issue with the determination thus made.

Yet I doubt that these textually demonstrable commitments to Congress would have troubled Justice Brennan as they had Justice Taney, had *Luther* been Justice Brennan's to write and had the case arisen in his own time. Justice Brennan would have felt the full force of the fact that the obligation of the guarantee of Section 4 is imposed not upon Congress or any other federal branch, but upon the "United States"—including, presumably, its judicial branch. Justice Brennan would have felt the insufficiency of the House or Senate (1994) 65 U. COLO. L. REV. 924 as a forum for determining the legitimacy of the representative's government at the moment of seating that representative. And Justice Brennan would have understood, as *Baker v. Carr* shows, that a collapse of republican norms cannot be self-correcting through the political process.

To be sure, Justice Brennan in *Baker* saw all sorts of other reasons adjudication might be unwise in a particular case. He saw that courts would defer to the political branches if there were some "unusual need for unquestioning adherence," or a "potentiality of embarrassment from multifarious pronouncements," or "the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion."¹³⁶ Those are severe problems of equity. One can agree with Justice Brennan, in other words, that there are some things courts will not do. But with hindsight we can all agree that coming up with the "one man, one vote" standard for voting rights cases has hardly been one of those things.¹³⁷

I think we can get some help by having another look, with our binoculars set at the hindsight position, at *Luther v. Borden*. It turns out that what *Luther* was about, precisely, was voting rights. I think we can show that Justice Brennan took a wrong turn when he decided to fall in with the view that *Luther* presented a nonjusticiable "political question."

1. *Luther* in Hindsight:¹³⁸ The "Chaos" Argument and the Fear of Litigation

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

137. *Reynolds v. Sims*, 377 U.S. 533 (1964). *But see infra* note 169.

138. The echo of George Meredith's "Lucifer in Starlight" is inadvertent, but not inapposite: "He reached the middle height, and at the stars,/ Which are the brain of heaven, he looked, and sank./ Around the ancient track marched, rank on rank,/ The army of unalterable law."

Chief Justice Taney did not rest the *Luther* Court's unanimous perception of a political question only on the powers confided to the political branches of the nation. He also thought it necessary to defer to the political branches of the *existing state government*. Although that sort of deference would seem to make state election rights unadjudicable, not only in *Luther*, but in *Baker*, Taney was identifying what seemed to him a very real problem. Taney reasoned that a holding delegitimizing an existing state government would put into question all the state's acts, laws and taxes down through the **(1994) 65 U. COLO. L. REV. 925** years, and render its officers vulnerable to suit and even criminal process.¹³⁹

Chief Justice Taney's reasoning in *Luther* seemed to weigh heavily with Justice Brennan in *Baker*. He voiced agreement with Taney that a decision in *Luther* would have led to "chaos."¹⁴⁰ This argument from "chaos" is at root, it seems to me, only a deep fear of litigation. This is all that Justice Brennan finally could glean from it in *Baker*.¹⁴¹ The argument is that declaring a state government unconstitutional will render all of its past acts and taxes open to legal challenges. But even assuming no relevant statutes of limitation, in the nineteenth century as now direct litigation against a state would have been virtually ruled out by sovereign immunity in the state courts and the Eleventh Amendment in federal courts. Officer suits for injunctive relief were available in theory,¹⁴² but the feared litigation that the "chaos" argument envisions, being for old damages, would not lie in equity. Actions for retrospective relief at law could not lie if relief would run against the state treasury.¹⁴³ The only **(1994) 65 U. COLO. L.**

139. *Luther*, 48 U.S. (7 How.) at 38-39. See *supra* note 102. For some discussion of why the reapportionment cases do not turn out this way, see *infra* notes 143-48 and accompanying text.

140. *Baker*, 369 U.S. at 219.

141. *Id.*

142. See LOUISE WEINBERG, FEDERAL COURTS: CASES AND COMMENTS ON JUDICIAL FEDERALISM AND JUDICIAL POWER ch. VI, § 1 (1994) (on the emergence of the federal officer suit for an injunction against state action, exploring the range of opportunities for nineteenth century litigation against a state or the nation or their officers); see also Louise Weinberg, *The Monroe Mystery Solved: Beyond the "Unhappy History" Theory of Civil Rights Litigation*, 1991 B.Y.U. L. REV. 737 (1991) (considering the phenomenology of earlier litigation as it may have been constrained by the nature of the substantive constitutional claims cognizable at the time).

143. The position was nailed down in the modern era in *Edelman v. Jordan*, 415 U.S. 651 (1974) (Rehnquist, J.) (holding barred under the Eleventh Amendment an injunction against a state official, notwithstanding *Ex parte Young*, 209 U.S. 123 (1908), when compliance would require retroactive payments from the state treasury, and distinguishing injunctions requiring future expenditures). Where the plaintiff seeks the return of its own specific property, and this will not entail taking money from the state treasury, the plaintiff may have an action against the state notwithstanding the Eleventh Amendment. In *Florida Dep't of State v. Treasure Salvors*, 458 U.S. 670 (1982), the Court, per Justice Stevens, ruled that the Eleventh Amendment did not bar an

REV. 926 actions available, then, would have been actions against individual officers for damages payable by them for their own torts, in their individual capacities. Justice Brennan sees all this as he thinks his way through *Luther's* “chaos” rationale. You can see his quick mind working it out on the living page.

Trying to put some flesh on this “chaos” argument, Justice Brennan suggests in *Baker* that we need to ask what might have happened in subsequent cases if the plaintiff had prevailed in *Luther*. Justice Brennan says it would have seemed to Chief Justice Taney, looking at the case *ex ante*, that future civil and criminal actions indeed would have succeeded. The *Luther* plaintiff having prevailed, defenses of “de facto” authorization, “good faith,” and the like, would have become unavailable in later cases, having been trumped in *Luther*: “There was, of course, no room for application of any doctrine of *de facto* status to uphold prior acts of an officer not authorized *de jure*, for such would have defeated the plaintiff’s very action.”¹⁴⁴ (The further implication, not explicitly mentioned by Justice Brennan, is that officers, fearing litigation, would begin to refuse to enforce law.) The trouble was that, in *Luther*, unsurprisingly, the defendant had prevailed below. The Circuit Judge had refused to receive the plaintiff’s evidence and had informed the jury that the laws of the Charter government authorized the defendant to act as he had. Accordingly, the jury had found for the defendant.¹⁴⁵ Justice Brennan is saying here that, as a practical matter, a reversal on behalf of the plaintiff would have stripped the defendant of his defenses of authorization, good faith, and de facto government, as a matter of law.

But surely Justice Brennan is making a jump of logic here. It might have been conducive to “chaos” for the Supreme Court in *Luther* to strip defendants of their defenses. But that tells us nothing about whether it would be conducive to “chaos” for the Supreme Court to permit plaintiffs to go to the jury on Guarantee Clause claims generally. Although the posture of the *Luther* case seems to knit these issues together, in theory there is nothing in permitting plaintiffs to go to the jury with Guarantee Clause claims, free from the bar of the political question

admiralty suit against state officials in their official capacity for the return of artifacts discovered by the plaintiffs in undersea exploration. Until *Treasure Salvors*, the protection of property rights ringingly affirmed in *United States v. Lee*, 106 U.S. 196 (1882), had been thought undercut by *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949). *Larson* was an action to enjoin a federal official from selling coal that the plaintiff alleged had already been sold to the plaintiff. The Court held the action barred by the sovereign immunity of the United States. The Supreme Court in *Treasure Salvors* relied on *Lee*, and suggested that *Larson* and *Lee* together meant only that relief may not run against the state treasury.

144. *Baker*, 369 U.S. at 219.

145. *Luther*, 48 U.S. (7 How.) at 38.

doctrine, that should strip defendants of their other defenses.¹⁴⁶ (1994) 65 U. COLO. L. REV. 927

In fact “chaos” does not occur in the wake of malapportionment rulings, although in theory such cases delegitimize a government. In part this is because individual low-level officers do retain their defenses. In part this is because the threat of trespass suits against low-level officers is not a very realistic one. Such civil servants as the defendant in *Luther* rarely present the sorts of litigational targets regarded as promising. *Luther* itself, after all, was a contrived case, brought to make a point; I doubt that Luther had damages worth suing over, or that Borden had sufficient wealth to satisfy a judgment. Suing such defendants will not restore the losses to a plaintiff which it incurred in complying with the past acts or taxes of which it complains. Where there are damages attributable to trespassory acts of an enforcing officer, juries are very sympathetic to impecunious public servants,¹⁴⁷ and will afford them a rough defense of good faith whether or not instructed to do so. The costs of defending can be devastating for low-level public servants, but after a while plaintiffs stop bringing suits they cannot win and that cannot remedy their underlying grievances.

Concededly, today liabilities for past taxes wrongfully collected may be serious for the state. In 1990 we had an enigmatic pronouncement from the Court that in such situations a state must provide meaningful retrospective relief.¹⁴⁸ But such a pronouncement can have scant relevance for malapportionment cases. The revenues collected by Tennessee and Rhode Island before *Baker* or *Luther* arose were expended for the ongoing needs of the de facto state by authorization of legislatures then believed to be legitimate, under laws then in force. Actions against the state for refunds could not prevail against such a defense, even if the then existing state (1994) 65 U. COLO. L. REV. 928 government had been adjudicated illegitimate.

146. In civil rights actions against state officials today, all those not absolutely immune have a qualified immunity insofar as their conduct “does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Cf. *Anderson v. Creighton*, 483 U.S. 635 (1987). For discussion see John C. Jeffries, Jr., *Compensation for Constitutional Torts: Reflections on the Significance of Fault*, 88 MICH. L. REV. 82 (1989); Richard A. Matasar, *Personal Immunities under Section 1983: The Limits of the Court’s Historical Analysis*, 40 ARK. L. REV. 741 (1987).

147. Cf. *Bivens v. Six Unknown Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388, 421-22 (1971) (Burger, C.J., dissenting) (remarking on the difficulty plaintiffs experience in recovering in common-law trespass actions against local police).

148. *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18 (1990).

More serious, perhaps, is the apparition of widespread noncompliance with, as well as refusals to enforce, the laws and taxes of an existing government perceived as illegitimate. But this would have been a problem for Rhode Island, in any event, whether or not the plaintiff was allowed to go to the jury in *Luther v. Borden*. The general perception that the existing suffrage scheme was, after all, irrational and unfair, explains why the existing Rhode Island government did get behind a new constitution for Rhode Island, one which was in effect by the time *Luther* was decided.

Perhaps “chaos” does not occur in malapportionment cases because courts in equity can supervise the orderly transitions the situation requires. To the extent fear of disorder or lawlessness might present a problem in malapportionment cases, courts are able to take such precautions as the ordering of special early elections. Moreover, rulings in equity, having prospective force only, may less directly challenge the authority of the government in such cases than rulings at law. In any event “chaos” has turned out not to be an issue. The threat is simply unreal. And if it is unreal for actions under the Equal Protection Clause, it is unreal for actions under the Guarantee Clause.

I should give my reasons for speaking of *Luther* in the context of malapportionment cases, reasons beyond its pivotal role in the great malapportionment case of *Baker v. Carr*. For the purpose, I will need to take a closer look at *Luther*.

2. More on *Luther* in Hindsight: What *Luther* Was Really About¹⁴⁹

In *Baker*, Justice Brennan finds Chief Justice Taney’s decision in *Luther* explained in part by “the lack of criteria by which a court could determine which form of government was republican. . .” I do not think we can follow Justice Brennan into this territory. I do not think there was any problem of judicially manageable criteria in *Luther*. Justice Brennan’s position is that *Baker*, unlike *Luther*, was only about equal voting rights. But equal voting rights was, precisely, what *Luther* was about too. (1994) 65 U. COLO. L. REV. 929 In *Luther*, the election that brought in the existing government was one which was open to less than half of Rhode Island’s adult white males. That was because the original colonial Charter retained by Rhode Island as its constitution permitted the state legislature to set qualifications for the franchise, and the state legislature had established property qualifications. Under freehold suffrage, by the middle of the

149. I am building here on views sketched out in LOUISE WEINBERG, FEDERAL COURTS: CASES AND COMMENTS ON JUDICIAL FEDERALISM AND JUDICIAL POWER ch. III, § 2 (1994) (on the separate judicial power, discussing *Luther* and the Guarantee Clause).

nineteenth century only some forty percent of adult white males were qualified to vote, and the legislature elected by these constituents rejected all petitions to change the rules. One is reminded of Justice Clark's remark, concurring in *Baker*: "We . . . must conclude that the people . . . are stymied. . ."¹⁵⁰ On the other hand, the new Suffragist party's "government" was voted in by an election open to all adult white males, under a new constitution allegedly ratified by a majority of the same electorate.

There was full-dress argumentation of the issue of manageable standards in *Luther*.¹⁵¹ The defendant argued that the exclusion of women and nonwhite males even in the Suffragists' constitution showed that voting rights are always afforded selectively; that the exclusion of unpropertied white males in the Rhode Island's existing Charter was not materially different in that regard from the Suffragist constitution's exclusion of women and nonwhite males; and that a state has to have the power to set such criteria.¹⁵²

Why should not the federal court have tried the issue of violation of the Guarantee Clause in such a situation? If, for the sake of argument, we delete the defenses that actually decided the case below, the legitimacy of freehold suffrage in theory is an adjudicable issue, as *Baker v. Carr* makes plain. Of course, it is for a state to set its own standards, but such standards may not be arbitrary or irrational,¹⁵³ as *Baker* holds. Yet Rhode Island irrationally disenfran-

(1994) 65

150. *Baker*, 369 U.S. at 259 (Clark, J., concurring).

151. *Luther*, 48 U.S. (7 How.) at 19-34. Daniel Webster made one of the arguments for the existing government, famously beginning: "This is an unusual case." *Id.* at 29.

152. Whipple argued, for the existing government: "A right to vote . . . [i]f it was a natural right, . . . would appertain to every human being, females and minors. Even the Dorr men excluded all under twenty-one, and those who had not resided within the State during a year" *Luther*, 48 U.S. (7 How.) at 28-29. For a current look at this class of problems, see Akhil Reed Amar, *The Central Meaning of Republican Government: Popular Sovereignty, Majority Rule, and the Denominator Problem*, 65 U. COLO. L. REV. 749 (1994) (this issue).

153. No question of invidious discrimination as such was involved in *Baker*; the issue was one of irrational discrimination between urban and rural voters, as to a substantial extent it was in *Luther*. For more on rationality review, cf. *Shaw v. Reno*, 113 S.Ct. 2816 (1993) (striking down oddly shaped voting districts); cf. *Davis v. Bandemer*, 478 U.S. 109 (1986). See, e.g., *Massachusetts v. Mosbacher*, 785 F.Supp. 230 (D. Mass. 1992), cert. denied, 112 S.Ct. 1462 (1992) (holding arbitrary and irrational the Secretary of Commerce's reversal, in the 1990 census, of its traditional method of counting overseas personnel and thus reallocating state strength in the House of Representatives). The latter case is controlled by *United States Dep't. of Commerce v. Montana*, 112 S.Ct. 1415 (1992) (holding that the constitutionality of Congress's apportionment of Congressional districts among states does not present a nonjusticiable political question). For a discussion of the Guarantee Clause as furnishing rationality review, see Thomas C. Berg, *The Guarantee of Republican Government: Proposals for Judicial Review*, 54 U. CHI. L. REV. 208,

U. COLO. L. REV. 930 chided even its mercantile and professional men of affairs. These men could not be presumed to be less well- educated or to have less of a stake in the public good than freeholders, certainly not if we take the small freeholders together with the great. Standards of arbitrariness, irrationality, or discrimination are and have been judicially manageable.

Now consider the background of actual events in Rhode Island.¹⁵⁴ When the Chartist government refused to depart, some of Dorr's radical Suffragist followers, instead of seeking adjudication *then*, took to the streets. The governor, fearing that the militia would not follow orders, asked President Tyler to send in troops. Tyler had threatened to do so, but in fact refused. The governor then declared martial law, and dispatched troopers and deputies to arrest the Suffragist ringleaders. When Luther, a rank-and-file Suffragist, sued Borden in trespass for unauthorized arrest, the leaders of the rebellion for the most part were in custody, and Rhode Island was quiet. There was no second Suffragist "government" in existence. As Daniel Webster argued, in closing, "[T]he government of Mr. Dorr, if it ever existed at all, only lasted for two days . . . It was all paper and patriotism; and went out on the 4th of May, admitting itself to be, what every one must now consider it, nothing but a contemptible sham."¹⁵⁵

Thus, the question in *Luther* was *not* which of two elected governments was the legitimate one. The question was whether the existing government was constitutionally elected. Why should that not **(1994) 65 U. COLO. L. REV. 931** be an adjudicable question? Given *Baker v. Carr*, we know that it is.

3. The Exception That Proves the Rule: *Georgia v. Stanton*

*Georgia v. Stanton*¹⁵⁶ is probably the limiting case, the exception to the general rule that voting rights cases, at least, ought to be adjudicable. In *Stanton*, we have another clear Supreme Court refusal, on political question grounds, to decide a dispute brought under the Guarantee Clause. The case is remembered as a challenge to the constitutionality of the Reconstruction Acts. *Stanton* arose on a motion to dismiss for want of jurisdiction a bill in equity brought by Georgia in

242 (1987). *Cf.* *Quinn v. Millsap*, 491 U.S. 95 (1989) (striking down as arbitrary and irrational under the Equal Protection Clause a state's real property qualification for appointment to a government board).

154. *See generally* MARVIN E. GETTLEMAN, *THE DORR REBELLION, A STUDY IN AMERICAN RADICALISM: 1833-1849* (1973); WILLIAM A. WIECEK, *THE GUARANTEE CLAUSE OF THE U.S. CONSTITUTION* (1972); ARTHUR M. MOWRY, *THE DORR WAR: OR, THE CONSTITUTIONAL STRUGGLE IN RHODE ISLAND* (1901).

155. *Luther*, 48 U.S. (7 How.) at 34.

156. 73 U.S. (6 Wall.) 50 (1867).

the Supreme Court's original jurisdiction. The bill sought to enjoin the Secretary of War, and Generals Grant and Pope, from carrying out the terms of the Reconstruction Acts in that state, insofar as to do so would abolish the existing State government and establish another and different one in its place.¹⁵⁷

The first Reconstruction Act made certain existing southern state governments "provisional" and subjected them to the Union's military control. The Act conditioned these rebel states' reentry¹⁵⁸ into the Union upon their ratification of the Fourteenth Amendment. Toward that objective, the Act required in each "provisional" state the creation of a new state constitution to be approved by Congress, under which—by universal adult male suffrage—its people would elect a legislature which would ratify the Fourteenth Amendment.

That the questions *Stanton* raised were intensely "political" we would all grant; but the constitutionality of an act of Congress surely is within the power of the Supreme Court to decide; and the Guarantee Clause of Article IV, Section 4 of the Constitution guarantees to the states a "Republican Form of Government." (It is the irony of the situation, and a measure of the amorphousness of the Guarantee Clause, that both sides in *Stanton* relied on it.) Justice Nelson, writing for the Court in *Stanton*, nevertheless complained that the (1994) **65 U. COLO. L. REV. 932** plaintiff state raised no claim of "individual right."¹⁵⁹ Of course, in the sense of "a cause of action," we understand today that a state can plead an "individual right" as to itself;¹⁶⁰ but the *Stanton* Court's view was that a state could plead only property rights,¹⁶¹ and this was not such a case.

157. *Id.* at 50.

158. Act of Mar. 2, 1867, ch. 153, 14 Stat. 428. This history is part of the controversy over the legitimacy of the ratification of the Fourteenth Amendment. It was President Lincoln's position that a state could not secede from the Union. Thus, it could not be readmitted. Yet the Reconstruction Congress conditioned readmission of the states to the Union upon ratification of the Fourteenth Amendment. The issue was substantially resolved in *Texas v. White*, 74 U.S. (7 Wall.) 700 (1869), when the Court, per Chief Justice Chase, held that the states had retained their sovereignty as states after secession, and that the Union was indissoluble. *Id.* at 725-26.

159. *Stanton*, 73 U.S. at 76-77.

160. *See, e.g.*, *Illinois v. Milwaukee*, 406 U.S. 91 (1972) (holding that a state may sue cities in another state for environmental tort), vacated on other grounds, 451 U.S. 304 (1981).

161. *Stanton*, 73 U.S. at 76-77. *See also* *Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657, 752 (Taney, C. J., dissenting, arguing that jurisdictional disputes between states not involving property should be unadjudicable political questions).

But *Stanton*, I think, was *unadjudicable*. I do not mean to be naive about it; the case comes down contemporaneously with *Mississippi v. Johnson*¹⁶² and *Ex parte McCardle*, and obviously represents a real retreat by the Court in the face of terrific political pressures.¹⁶³ When the Court backed off the case, President Johnson (1994) 65 U. COLO. L. REV. 933 fired Stanton, his Secretary of War—evidently in an effort to put a lid on Reconstruction. To this the House reacted by finally succeeding in bringing articles of impeachment against the President.

But these features of the situation did not make *Stanton* unadjudicable. Indeed, *Stanton* was an elections case, just as *Luther* had been. Counsel for both sides saw *Stanton* as an anticipatory *Luther v. Borden*.¹⁶⁴ The state explained

162. 71 U.S. (4 Wall.) 475, 500 (1867) (holding that courts could not enjoin the President from enforcing Reconstruction). But until 1992 we have understood that an injunction can issue against the President. *United States v. Nixon*, 418 U.S. 683 (1974). *Cf.* *The Steel Seizure Case*, (*Youngstown Sheet & Tube Co. v. Sawyer*), 343 U.S. 579 (1952) (action against a member of the cabinet to restrain enforcement of a presidential order); *see also* 5 U.S.C. § 702 (as amended, 1976) (codifying as against federal officials the principle of the officer suit embraced in *Ex parte Young*, 209 U.S. 123 (1908) (violation of the Constitution by an official sued in official capacity strips the defendant official of Eleventh Amendment immunity from injunctive relief).

In 1992, the Court decided *Franklin v. Massachusetts*, 112 S.Ct. 2767 (1992). In the course of considering the plaintiff's standing in that case, Justice O'Connor, for the Court, took occasion to say:

We have left open the question whether the President might be subject to a judicial injunction requiring the performance of a purely "ministerial" duty, *Mississippi v. Johnson*, 4 Wall. 475, 498-99, 18 L. Ed. 437 (1867), and we have held that the President may be subject to a subpoena to provide information relevant to an ongoing criminal prosecution, *United States v. Nixon*, 418 U.S. 683, 94 S.Ct. 3090, 41 L. Ed. 2d 1039 (1974), but in general "this court has no jurisdiction of a bill to enjoin the President in the performance of his official duties." *Mississippi v. Johnson*, *supra*, 4 Wall. at 501.

Id. at 2776-77. Justice Scalia, concurring separately, opined that the rule of *Mississippi v. Johnson* not only was alive and well, but extended to declaratory judgments against the President as well as injunctions. *Id.* at 2789. If read for all it is worth, *Franklin* converts the grand principle of *United States v. Nixon* into a mere exception for discovery of evidence in criminal cases, and sets back to 1867 the law on the availability of injunctions against the President. *See* Bernard Schwartz, "Apotheosis of Mediocrity"?: *The Rehnquist Court and Administrative Law*, 46 ADMIN. L. REV. 141, 170-72 (1994).

163. For background, *see* KENNETH M. STAMPP, *THE ERA OF RECONSTRUCTION: 1865-1877*, at 142-54 (1972).

164. *Stanton*, 73 U.S. at 65 (argument of Messrs. O'Connor and Walker for the state); *id.* at 61 (argument of Attorney General Stanbery for the government).

clearly that the threat it wished to stave off was the threat to white male suffrage; the state did not want its elections “Africanized.”¹⁶⁵

A decision in *Stanton* in favor of the Union, of course, would have presented no difficulties. Union troops were in place, and such a decision would have been enforceable to the extent history tells us that Reconstruction was enforced. The presence of occupying Union troops in the South until 1877 arguably made enforceable Supreme Court mandates against the southern states under the Contracts Clause, requiring those states to meet their bond obligations.¹⁶⁶ Rather, the danger in *Stanton* would have been a decision holding Reconstruction unconstitutional. President Johnson might have hastened to comply with the Court’s ruling by ordering withdrawal of the Union troops, whether or not an injunction issued.¹⁶⁷ Nor would it have been realistic to expect that the troops would have been allowed to rest in situ pending some fresh try by Congress. The troops were in the South in 1867 because the radical Reconstruction Congress required that they be so deployed, but that was effected over the objections of the President, and with little sympathy from the judicial branch. But to say all this is not to reach the heart of the (1994) 65 U. COLO. L. REV. 934 matter. The real trouble was that there was no Fourteenth Amendment and no Fifteenth Amendment. Thus, there was scant basis for federal control over state action; there were only—apart from the ambiguous Guarantee Clause on which both sides were relying—victory, will, and force. To have encouraged President Johnson precipitately to withdraw would have been to put at risk the Fourteenth Amendment and the fruits of the Civil War.

165. *Id.* at 66 (argument for Georgia).

166. The effect of the withdrawal of the Union troops can be seen in *Louisiana ex rel. Elliott v. Jumel*, 107 U.S. 711, 727 (1882) (holding federal courts powerless to interfere with the state’s repudiation of its debt): “The remedy sought . . . would require the court to . . . supervise the . . . levy, collection, and disbursement of the tax . . . until the bonds, principal and interest, were paid . . .” *Id.* at 727. The first Justice Harlan dissented in *Jumel*, arguing that the Court’s opinion was against “the spirit and tenor” of the Court’s earlier decisions. *Id.* at 746. Justice Field also dissented, *id.* at 728. In fact, the Court did enforce some state obligations even after departure of the Union troops, notably in the Virginia Coupon Cases, *Poindexter v. Greenhow* 114 U.S. 270, 296 (1885). See generally JOHN ORTH, *THE JUDICIAL POWER OF THE UNITED STATES—THE ELEVENTH AMENDMENT IN AMERICAN HISTORY* (1987); see also WEINBERG, *supra* note 149, ch. VI, § 1.

167. See FAIRMAN, *supra* note 83 at 465 (referring to a dispatch by Whitelaw Reid describing the Radicals’ fear of this); see also *supra* text accompanying note 58.

Stanton, then, provided no judicially manageable standards because its context, in the aftermath of the Civil War, was outside the contemplation of the Constitution. *Stanton* was extra-constitutional.¹⁶⁸

In a case brought under the Guarantee Clause today, there is no important reason why a state should not be able to challenge the constitutionality of an act of Congress purporting to reorganize the state. Even if both parties relied alike on the Clause, and even if the Supreme Court ruled in favor of the state, nothing very exotic would happen. The effect of the Court's opinion would be to send Congress scurrying back to the drafting table, while the parties were held *in statu quo*.¹⁶⁹

C. *The Right Complaint in the Right Court at the Right Time*

I have said that the issue presented in *Luther*—the issue of the legitimacy of the existing government of Rhode Island—was an adjudicable issue. But I think *Luther* a poor piece of strategy on the part of the remnant Suffragists who rigged it.¹⁷⁰ If this sort of issue is to be raised, the lesson of history is that it should be raised in courts (1994) 65 U. COLO. L. REV. 935 competent and willing to give injunctive relief, if necessary, and willing to back that relief by force, if necessary. A judgment in trespass, without more, does not empower a court to supervise the orderly transitions the underlying judgment of unconstitutionality may require. That *Luther* was held unadjudicable does not tell us very much about judicial power today to enforce the Guarantee Clause.

168. For the view that *Stanton* was adjudicable, see the concurring opinion of Justice Douglas in *Baker v. Carr*, 369 U.S. 186, 246 n.3 (1962).

169. See *supra* note 59 and accompanying text. I should not overstate the judicial manageability of standards in reapportionment and related cases. For a disturbing discussion of the current quagmire in redistricting cases see Samuel Issacharoff, *Judging Politics: The Elusive Quest for Judicial Review of Political Fairness*, 71 TEX. L. REV. 1643 (1993); see also the absorbing essay by Sanford Levinson, *Gerrymandering and the Brooding Omnipresence of Proportional Representation: Why Won't It Go Away?*, 33 UCLA L. REV. 257 (1987). As Professor Abrams reminds us, at the end of the road there are quagmires. See generally Kathryn Abrams, *No "There" There: State Autonomy and Voting Rights Regulation*, 65 U. COLO. L. REV. 835 (1994) (this issue). I would add only the observation that quagmire may be a general characteristic of all much-litigated law, eventually taking the familiar circular form of causing the litigation that causes it. But this sad verity does not require a conclusion that access to courts is a bad thing.

170. See a similar error in *Scott & Boland v. Jones*, 46 U.S. (5 How.) 343 (1847) (action in ejectment challenging the authority of territorial judges to sign a deed).

Long before *Baker v. Carr*, at the turn of the last century, a group of voting rights cases reached the Supreme Court which had been brought under the Equal Protection Clause.¹⁷¹ In these cases, the Supreme Court repeatedly expressed grave misgivings about the efficacy of judicial review of electoral fairness.

In one such case, *Giles v. Harris*,¹⁷² the plaintiff complained that Alabama registrars would not register black voters, and sought injunctive relief. The Court held that the complaint failed to state a cause of action for which relief could be granted. Justice Holmes, writing the opinion, explained:

It seems to us impossible to grant the equitable relief which is asked The traditional limits of proceedings in equity have not embraced a remedy for political wrongs

If the conspiracy and the intent exist, a name on a piece of paper will not defeat them. Unless we are prepared to supervise the voting in that State by officers of the court, it seems to us that all that the plaintiff could get from equity would be an empty form [R]elief from a great political wrong . . . by the people of a State and the State itself, must be given by them or by the legislative and political department of . . . the United States.¹⁷³

Unlike *Luther v. Borden*, *Giles v. Harris* was framed in a modern way, in a proper complaint seeking equitable relief. Surely if there is a difference between *Giles v. Harris* and *Baker v. Carr* it is to be located in the willingness of the Supreme Court, by the time of *Baker*, to authorize courts to undertake the forceful supervision of state officers which Justice Holmes saw might be necessary. It also should be considered whether the political branches at the time of *Giles* would (1994) 65 U. COLO. L. REV. 936 have supported and even enforced a judicial mandate enlarging the franchise of black voters, as they had become prepared to do by the time of *Baker*. But it is the problem of judicial *willingness* that I find interesting here; judicial *power* seems clear.

1. A Revived Political Question Doctrine?

*Nixon v. United States*¹⁷⁴ shows the determination of the current Court to restore pre-Warren Court judicial “restraint.” It displays, in its virtually

171. I discussed these recently in Louise Weinberg, *The Monroe Mystery Solved: Beyond the “Unhappy History” Theory of Civil Rights Litigation*, 1991 B.Y.U. L. REV. 737, 752-57 (1991). The cases are even more pertinent in this context.

172. 189 U.S. 475 (1903).

173. *Id.* at 486, 488.

174. 113 S.Ct. 732 (1993), discussed *supra* notes 100, 104-21 and accompanying text.

unreasonable insistence on the position,¹⁷⁵ a returned judicial unwillingness to take responsibility for enforcement of constitutional norms. By upsetting the conclusion reached in *Powell v. McCormack*, that judicial review must be available when powers committed to the political branches are exercised unconstitutionally, the Court in *Nixon* moves to insulate the political branches from the rule of law. But the Court misconceives not only the power but also the duty of courts in this country.

Specifically in actions contemplating structural injunctions, we have been seeing a similar movement backward to the position taken in *Giles v. Harris*, the case, now nearly a century old, in which we saw Justice Holmes explaining that equity could not undertake to supervise the state registrars. This retrograde movement probably began in the Burger Court. I am thinking of the 1973 case of *Gilligan v. Morgan*,¹⁷⁶ in which the Court refused to adjudicate the constitutionality of a state's failure to give the National Guard adequate training. That case arose when members of the National Guard opened fire on demonstrators at Kent State University. Using "political question" language, the Court closed the door to review, expressing fear that to take the case would entangle the district court in supervising the day-to-day administration of the National Guard.¹⁷⁷

Reasonable people may disagree about the wisdom or unwisdom of judicial intervention in the affairs of federal or state agencies, but **(1994) 65 U. COLO. L. REV. 937** even today's Court would acknowledge the sufficiency of raw judicial power to intervene. What we are seeing, then, is a turning away from what I have called "judicial willingness." It seems too political to be called a failure of nerve.

D. *Do We Need A Political Question Doctrine?*

1. Deciding by Default

Even if we suppose that today's reinvigoration of the political question doctrine is a salubrious, or even a politically neutral development, we should not fall into the trap of imagining that courts have the luxury of refusing to decide cases. There are very few cases otherwise within the jurisdiction of courts that do not become decided, in whatever color of abstinence or self-effacement a court

175. See *supra* notes 100-21 and accompanying text.

176. 413 U.S. 1 (1973).

177. For other Burger Court examples, see Louise Weinberg, *The New Judicial Federalism*, 29 STAN. L. REV. 1191 (1977). In the Rehnquist Court the pace of retrogression seems to be quickening. See, e.g., *Franklin v. Massachusetts*, 112 S.Ct. 2767, 2776-77 (1992) (O'Connor, J.); *id.* at 2789 (Scalia, J., concurring), stated *supra* note 162.

chooses to paint the decision.¹⁷⁸ This is true even when a case is dismissed on motion at the outset on the ground that it presents a nonjusticiable political question. Of course the defendant wins. But more substantively than that, the constitutionality or legality or validity of whatever it was that the plaintiff was challenging is now conclusively established because it has become unchallengeable in any court of law.¹⁷⁹ (1994) 65 U. COLO. L. REV. 938

178. See Louise Weinberg, *Federal Common Law*, 83 NW. U. L. REV. 805, 839-40 (1989) (describing what happens when courts purport to decide without deciding; discussing the example of *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630 (1981)).

179. This validating quality can work in any political direction. Consider *Coleman v. Miller*, 307 U.S. 433 (1939). There the Court, per Chief Justice Hughes, held that the validity of the process of amending the Constitution is a nonjusticiable political question, a question confided to Congress. *Nixon v. United States*, 113 S.Ct. 732 (1993), revives that sort of view of judicial power for our times. See *supra* notes 100, 104-21 and accompanying text. Thus, after *Coleman*, and given *Nixon*, the question when the amending process ends, and the question of the effect of a prior rejection or a subsequent rescission by a state, are and remain nonjusticiable political questions.

Coleman's underlying function, I suspect, is to insulate the Fourteenth Amendment from challenge. That is an important function. But the Amendment is too interwoven with, and too established a part of, all of our public law to be struck down. The Court can and should save the Amendment on explicit prudential grounds if it ever opens the validity of the amendment process to federal judicial scrutiny.

Coleman's importance at this moment in history, of course, is for the light or shadow it may cast on the apparent ratification of the Twenty-Seventh Amendment, and in turn upon attempted revival of the Equal Rights Amendment. On May 7, 1992, Michigan became the 38th state to ratify an amendment which James Madison had proposed in the First Congress on June 8, 1789. The National Archivist (see 1 U.S.C. § 106b) certified the Twenty-Seventh Amendment as "ratified" on May 20, 1992. The amendment provides: "No law, varying the compensation for the services of the Senators and Representatives, shall take effect, until an election of Representatives shall have intervened." 57 Fed. Reg. 21,187 (1992). This provision was, originally, the "Second Amendment," in that it was the second of the twelve original amendments dispatched by the First Congress in 1789 to the several states for ratification. Only six states had ratified it by 1800. Reportedly "rediscovered" by a student at the University of Texas School of Law, see Sanford Levinson, *Authorizing Constitutional Text: On the Purported Twenty-Seventh Amendment*, 11 CONST. COMM. 82, 102 (1994), from 1978-1992 the Amendment gradually has won ratification among the states, most of which did not exist at the time the Amendment was proposed. A dogged modern grass-roots campaign for ratification has succeeded.

The argument is that if the passage of time has rendered Michigan's 1992 ratification ineffectual under Article V of the Constitution, the political question doctrine prevents our saying so. See Michael Stokes Paulsen, *A General Theory of Article V: The Constitutional Lessons of the Twenty-Seventh Amendment*, 103 YALE L.J. 677, 682 (1993). But of course, a refusal on political question grounds to review the certification of the 27th Amendment would be tantamount to a ruling on the merits. My point here is that—from another political direction—the question for proponents of the failed Equal Rights Amendment becomes whether they can sneak a revived ERA in under the same tent, deadline, extension, revival, and all.

Seeing this, the current Supreme Court labors to draw a distinction between judicial abstention and a determination on the merits.¹⁸⁰ But I find the proffered distinction unconvincing. I am persuaded, rather, by Justice White's dissenting remarks in *Banco Nacional de Cuba v. Sabbatino*,¹⁸¹ a case famous to international lawyers. There, the Court held the acts of foreign states immune from scrutiny in American courts. Justice Harlan, writing for the Court, argued that the validity of a foreign act of state is a question implicitly confided to the executive branch.¹⁸² Justice White, dissenting, saw the true costs of a judicial decision not to decide: "[Under this] backward-looking doctrine, . . . not only are the courts powerless to question acts of state proscribed by international law but . . . they must render judgment and thereby validate the lawless act."¹⁸³ Note that Justice White's phrase, "must render judgment," applies in cases dismissed at the outset. Judgments of dismissal in such cases are, of course, with prejudice. In this sense they are judgments on the merits, and they do validate "lawless" acts.

On the other hand, if courts were to abandon the political question doctrine, the options would remain open. A plaintiff might win, but so might a defendant. The plaintiff would be afforded a hearing, (1994) 65 U. COLO. L. REV. 939 but so would the defendant. Issues of importance to which the judicial power of the United States extends would be aired. Decision on the merits would be based on the merits, not on mantras about the supposed powerlessness of courts.

2. Current Adjudication

The occasional anomalous¹⁸⁴ enforcement of the Guarantee Clause in state courts¹⁸⁵ helps to confirm my conviction that, when justice is afforded in a case

180. See, e.g., *United States Dep't of Commerce v. Montana*, 112 S.Ct. 1415, 1425 (1992) (Stevens, J., for a unanimous court).

181. 376 U.S. 398 (1964).

182. *Id.* at 423.

183. 376 U.S. 398, 439 (1964) (White, J., dissenting).

184. See *infra* text accompanying notes 197-206.

185. For the view that state courts are not wholly adequate to this task, see Julian N. Eule, *Crocodiles in the Bathub: State Courts, Voter Initiatives, and the Threat of Electoral Reprisal*, 65 U. COLO. L. REV. 733 (1994) (this issue). But for current cases, see, e.g., *In re Initiative Petition No. 348, State Question No. 640*, 820 P.2d 772 (Okla. 1992), in which the state court adjudicated a Guarantee Clause challenge to a petition to amend the state constitution. See also *Cagle v. Qualified Electors of Winston County*, 470 So.2d 1208 (Ala. 1985); *Opinion of the Justices*, 468 So.2d 883 (Ala. 1985). The reader may also want to refer to *Speaker v. Governor*, 506 N.W.2d 190 (Mich. 1993), in which the allocation of intra-governmental state powers was held justiciable and adjudicated under provisions of the state constitution. Cf. *Cooper v. Gwinn*, 298 S.E.2d 781 (W. Va. 1982) (under state constitution's guarantee clause).

thought to raise a political question, the heavens do not fall. Even in federal courts judicial review of arguably political questions is not infrequent, although we do not find assaults on the citadel of Guarantee Clause nonjusticiability.

Consider the current example of *Marks v. Stinson*.¹⁸⁶ There, the plaintiff, an unsuccessful Republican candidate for the state senate, alleged that his opponent had stolen the election. The United States District Court in Philadelphia issued a preliminary injunction canceling the results of the statewide election. Even more extraordinarily, the Court *reversed* the results of the election, ordering the defendant Democrat to yield his seat in the state senate to the plaintiff. The court issued the order even though in doing so it shifted the majority in the state senate to the Republican party. The trial judge was unhappy about installing a state senator who had not established his credentials, but he did so out of concern that the voters otherwise would be without representation in the state senate during the pendency of the litigation.

The United States Court of Appeals for the Third Circuit sustained the District Court's preliminary injunction insofar as it sus- **(1994) 65 U. COLO. L. REV. 940** pended the results of the election, but vacated it insofar as it would have certified a candidate who had not established his credentials. To meet the trial judge's concern about the unrepresented voters, the appeals court could only urge speed in the proceedings. But it left it open to the trial court to decide whether, if a constitutional violation were found at trial on the merits, simply to declare the vacancy and let local authorities worry about it, or to order a special election.¹⁸⁷

In *Marks*, the plaintiffs pleaded that "a racially discriminatory strategy was conducted by the defendants by actively misrepresenting and abusing the . . . vote by minority Latino, Afro-American, elderly and other absentee ballot voters and otherwise stuffing the ballot box."¹⁸⁸ No Guarantee Clause question was raised in *Marks*, and in the current state of the law perhaps we should not fault the plaintiff for that. But why should a count under the Guarantee Clause not have been pleadable on these same facts?¹⁸⁹ Indeed, in the concededly different context of a threat to the state by the nation, a plaintiff state recently did plead a Guarantee Clause claim in federal court, although the District Court dismissed that claim

186. 1994 WL 37,722 (E.D. Pa.); *id.*, 1994 WL 47,710, *vacated in part*, 19 F.3d 873 (3d Cir. 1994).

187. *Marks*, 19 F.3d at 889-90.

188. 1994 WL 37,722, at *1.

189. For an interesting further suggestion see Philip Kurland, *The Guarantee Clause As a Basis for Federal Prosecutions of State and Local Officials*, 62. S. CAL. L. REV. 367 (1988).

along with the other claims in the case,¹⁹⁰ and the Court of Appeals affirmed.¹⁹¹ With notable readiness, the United States Supreme Court decided the Guarantee Clause question, assuming without deciding that the question was justiciable.¹⁹² The case was *New York v. United States*.

New York was an action by the state challenging a provision of federal law regulating hazardous waste. The Court, per Justice O'Connor, struck down as unconstitutional a section of the Low-Level Radioactive Waste Policy Amendments Act of 1985.¹⁹³ The provision would have required a state to "take title" to—and assume all liabilities flowing from—wastes for which the state, by a certain date, was unable to locate disposal sites. Justice O'Connor ac- (1994) 65 U. COLO. L. REV. 940 knowledged that Congress had plenary power to regulate in this area, even preemptively.¹⁹⁴ But she concluded that Congress violated principles of federalism when it sought to "commandeer" the state's own processes for federal governmental purposes. The nation may regulate the subject directly, but cannot conscript the state as its agent.¹⁹⁵ The Court struck down the challenged provision under the Tenth Amendment, but the Court took the occasion to hold also that there was no Guarantee Clause claim with respect to other conditions imposed on the states under the federal law. Justice O'Connor reasoned that, if New York failed to meet the statutory deadlines, the resulting loss of its statutory monetary incentives or the loss of access for New Yorkers to out-of-state disposal outlets, as provided for in the legislation, would

not pose any realistic risk of altering the form or the method of functioning of New York's government. Thus even indulging the assumption that the Guarantee Clause provides a basis upon which a State or its subdivisions may

190. *New York v. United States*, 757 F.Supp. 10 (N.D.N.Y. 1991).

191. 942 F.2d 114 (2d Cir. 1991).

192. *New York v. United States*, 112 S.Ct. 2408, 2432-33 (1992). (Professor Merritt, who was clerking for Justice O'Connor when *New York* was decided, is the author of Deborah J. Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1 (1988)).

193. Pub. L. 99-240, 99 Stat. 1842, 42 U.S.C. § 2021b.

194. *New York*, 112 S.Ct. at 2419-20.

195. It is unclear to me how the "take title" provision "commandeered" state processes. Apparently the vice of the provision was that it was too coercive, resulting in the conscription of the state as the nation's agent. For the view that *New York* is inconsistent with *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816) (holding that the Supreme Court has power to review federal questions raised by state-court judgments), see H. Jefferson Powell, *The Oldest Question of Constitutional Law*, 79 VA. L. REV. 633 (1993).

sue to enjoin the enforcement of a federal statute, petitioners have not made out such a claim in this case.¹⁹⁶

What is notable here is that the *New York* Court resolved the Guarantee Clause issue on the merits, not under *Luther* or *Baker*.

3. Spurious State Power: The Logic of *Sabbatino*

A short while ago I called the adjudication of Guarantee Clause claims in state courts “anomalous,”¹⁹⁷ although I think Guarantee Clause claims should be adjudicable. Let me explain what I mean. I refer to an oddity that is a consequence of the position that political questions like the Guarantee Clause are thought to be “confided” to the political branches. I think it astonishing that when a power is (1994) 65 U. COLO. L. REV. 941 held committed in some final sense to Congress or the executive branch we continue to suppose the *states* can adjudicate it—that state courts are not bound by federal political question doctrine. The Supreme Court seemed to assume as much in its disposition of the old Guarantee Clause case of *Pacific States Tel. & Tel. Co.*¹⁹⁸ and arguably in *Luther v. Borden* itself.¹⁹⁹ And state courts do adjudicate such claims. They hold themselves free to do so, and that is the state of our black letter. But I find this astonishing. If federal courts are precluded from affording judicial review *because* the matter in controversy is confided to the exclusive authority of Congress, logically, it is equally impermissible for state courts to give review in the same matter.

196. *New York*, 112 S.Ct. at 2433.

197. *See supra* text accompanying note 184.

198. 223 U.S. 118, 151 (1912). It is puzzling to me that the Court dismissed the writ of error to review Oregon’s interpretation of the Guarantee Clause sustaining the referendum in the case. *Oregon v. Pacific States Tel. & Tel. Co.*, 53 Or. 162, 99 P. 427 (1909). A holding of nonjusticiability would be encompassed today by vacating judgment and remanding to dismiss. Dismissal of the writ of error, on the other hand, seems readable merely as a holding of nonreviewability by the Supreme Court, leaving the state courts free to adjudicate, without Supreme Court review, matters confided exclusively to Congress. Judge (now Professor) Hans Linde, an expert on, and exponent of, state-court power over Guarantee Clause claims, reads the disposition in *Pacific States* to buttress his view. Hans A. Linde, *Who Is Responsible for Republican Government?*, 65 U. COLO. L. REV. 709, 714 (1994) (this issue). I read it only as an error. For additional authority relied on by Judge Linde, *see infra* note 202.

199. *Luther*, 48 U.S. (7 How.) at 39-40, 47 (pointing out that the Rhode Island state court had determined the legitimacy of the existing government in Dorr’s prosecution for treason, and suggesting that this was an interpretation of the state constitution to which the Supreme Court should defer). This, of course, is different from deferring to a state court ruling under the federal constitution.

Return for the moment to *Sabbatino*.²⁰⁰ Recall that in *Sabbatino*, in 1964, the Supreme Court, per Justice Harlan, held that courts in this country may not scrutinize the legality of acts of a foreign sovereign. Matters affecting the foreign relations of the United States are confided to the political branches. In *Sabbatino*, Justice Harlan felt “constrained” to make it clear that since the executive and legislative branches had to have sole competence over any wrist-slapping meted out to foreign governments, the states lacked all authority to do any such wrist-slapping themselves.²⁰¹ This was a point of preemption.

I do not mean to be understood as saying that questions of the legality of foreign governmental actions cannot arise in state as well (1994) 65 U. COLO. L. REV. 943 as in federal courts; but only that neither set of courts is free to answer them. The acts of foreign sovereigns present nonjusticiable political questions, as it were, in all courts in this country.

There is an argument that the Guarantee Clause imposes a special duty upon the states themselves to maintain, and presumably to monitor in their courts, republican forms of government.²⁰² But if the legitimacy of their forms of government is held confided to Congress, then it would seem, as a matter of logic, that the states must perform any such duties under the Clause to satisfy Congress, not the judiciary.

To be sure, the act-of-state doctrine often is distinguished from other political question doctrines, and this may help to justify its preemptive sweep. It is sometimes argued that we do need a political question doctrine in such matters as foreign affairs,²⁰³ although in my opinion *Sabbatino* was a wrong turn. The act-

200. 376 U.S. 398 (1964), *supra* notes 181-83 and accompanying text.

201. *Id.* at 425.

202. I am indebted to Hans Linde for arguing this point with me. He relies on *Minor v. Happersett*, 84 U.S. (21 Wall.) 162, 175 (1874), in which the Court remarked of the guarantee of a “Republican Form of Government:” “The guaranty necessarily implies a duty on the part of the States themselves to provide such a government.” But the *Happersett* Court held nothing as to the power of the state judiciary. The Court simply sustained exclusively male suffrage as being within the contemplation of the original states and the Framers, given what was considered a republican form of government when the Constitution was drafted.

203. Cf. Anne-Marie Slaughter Burley, *Are Foreign Affairs Different?*, 106 HARV. L. REV. 1980 (1993) (reviewing THOMAS M. FRANCK, *POLITICAL QUESTIONS/JUDICIAL ANSWERS: DOES THE RULE OF LAW APPLY TO FOREIGN AFFAIRS?* (1992)).

For an egregious application of the political question doctrine in this context see *Linder v. Portocarrero*, 747 F.Supp. 1452 (S.D. Fla. 1990), *rev'd*, 963 F.2d 332 (11th Cir. 1992), holding nonjusticiable as a political question an action for the wrongful death and torturing, in Nicaragua, of an American citizen who was assisting the government of Nicaragua in constructing a

of-state doctrine seems no more justifiable than other political question doctrines. (1994) 65 U. COLO. L. REV. 944 Perhaps judicial intervention in the sphere of foreign relations could embarrass the foreign relations of the United States.²⁰⁴ The evidence of Congress's override of *Sabbatino* on its facts may belie that assumption. Congress would have preferred enforcement on behalf of American victims of unlawful expropriations, at least where the expropriated property could be found in this country.²⁰⁵ But I am skeptical in any event that courts need to validate a lawless act on a vague and generalized speculation that the State Department would want them to, and especially skeptical that courts should do so at the suggestion of the State Department.

It might be argued that a question of the legitimacy of foreign governmental acts is more likely to arise in wholly private litigation than other political questions, and thus more likely to produce invalidating rulings as a mere incident of adjudication. The argument is that embarrassment to foreign policy should be avoided especially in wholly private litigation, since an invalidating ruling might be reached on insufficient reasoning, without joinder of the particular foreign government. But the issue is whether that and like considerations are sufficient to justify insulating a private defendant from liability, and depriving a plaintiff with a meritorious claim of a judicial remedy.

It needs to be remembered that when a court avoids a "political question" in a case between private parties, the metaphysical protections of the political question doctrine are likely to be bestowed not upon the states or the people; not upon the prerogatives of the President or the Congress, but only upon those cloaking themselves with these protections in the particular case.

hydroelectric plant. The defendant was a member of antigovernment forces supported by the United States. The court applied the political question doctrine chiefly because adjudication, in its view, would interfere with the conduct of foreign relations by the political branches. The Court of Appeals, reversing, saw that "the complaint [does not] require the court to pronounce who was right and who was wrong in the Nicaraguan Civil War." *Linder*, 963 F.2d at 337.

Query how the Torture Victim Protection Act of 1992, Pub. L. 102-256, Mar. 12, 1992, 106 Stat. 73, would affect the result in a future case like *Linder*. The Act provides an action for damages, subject to exhaustion of remedies in the place of wrong, for wrongful killing or torture of Americans or others, by an individual acting "under actual or apparent authority, or color of law, of any foreign nation." The legislation seems to approve in much modified form the controversial case of *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980) (wrongful death of Paraguayan in Paraguay caused by Paraguayan official held actionable against the official in his individual capacity under the Alien Tort Statute, 28 U.S.C. § 1350).

204. Mere embarrassment of the foreign government involved is not an issue. *W.S. Kirkpatrick & Co., Inc. v. Environmental Tectonics Corp., Int'l*, 493 U.S. 400 (1990).

205. Hickenlooper Amendment, 22 U.S.C. § 2370(e)(2).

But I raise *Sabbatino* simply to trace out that part of the logic of Justice Harlan's preemption point which is inexorable in any context. Once the Court holds that any question is nonjusticiable *because* it is "confided" to a political branch of the government of the United States, clearly there remains no scope for the exercise of state power over that question. I see no escape from this reasoning, whether or not a case involves foreign relations.

So suppose that Louisiana, shall we say, peacefully becomes a virtual despotism, holding elections only for federal office; and sup- (1994) 65 U. COLO. L. REV. 945 pose that for political reasons the President and Congress take no action.²⁰⁶ Suppose that the state courts miraculously manage to maintain their political independence nevertheless. We know that under *Luther v. Borden*, as saved in *Baker v. Carr*, claims under the constitutional guarantee of a republican form of government are nonjusticiable political questions in federal courts, because the legitimacy of an existing state government is a matter "confided" to Congress. Could a Guarantee Clause claim be brought in the state courts? Under the logic of *Sabbatino*, neither federal nor state courts can hear Guarantee Clause challenges to the legitimacy of our hypothetical runaway Louisiana state government. State courts must be bound by federal political question cases when they rest upon a constitutional commitment of exclusive power to Congress or the executive branch.

I find such door-closing unnerving; and I take small comfort from Justice Brennan's attempt in *Baker v. Carr* to cabin *Luther* by distinguishing between the Guarantee Clause, for which we lack "judicially discoverable and manageable standards," and the Equal Protection Clause, for which we have a slew of standards. There are some cases that the Equal Protection Clause will not cover. Why should a showing of arbitrariness or discriminatory intent be required to challenge the constitutionality of such contrivances as the initiative or referendum,²⁰⁷ or the process by which an amendment to the Constitution has been ratified?²⁰⁸

206. The example is not wholly fanciful. Old timers in Louisiana will tell you that Huey Long was running the state without any state office from 1932 to 1935 while he was serving in the United States Senate. Although President Roosevelt was acutely aware of the problem, and considered ameliorative legislation grounded on Guarantee Clause power, apparently he sensed a want of support in Congress and dropped the matter. For background see ARTHUR SCHLESINGER, JR., *THE POLITICS OF UPHEAVAL*, 58-59, 250 (1960).

207. For the argument that the constitutionality of initiative and referendum should be open to judicial scrutiny, see Hans A. Linde, *When Initiative Lawmaking Is Not "Republican Government": The Campaign Against Homosexuality*, 72 OR. L. REV. 19 (1993) (arguing that at least in some instances statewide initiative or referendum may be unconstitutional bypasses of republican governmental norms); and see generally Douglas H. Hsiao, *Invisible Cities: The*

III. ENVOI

Under modern understandings, then, questions likely to arise under the Guarantee Clause should become adjudicable. These questions should be properly pleaded in an action by parties with standing, against joined proper parties, for a judgment declaring what the law is, and an injunction ordering the right relief, under the limitations and with the protections that the circumstances may require. The balance of equities must be considered. Courts must weigh the public interest. But we do not need and should not have as a further criterion of adjudicability that the case not present a "political question."

Nor should we seek to insulate from review even the most political of discretionary governmental choices. Courts retain power to scrutinize the constitutionality and legality even of such choices.

The true position is that a question requiring the interpretation of the Constitution or of federal law cannot be confided exclusively to the political branches. The interpretation of law is the essential judicial function.

For other writings by Louise Weinberg, click on the following links:

["Our Marbury,"](#) 89 VIRGINIA LAW REVIEW 1235 (2003).

["Of Theory and Theodicy: The Problem of Immoral Law, in Law and Justice in a Multistate World: A Tribute to Arthur T. von Mehren,"](#) pp. 473-502 SYMEON SYMEONIDES (2002).

Constitutional Status of Direct Democracy in a Democratic Republic, 41 DUKE L.J. 1267 (1992); Julian N. Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503 (1990). Cf. *Reitman v. Mulkey*, 387 U.S. 369 (1967) (invalidating state referendum authorizing owner of housing to sell to the buyer of its choice). For the further implications of the debate on the constitutionality of initiative and referendum, see *infra* note 208.

208. On this latter question as it may bear upon the Reconstruction Amendments, see remarks on *Coleman v. Miller*, *supra* note 179.

The question of the validity of an amendment process under Article V is connected, as a practical matter, with the question broached *supra* note 207, on the constitutionality of initiative and referendum. Both the Seventeenth Amendment (popular election of senators) and the Nineteenth Amendment (female suffrage) were passed with the assistance of state-level referendums. A popular movement toward a congressional term-limits amendment is now making progress largely through this mechanism. See Kris Kobach, Note, *Rethinking Article V: Term Limits and the Seventeenth and Nineteenth Amendments*, 103 YALE L.J. 1971 (1994).

["This Activist Court,"](#) 1 GEORGETOWN JOURNAL OF LAW & PUBLIC POLICY 111 (2002).

["When Courts Decide Elections: The Constitutionality of Bush v. Gore](#) [Symposium: Federal Courts and Electoral Politics]," 82 BOSTON UNIVERSITY LAW REVIEW 609 (2002).

["Of Sovereignty and Union: The Legends of Alden](#) [Annual Federal Courts Issue]," 76 NOTRE DAME LAW REVIEW 1113 (2001).

["The Article III Box: The Power of 'Congress' to Attack the 'Jurisdiction' of Federal Courts'](#) [Symposium: Restructuring Federal Courts]," 78 TEXAS LAW REVIEW 1405 (2000).

["Choosing Law and Giving Justice](#) [Symposium: Tribute to Symeon C. Symeonides]," 60 LOUISIANA LAW REVIEW 1361 (2000).

["Fear and Federalism](#) [annual constitutional law symposium]," 23 OHIO NORTHERN UNIVERSITY LAW REVIEW 1295 (1997).

["Holmes' Failure,"](#) 96 MICHIGAN LAW REVIEW 691 (1997).

["Methodological Interventions and the Slavery Cases; Or, Night-Thoughts of a Legal Realist](#) [AALS Conference Symposium]," 56 MARYLAND LAW REVIEW 1316 (1997).

["The Power of Congress Over Courts in Nonfederal Cases,"](#) 1995 BRIGHAM YOUNG UNIVERSITY LAW REVIEW 731.

["Political Questions and the Guarantee Clause \[Rothberger Conference on Constitutional Law\],"](#) 65 UNIVERSITY OF COLORADO LAW REVIEW 849 (1994).

["The Federal-State Conflict of Laws: 'Actual' Conflicts,"](#) 70 TEXAS LAW REVIEW 1743 (1992).

["Against Comity,"](#) 80 GEORGETOWN LAW JOURNAL 53 (1991).

["The Monroe Mystery Solved: Beyond the 'Unhappy History' Theory of Civil Rights Litigation](#) [Federal Courts Symposium]," 1991 BRIGHAM YOUNG UNIVERSITY LAW REVIEW 737.

["Federal Common Law,"](#) 83 NORTHWESTERN UNIVERSITY LAW REVIEW 805 (1989).

["Choice of Law and Minimal Scrutiny,"](#) 49 UNIVERSITY OF CHICAGO LAW REVIEW 440 (1982). [Anthologized in A CONFLICT-OF-LAWS ANTHOLOGY 339 (Gene R. Shreve ed.; Cincinnati: Anderson Publishing Co., 1997).]

["The New Judicial Federalism,"](#) 29 STANFORD LAW REVIEW 1191 (1977). [Indexed in CONCEPTS OF FEDERALISM (William Stewart ed.; Lanham, MD: University Press of America, 1984).]