

# DON'T ANSWER THAT: REVISITING THE POLITICAL QUESTION DOCTRINE IN STATE COURTS

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## ABSTRACT

*As with the federal Constitution, state systems of separation of powers occasionally give rise to questions about the propriety of judicial resolution of certain issues. The resulting political question doctrine under state constitutions, though the object of less attention than its federal counterpart, can claim its own jurisprudential niche. Nor has the conception of political questions in state courts remained static. This Article examines the political question doctrine under state constitutions in the wake of developments that have occurred over the past several decades. It seeks to place this evolution in the context of the two frequently criticized bodies of jurisprudence at whose intersection it lies: the political question doctrine as construed by the United States Supreme Court and the general realm of state constitutional law. Taken as a whole, state court decisions and pronouncements on the political question doctrine display a distinct duality. Formal exposition of the doctrine remains largely derivative of the federal version. At the same time, state courts apply the doctrine in ways that differ from Supreme Court rulings. Such deviation can arise either from readings of state constitutional provisions independent of the Court's interpretation of their federal counterpart, or from the construction of provisions that have no parallel in the United States Constitution. In both instances, state courts make a judicial contribution to the oft-honored role of states as laboratories of democracy.*

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## INTRODUCTION

While the United States Supreme Court recently continued its debate over whether partisan-gerrymandering claims are even justiciable,<sup>1</sup> the Pennsylvania Supreme Court briskly dismissed this concern in holding the state's legislative districting scheme to violate the state constitution's guarantee of free and equal elections.<sup>2</sup> This juxtaposition illustrates the

1 In *Gill v. Whitford*, 138 S. Ct. 1916 (2018), the Court remanded the case to give the plaintiffs the opportunity to prove concrete and particularized injuries requisite for standing to bring a challenge to Wisconsin's gerrymandering scheme. *Id.* at 1933–34. Having confined its ruling to this question, the Court “express[ed] no view on the merits of the plaintiffs’ case.” *Id.* at 1934. However, in *Vieth v. Jubelirer*, 541 U.S. 267 (2004), a plurality opinion of the Court had determined that the political question doctrine prevented the Court from hearing claims against political gerrymandering, because there were no judicially discernable and manageable standards for adjudicating such claims. *Id.* at 281 (plurality opinion). Justice Anthony Kennedy concurred in the judgment. *Id.* at 270 (Kennedy, J., concurring in the judgment). However, Justice Kennedy left open the possibility that an appropriate standard could be developed in the future. *Id.* at 311.

2 *League of Women Voters v. Commonwealth*, 178 A.3d 737, 824 (Pa. 2018) (“[I]t is beyond peradventure that it is the legislature, in the first instance, that is primarily charged with the task of reapportionment. However, the Pennsylvania Constitution, statutory law, our Court’s decisions,

hybrid nature of state courts' treatment of political question claims. Like most state courts,<sup>3</sup> Pennsylvania's high court invoked federal precedent—especially the Supreme Court's iconic decision in *Baker v. Carr*<sup>4</sup>—in discussing its authority to rule on the claim.<sup>5</sup> On the other hand, state courts are not required to slavishly adhere to the Supreme Court's interpretation of parallel constitutional provisions.<sup>6</sup>

In 1984 two articles appeared that addressed the political question doctrine under state constitutions. One of these, in the course of a broader commentary on judicial review in state courts, pronounced the very idea a virtual nullity: “If a ‘political question doctrine’ exists in a state court, I have not heard of it.”<sup>7</sup> As the author approvingly noted, state courts instead often bypassed the constitutional ruling sought by a party by disposing of the case through interpretation of ordinary law.<sup>8</sup> By contrast, the other article took a more sanguine view of the putatively nonexistent doctrine.<sup>9</sup> Surveying state courts' discussion of political questions, the article discerned in these opinions a healthy illustration of the virtues of federalism. By developing conceptions independent of both the federal version of the doctrine and each other's, state courts promoted both experimentation and doctrinal pluralism.<sup>10</sup>

In retrospect, both assessments may have missed the mark. Over three decades later, state courts' routine engagement with political question claims makes it difficult to dismiss the doctrine as a mere phantom. At the same time, expectation that the doctrine would prove fertile ground for creative analysis overestimated the dynamism displayed by courts. The result has been a middle ground in which state courts have grappled with application of the political question doctrine without, on the whole, having carved out the kind of distinctively nonfederal theory for which scholars have called<sup>11</sup> in state constitutional discourse. Unsurprisingly for a concept already cloudy in its original federal incarnation,<sup>12</sup> and separately treated

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federal precedent, and case law from our sister states, all serve as a bedrock foundation on which stands the authority of the state judiciary to formulate a valid redistricting plan when necessary.”)

<sup>3</sup> See *infra* Part III.

<sup>4</sup> 369 U.S. 186 (1962).

<sup>5</sup> See *League of Women Voters*, 178 A.3d at 822–23.

<sup>6</sup> See *id.* at 813 (“[This Court does not] utilize the same standard to adjudicate a claim of violation of the [Pennsylvania] Free and Equal Elections Clause and the federal Equal Protection Clause.”).

<sup>7</sup> Hans A. Linde, *E Pluribus—Constitutional Theory and State Courts*, 18 GA. L. REV. 165, 189–90 (1984).

<sup>8</sup> See *id.* at 190–92.

<sup>9</sup> Nat Stern, *The Political Question Doctrine in State Courts*, 35 S.C. L. REV. 405, 422 (1984).

<sup>10</sup> See *id.* at 422–23.

<sup>11</sup> See *infra* Section II.B.

<sup>12</sup> See *infra* Section I.B.

by fifty jurisdictions, no uniform approach has emerged.<sup>13</sup> Still, a review of the landscape of political question decisions can shed light on state courts' perceptions of their proper role in the one universal feature of their various structures of government: separation of powers.

This Article undertakes such an examination. Its scope is confined to cases in which courts have expressly confronted assertions that a claim should be rejected because it presents a political question. Thus, it does not encompass denials of standing that may effectively bar any suit from being brought under the constitutional provision in question.<sup>14</sup> Nor does it include instances in which wholesale judicial deference to legislation under constitutional attack might be criticized as abdication of judicial duty.<sup>15</sup> Parts I and II describe the elusive nature of two areas of law—respectively, the Supreme Court's political question doctrine and state constitutional law—that intersect to form this Article's subject. Part III then examines the extent to which federal jurisprudence has dominated state courts' articulation of the essence of political questions. Using state education clauses as an exemplar, Part IV reviews ways that state courts construe positive mandates embedded in their constitutions. This part includes reflection on the broader problem of “self-executing” provisions in state constitutions. Part V explores the marked diffidence generally displayed by state courts when asked to oversee internal processes of coordinate

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<sup>13</sup> Widespread reliance on the United States Supreme Court's formulation of political questions in *Baker*, however, might be thought to come close. See *infra* Part III.

<sup>14</sup> See, e.g., *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 209 (1974) (denying standing to plaintiffs as taxpayers or citizens in suit challenging membership of Congresspersons in Armed Forces Reserves as violating the Constitution's Incompatibility Clause, U.S. CONST., art. I, § 6, cl. 2); *United States v. Richardson*, 418 U.S. 166, 167–68, 170 (1974) (rejecting taxpayer standing in an action under the Statement and Account Clause, U.S. CONST., art. I, § 9, cl. 7, to compel publication of receipts and expenditures of the Central Intelligence Agency); see also William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 271 (1988) (indicating that Court's opinion in *Schlesinger* is open to interpretation that plaintiffs' claim amounted to political question); Steven G. Gey, *The Procedural Annihilation of Structural Rights*, 61 HASTINGS L.J. 1, 59 (2009) (asserting that Court's ruling in *Richardson* effectively treated claims under the Constitution's Statement and Account Clause as raising a political question).

<sup>15</sup> See, e.g., *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 552 (1985) (rejecting a Tenth Amendment challenge to the application of federal Fair Labor Standards Act to state employees involved in integral operations of traditional governmental functions on the ground that the Constitution's protection of states from federal overreaching under the Commerce Clause resided in “the workings of the National Government itself, rather than in discrete limitations on the objects of federal authority”). But see *id.* at 567 n.12 (Powell, J., dissenting) (accusing the Court of “abdicat[ing] responsibility for assessing the constitutionality of challenged action”); Mark Tushnet, *Principles, Politics, and Constitutional Law*, 88 MICH. L. REV. 49, 60–61 (1989) (supporting Justice Powell's dissent in *Garcia* by arguing that congressional consideration of the states is “relatively sporadic”).

branches of government. Finally, Part VI discusses the ultimate convergence of state and federal jurisprudence illustrated (somewhat paradoxically) by courts' application of the political question doctrine: judicial supremacy.

## I. THE ELUSIVE POLITICAL QUESTION DOCTRINE

The political question doctrine under state constitutional law falls at the confluence of two legal categories under siege. Though the Supreme Court has promulgated a widely adopted standard for identifying political questions, commentators have attacked the Court's approach as muddled and even incoherent. Meanwhile, state constitutionalism has suffered perhaps even more withering criticism, as scholars lament the gap between the potential for a distinctive discourse and their sense that courts have squandered it. A brief review of the Court's treatment of the political question doctrine provides a baseline for the examination that follows of the—largely failed—movement to develop independent state versions of such doctrines.

### A. *A Short History*

At first blush, the federal political question doctrine seems straightforward enough. Under its conventional formulation, certain constitutional provisions may be construed and applied only through the political process.<sup>16</sup> Interpretation of such provisions is removed from the ordinary purview of judicial resolution because they raise “controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch.”<sup>17</sup> On the surface, then, the idea of political questions appears to take its place alongside such other established doctrines of nonjusticiability as standing, advisory opinions, ripeness, and

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<sup>16</sup> ERWIN CHEMERINSKY, INTERPRETING THE CONSTITUTION 99–105 (1987).

<sup>17</sup> *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986); see also Helen Hershkoff, *State Courts and the “Passive Virtues”*: Rethinking the Judicial Function, 114 HARV. L. REV. 1833, 1862 (2001) (“The political question doctrine . . . remits entire areas of public life to Congress and the President, on the grounds that the Constitution assigns responsibility for these areas to the other branches, or that their resolution will involve discretionary, polycentric decisions that lack discrete criteria for adjudication and thus are better handled by the more democratic branches.” (footnotes omitted) (citing *Baker v. Carr*, 369 U.S. 186, 210–26 (1962); then citing Fritz W. Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 YALE L.J. 517 (1966)).

mootness.<sup>18</sup> In practice, however, the conception, validity, and even existence of the doctrine have come under critical scrutiny.<sup>19</sup> Thus, no description can provide a definitive account of the doctrine. Still, the doctrine's evolution in Supreme Court jurisprudence forms a discernible if not cohesive picture.

### 1. *The Doctrine Before Baker*

While few would dispute that the modern federal political question doctrine was established in *Baker v. Carr*,<sup>20</sup> the standard announced there did not emerge from a vacuum. Indeed, the idea of nonjusticiable issues is thought to trace its lineage back to *Marbury v. Madison*.<sup>21</sup> Chief Justice Marshall's opinion in *Marbury* is famed, of course, for reserving to the judiciary "the province and duty of the judicial department to say what the law is."<sup>22</sup> He also, however, acknowledged limitations on this power:

The province of the court is, solely, to decide on the rights of individuals, not to enquire how the executive, or executive officers, perform duties in which they have a discretion. Questions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court.<sup>23</sup>

Though admittedly dicta, and open to varying interpretation, this passage planted the idea of judicial abstention from constitutional issues assigned under our system to the political process.

Implementation of this concept occurred fitfully in the years before *Baker*.<sup>24</sup> Perhaps the most direct antecedent of *Baker*'s understanding of political questions is *Luther v. Borden*.<sup>25</sup> There, the Court ruled that issues arising under Article IV, Section 4, which provides that "[t]he United States shall guarantee to every State in this Union a Republican Form of

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<sup>18</sup> See *Flast v. Cohen*, 392 U.S. 83, 97 (1968).

<sup>19</sup> See *infra* Section I.B.2.

<sup>20</sup> 369 U.S. 186 (1962).

<sup>21</sup> 5 U.S. (1 Cranch) 137 (1803).

<sup>22</sup> *Id.* at 177.

<sup>23</sup> *Id.* at 170 (dictum).

<sup>24</sup> For the view that the conception of political questions articulated in *Baker* represented a departure from the term's meaning in Court rulings of the nineteenth and early twentieth century, see generally Tara Leigh Grove, *The Lost History of the Political Question Doctrine*, 90 N.Y.U. L. REV. 1908 (2015). Professor Grove asserts that the traditional version of the doctrine during that period signified wholesale judicial deference to the political branches in their determinations of certain factual issues arising in cases. See *id.* at 1915–39.

<sup>25</sup> 48 U.S. (7 How.) 1 (1849). *Luther* is discussed at length in the Court's opinion in *Baker*. *Baker*, 369 U.S. at 218–23 (1962).

Government,”<sup>26</sup> are reserved for resolution by Congress.<sup>27</sup> Disposition on the merits of the suit in *Luther* would have entailed judicial determination of which of two rival factions represented the legitimate government of Rhode Island. Instead, the Court determined that only Congress had authority to designate “what government is the established one in a State”<sup>28</sup> and to choose how to effectuate that decision.<sup>29</sup> Because the subject was “political in its nature,” the Guarantee Clause “placed . . . [it] in the hands of” Congress.<sup>30</sup>

Subsequent decisions reaffirmed the nonjusticiability of the Guarantee Clause in the face of colorable arguments that a state government did not qualify as “Republican.” Most notably, the Court in *Pacific States Telegraph & Telephone Co. v. Oregon*<sup>31</sup> rejected a Guarantee Clause challenge to Oregon’s initiative system.<sup>32</sup> Oregon voters had used this mechanism to enact a law taxing telephone and telegraph companies.<sup>33</sup> Pacific States contended that passage of laws by direct popular vote rather than by elected legislatures did not conform to the model of republican government guaranteed by Article IV.<sup>34</sup> In sweeping language, the Court proclaimed that the question raised by the plaintiff had been “definitely determined to be political and governmental, and embraced within the scope of the powers conferred upon Congress, and not therefore within the reach of judicial power.”<sup>35</sup>

One other forerunner of the doctrine that crystallized in *Baker*<sup>36</sup> was the Supreme Court’s decision in *Coleman v. Miller*.<sup>37</sup> The case involved a challenge to the Kansas legislature’s ratification of a proposed

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26 U.S. CONST. art. IV, § 4.

27 *Luther*, 48 U.S. (7 How.) at 42–47.

28 *Id.* at 42.

29 *Id.* at 43.

30 *Id.* at 42.

31 223 U.S. 118 (1912).

32 The Court also rejected a challenge based on the Equal Protection Clause. *Id.* at 137–40.

33 *Id.* at 135.

34 *Id.* at 137–38.

35 *Id.* at 135, 151; see also *Highland Farms Dairy, Inc. v. Agnew*, 300 U.S. 608, 612 (1937) (rejecting the Guarantee Clause claim as nonjusticiable); *Cochran v. La. State Bd. of Educ.*, 281 U.S. 370, 374 (1930); *Mountain Timber Co. v. Washington*, 243 U.S. 219, 234 (1917).

36 The examples provided here are not meant to be exhaustive. See, e.g., *Oetjen v. Cent. Leather Co.*, 246 U.S. 297, 302 (1918) (treating as a political question the decision to recognize a foreign sovereign and declaring that “[t]he conduct of the foreign relations of our government is committed by the Constitution to the executive and legislative—the political—departments of the government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision”).

37 307 U.S. 433 (1939).

constitutional amendment pursuant to Article V.<sup>38</sup> According to the plaintiffs, the proposed amendment had already lost its vitality because Kansas had failed to act within a “reasonable time” after Congress had submitted it to the states.<sup>39</sup> The Court neither endorsed nor rejected this contention. Instead, the Court refrained from deciding the case altogether. In the Court’s eyes, the decision would be based on social, economic, and other nonjudicial considerations which Congress was in far better position to assess.<sup>40</sup> Such factors rendered the issue “political and not justiciable.”<sup>41</sup> Accordingly, the determination of a reasonable time for the pendency of a proposed amendment “lies within the congressional province.”<sup>42</sup>

## 2. Baker’s *Totemic Standard and Its Aftermath*

Somewhat ironically, the classic articulation of the political question doctrine appeared in a case in which the Court found that a political question was not present. In *Baker v. Carr*,<sup>43</sup> voters from populous counties underrepresented in Tennessee’s malapportioned legislature challenged the depreciation of their votes as a violation of the Equal Protection Clause.<sup>44</sup> Before the Court could reach the merits of the claim, the Court had to confront the contention that the claim was nonjusticiable as a political question. As a threshold matter, the Court dispelled the notion that the political nature of the controversy inherently rendered the issue a political question in the constitutional sense. Writing for the Court, Justice Brennan dismissed this reasoning as “little more than a play upon words.”<sup>45</sup> He then

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<sup>38</sup> U.S. CONST. art. V (stating that a proposed constitutional amendment must be “ratified by the Legislatures of three fourths of [or “Conventions in”] the several States” to become valid).

<sup>39</sup> *Coleman v. Miller*, 307 U.S. 433, 436 (1939). The petitioners had also pointed to the amendment’s rejection by twenty-six states as grounds for ruling the amendment defunct. *Id.* at 436.

<sup>40</sup> *See id.* at 453–54.

<sup>41</sup> *Id.* at 454.

<sup>42</sup> *Id.* Four concurring Justices, speaking through Justice Black, took a more sweeping view of the breadth of Congress’s authority and the narrowness of the Court’s. Rather than confining his opinion to the question of a reasonable time for ratification, Justice Black recognized Congress’s plenary power over every facet of the amendment process. *Id.* at 459 (Black, J., concurring) (“Since Congress has sole and complete control over the amending process, subject to no judicial review, the views of any court upon this process cannot be binding upon Congress . . .”).

<sup>43</sup> 369 U.S. 186 (1962).

<sup>44</sup> *Id.* at 187–88.

<sup>45</sup> *Id.* at 209 (internal quotation marks omitted) (quoting *Nixon v. Herndon*, 273 U.S. 536, 540 (1927)); accord *INS v. Chadha*, 462 U.S. 919, 942–43 (1983) (“[T]he presence of constitutional issues with significant political overtones does not automatically invoke the political question doctrine.”); see also 13C CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE & PROCEDURE JURISDICTION* § 3534.1 (3d ed. 2018) (“Courts cannot avoid the responsibility of resolving a dispute between Congress and the Executive as to the constitutionality of a statute merely because

presented his endlessly quoted description of “prominent” indicia of political questions:

[A] textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.<sup>46</sup>

Finding standards under the Equal Protection Clause “well developed and familiar,” the Court ruled that the suit against Tennessee’s malapportionment suit could proceed.<sup>47</sup>

In over a half-century of applying *Baker’s* standard, the Court has found its review of official action barred by the presence of a political question on only a few occasions. In *Gilligan v. Morgan*,<sup>48</sup> the Court dismissed a suit arising from the killing of four students by the Ohio National Guard at Kent State University.<sup>49</sup> The plaintiffs had sought an injunction restraining Ohio’s governor from prematurely ordering the National Guard to duty in the future and requested that the district court “assume and exercise a continuing judicial surveillance over the Guard to assure compliance with whatever training and operations procedures may be approved by that court.”<sup>50</sup> For the Court, the judicial intervention sought flew in the face of a textually demonstrable constitutional commitment to a coordinate branch. The Constitution assigned to Congress “the responsibility for organizing, arming, and disciplining the Militia (now the National Guard).”<sup>51</sup> Moreover, as the Court suggested—and Justice Blackmun spelled out in his concurrence—the Court lacked judicially manageable standards for the oversight of military training and command that the requested relief would entail.<sup>52</sup>

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the issues have political implications.”).

<sup>46</sup> *Baker v. Carr*, 369 U.S. 186, 217 (1969).

<sup>47</sup> *Id.* at 226, 237. The Court ultimately held in a later case that legislative seats must be allocated on the basis of population to the extent practicable. *Reynolds v. Sims*, 377 U.S. 533, 568 (1964).

<sup>48</sup> 413 U.S. 1 (1973).

<sup>49</sup> *Id.* at 12.

<sup>50</sup> *Id.* at 6.

<sup>51</sup> *Id.* (citing U.S. CONST. art. I, § 8, cl. 16).

<sup>52</sup> *Id.* at 8 (“It would be inappropriate for a district judge to undertake this responsibility [of evaluating military procedures and policies] in the unlikely event that he possessed requisite technical competence to do so.”); *id.* at 14 (Blackmun, J., concurring).

Two decades later, the Court invoked a broader swathe of *Baker's* reasoning in ruling that a political question was presented in *Nixon v. United States*.<sup>53</sup> Judge Nixon had challenged his removal through impeachment proceedings on the ground that the Senate had appointed a committee to gather evidence to report to the full body.<sup>54</sup> According to Nixon, the Senate rule authorizing this procedure fell outside the Senate's constitutional authority to "try" impeachments<sup>55</sup> because it forbade the whole Senate from participating in the committee's hearings.<sup>56</sup> The Court's analysis first explained why the impeachment provision amounted to a textually demonstrable commitment to the Senate of plenary authority to devise proceedings for impeached officials. Most importantly, the conferral on the Senate of "sole" power to try impeachments signaled the exclusion of the judiciary from any part of the process.<sup>57</sup> As to Nixon's contention that he had not been properly tried as envisioned by the Constitution, the Court found that the multiplicity of meanings ascribed to the word "try" left it without a judicially manageable standard by which to review the Senate's methodology.<sup>58</sup> Still further, the Court cited *Baker* to support its conclusion that "the lack of finality and the difficulty of fashioning relief" militated against judicial resolution of Nixon's claim.<sup>59</sup> Judicial review of a Senate verdict against the President, especially, would be fraught with dangers to the nation's governance and political life.<sup>60</sup>

Reluctance to intrude upon foreign policy entered into a four-Justice plurality's conclusion that a political question was presented in *Goldwater v. Carter*.<sup>61</sup> The plaintiffs, members of the Senate, had challenged President Carter's abrogation of a mutual defense treaty with Taiwan (the Republic of China) without approval by the Senate.<sup>62</sup> Asserting the availability of judicially discoverable standards to resolve the issue, Justice Powell protested that the Court need only "apply normal principles of

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<sup>53</sup> 506 U.S. 224, 237–38 (1993).

<sup>54</sup> *Id.* at 228.

<sup>55</sup> U.S. CONST. art. I, § 3, cl. 6 ("The Senate shall have the sole Power to try all Impeachments.").

<sup>56</sup> *Nixon*, 506 U.S. at 228.

<sup>57</sup> *See id.* at 229.

<sup>58</sup> *Id.* at 229–30. The Court viewed the lack of judicially discoverable standards as related in this instance to the textually demonstrable commitment to a coordinate branch, with the former bolstering the determination of the latter. *Id.* at 228–29.

<sup>59</sup> *Id.* at 236 (citing *Baker v. Carr*, 369 U.S. 186, 210 (1962)).

<sup>60</sup> *See id.* (considering the negative effects judicial review of a Senate verdict would have on the legitimacy of an impeached president's successor, and what kind of relief would be available for a convicted official).

<sup>61</sup> 444 U.S. 996 (1979) (mem.).

<sup>62</sup> *Goldwater v. Carter*, 617 F.2d 697, 700–01 (D.C. Cir. 1979) (per curiam).

interpretation” to the pertinent constitutional provisions.<sup>63</sup> Writing for the plurality, however, Justice Rehnquist found decisive the issue’s implication of “the authority of the President in the conduct of our country’s foreign relations and the extent to which the Senate or the Congress is authorized to negate the action of the President.”<sup>64</sup> In addition, Justice Rehnquist analogized the case to *Coleman v. Miller*,<sup>65</sup> where the Court had refrained from ruling on the question of what constitutes a reasonable amount of time for a constitutional amendment to be ratified after its submission to the states. As with proposed amendments, the Constitution prescribed only the procedure for ratifying treaties; in both cases the Constitution was silent on the means of termination.<sup>66</sup>

### 3. A Narrow Scope in Practice

Ultimately, these isolated recognitions of political questions have been eclipsed by numerous instances of rejection of this defense. It is probably inaccurate to speak of the decline of the political question doctrine. Rather, as the holding in *Baker* itself intimated, the doctrine did not reflect a strong policy of judicial self-abnegation to begin with.

Two cases, *Powell v. McCormack*<sup>67</sup> and *Zivotofsky ex rel. Zivotofsky v. Clinton*,<sup>68</sup> particularly illustrate the Court’s inclination to sweep aside attempts to avoid judicial scrutiny through the political question defense. In *Powell*, the House of Representatives had refused to seat Adam Clayton Powell after his election because of his alleged misuse of public funds and false report to

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<sup>63</sup> *Goldwater*, 444 U.S. at 999 (Powell, J., concurring); see Edwin B. Firmage, *The War Powers and the Political Question Doctrine*, 49 U. COLO. L. REV. 65, 100 (1977) (“The national government is not speaking with one voice and may be able to do so only after judicial determination of constitutional competence.”). Justice Powell would have dismissed the complaint for lack of ripeness. *Goldwater*, 444 U.S. at 997 (Powell, J., concurring).

<sup>64</sup> *Goldwater*, 444 U.S. at 1002 (Rehnquist, J., concurring).

<sup>65</sup> 307 U.S. 433 (1939). *Coleman v. Miller* is discussed in this Article. See *supra* notes 37–42 and accompanying text.

<sup>66</sup> *Goldwater*, 444 U.S. at 1002–03 (Rehnquist, J., concurring). In *Vieth v. Jubelirer*, 541 U.S. 267 (2004), a different four-Justice plurality argued that claims of political gerrymandering under the Equal Protection Clause should be treated as nonjusticiable political questions. *Id.* at 305–06 (plurality opinion). Justice Kennedy, while supporting the decision not to recognize such claims at that time, “would not foreclose all possibility of judicial relief if some limited and precise rationale were found to correct an established violation of the Constitution in some redistricting cases.” *Id.* at 306 (Kennedy, J., concurring). The Supreme Court ruled on this issue in its 2017–18 term. See generally *Gill v. Whitford*, 138 S. Ct. 1916 (2018).

<sup>67</sup> 395 U.S. 486 (1969).

<sup>68</sup> 566 U.S. 189 (2012).

a House committee.<sup>69</sup> On its face, the provision in Article I that “[e]ach House shall be the Judge of the . . . Qualifications of its own Members”<sup>70</sup> appeared to block judicial review of Powell’s challenge to his exclusion. Rejecting this interpretation, the Court held that the House’s discretion was confined to judging whether members met the age, citizenship, and residency requirements<sup>71</sup> expressly set forth by the Constitution.<sup>72</sup> *Zivotofsky*, in turn, involved a delicate issue of foreign policy. Relying on a federal statute authorizing Americans born in Jerusalem to have “Israel” named the place of birth on their passports, Zivotofsky challenged the State Department’s refusal to do so pursuant to its longstanding policy of neutrality on the political status of Jerusalem.<sup>73</sup> The Secretary of State argued that the issue of whether Jerusalem-born Americans can elect to have Israel listed as their place of birth on their passport presented a political question, because the Constitution contained a “textually demonstrable constitutional commitment” to the President of exclusive power to recognize foreign sovereigns.<sup>74</sup> For the Court, however, the case involved a straightforward, if potentially complex, exercise in determining the constitutionality of a statute.<sup>75</sup>

In other instances, the Court has not been long detained by parties’ assertions of political questions before proceeding to the merits. In *United States Department of Commerce v. Montana*,<sup>76</sup> for example, Montana voters and representatives challenged the constitutionality of the method by which congressional seats were allocated.<sup>77</sup> The Court devoted only a few paragraphs to rebutting the government’s contention that Congress’s selection of apportionment methods was immune from judicial review<sup>78</sup> on its way to delivering a ruling on the merits. In *INS v. Chadha*,<sup>79</sup> too, the Court rather summarily disposed of the argument that the case involved a nonjusticiable political question.<sup>80</sup> Chadha had challenged a statutory

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<sup>69</sup> *Powell*, 395 U.S. at 489–93.

<sup>70</sup> U.S. CONST. art. I, § 5, cl. 1.

<sup>71</sup> U.S. CONST. art. I, § 2, cl. 2.

<sup>72</sup> *Powell*, 395 U.S. at 548.

<sup>73</sup> *Zivotofsky ex rel. Zivotofsky*, 566 U.S. 189, 191–93 (2012).

<sup>74</sup> *Id.* at 197 (internal quotation marks and citations omitted) (quoting *Nixon v. United States*, 506 U.S. 224, 228 (1993)).

<sup>75</sup> *See id.* at 197, 201. The Court remanded the case to the lower courts to consider the merits. *Id.* at 201–02.

<sup>76</sup> 503 U.S. 442 (1992).

<sup>77</sup> *Id.* at 446.

<sup>78</sup> *See id.* at 456–59.

<sup>79</sup> 462 U.S. 919 (1983).

<sup>80</sup> *Id.* at 941.

provision authorizing a house of Congress to override the Attorney General's decision to suspend Chadha's deportation.<sup>81</sup> The Court found unpersuasive the argument<sup>82</sup> that Congress's plenary authority under the Naturalization Clause<sup>83</sup> and the Necessary and Proper Clause<sup>84</sup> shielded this legislative veto from judicial inspection. After reciting *Baker's* factors, the Court simply noted that determination of laws' constitutionality was committed to the courts, that the Constitution itself provided discoverable and manageable standards for resolving the issue at hand, and that the Court's ruling would avert "multifarious pronouncements" on the question.<sup>85</sup> In additional cases as well, the Court has not been deterred by doubts over justiciability when confronted with assertions of unfettered congressional power.<sup>86</sup>

### B. Rationales and Critiques

While *Baker's* indicia supply discrete means of identifying political questions, the doctrine's foundation and significance have long been subject to debate. Though the doctrine has been viewed in some quarters as arising from prudential considerations, it is now settled—at least within the Supreme Court—that the principle of separation of powers forms its principal underpinning. This judicial consensus, however, has not spared the Court criticism that the doctrine fails as a coherent concept or that its underlying premise is fatally flawed.

#### 1. Discretionary Versus Compulsory Basis

Given the doctrine's name, it is easy to conceive of political questions as the product of discretionary deference to the political process arising from

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<sup>81</sup> *Id.* at 928.

<sup>82</sup> *See id.* at 940–41.

<sup>83</sup> U.S. CONST. art. I, § 8, cl. 4.

<sup>84</sup> U.S. CONST. art. I, § 8, cl. 18.

<sup>85</sup> *INS v. Chadha*, 462 U.S. 919, 941–42 (1983) (quoting *Baker v. Carr*, 369 U.S. 168, 217 (1962)).

<sup>86</sup> *See, e.g.,* *Cty. of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 248–50 (1985) (rejecting contentions that resolution of the issue presented was textually committed to Congress and that circumstances created "an unusual need for unquestioning adherence to a political decision already made" (quoting *Baker*, 369 U.S. at 217)); *see also* *United States v. Munoz-Flores*, 495 U.S. 385, 387, 396 (1990) (ruling that a claim alleging a federal statute was enacted in violation of Origination Clause, U.S. CONST. art. I, § 7, cl. 1, did not involve a political question). The *Munoz-Flores* Court admittedly addressed the question of nonjusticiability at greater length than in other cases discussed here where the Court brushed aside arguments that a political question was present; the opinion's firm insistence of the claim's justiciability, however, was consistent with the confidence in judicial oversight reflected by more peremptory opinions. *See id.* at 389–96.

judicial institutional concerns. Indeed, prior to *Baker*, this perspective held considerable currency.<sup>87</sup> Its most prominent exponent was Alexander M. Bickel, who viewed political questions as a potent device among the “[p]assive [v]irtues” that enabled courts to refrain from deciding some politically sensitive issues.<sup>88</sup> For Bickel, prudential exercise of the doctrine helped to avoid risking depletion of the Court’s moral authority from entanglement in controversial matters the political branches were equipped to decide.<sup>89</sup>

With *Baker*, however, the conception of political questions largely shed whatever prudential aura it had acquired. While Bickel’s model obviously reflects concerns arising from the separation of powers, Justice Brennan more bluntly declared that “[t]he nonjusticiability of a political question is primarily a function of the separation of powers.”<sup>90</sup> The implication that the Constitution compels rather than counsels judicial restraint in these instances is borne out by the dominant<sup>91</sup> first two prongs of the *Baker* test. If the Constitution manifestly commits an issue to another branch of government or the Court lacks judicial tools for resolving it, then the Court has no choice but to abstain. Conversely, if no such obstacle stands in the way of judicial resolution, then the Court should proceed to the merits unhindered by prudential anxieties.<sup>92</sup>

Still, if prudential conceptions of political questions have faded from formal doctrine, they have not disappeared altogether. The Court has occasionally remarked that prudential considerations of limitations on the judiciary’s reach inform doctrines of nonjusticiability, including political questions.<sup>93</sup> Moreover, scholars continue to discern strands of prudential

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<sup>87</sup> For an early commentary indicating a prudential understanding of political questions, see Maurice Finkelstein, *Judicial Self-Limitation*, 37 HARV. L. REV. 338, 344–45 (1924).

<sup>88</sup> See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 183, 187–88 (2d ed. 1986).

<sup>89</sup> See *id.* at 184. For an overview of the prudential model of political questions, see Rachel E. Barkow, *More Supreme than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237, 253–63 (2002).

<sup>90</sup> *Baker v. Carr*, 369 U.S. 186, 210 (1962); see also *id.* (“[T]he relationship between the judiciary and the coordinate branches of the Federal Government . . . gives rise to the ‘political question.’”).

<sup>91</sup> See Harlan Grant Cohen, *A Politics-Reinforcing Political Question Doctrine*, 49 ARIZ. ST. L.J. 1, 46 (2017) (“As concerns have risen that the courts have used the political question doctrine to abdicate their duty and avoid deciding hard cases, critics have emphasized the narrower, more constitutional aspects of the doctrine, specifically the first two *Baker* factors . . .”).

<sup>92</sup> See *Sprint Commc’ns, Inc. v. Jacobs*, 571 U.S. 69, 77 (2013) (“Jurisdiction existing, . . . a federal court’s ‘obligation’ to hear and decide a case is ‘virtually unflagging.’” (quoting *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976))).

<sup>93</sup> See, e.g., *Allen v. Wright*, 468 U.S. 737, 750 (1984) (stating that the political question doctrine is related in part to “constitutional and prudential limits” (quoting *Vander Jagt v. O’Neill*, 699 F.2d

discretion in political question determinations regardless of any acknowledgement by the Court.<sup>94</sup>

## 2. Criticism

More scathing than suggestions that there is more to the political question doctrine than meets the eye has been repeated insistence that there is—or should be—less. On one side, the doctrine has been described as at best confusing<sup>95</sup> and at worst hollow.<sup>96</sup> Another, more fundamental critique is that the very notion of constitutional issues the Court will decline to decide is at odds with the duty of judicial review.<sup>97</sup>

The contention that the political question doctrine lacks real substance is best associated with Louis Henkin, whose 1976 article famously asked: *Is There a “Political Question” Doctrine?*<sup>98</sup> For Henkin, the answer was essentially no. While Henkin did not deny the existence of political questions in an elemental sense,<sup>99</sup> he thought the term’s use in judicial parlance a misleading label for a farrago of distinct propositions.<sup>100</sup> The first two of

1166, 1178–79 (D.C. Cir. 1983) (Bork, J., concurring)).

<sup>94</sup> See, e.g., 1 LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 366 (3d ed. 2000) (“A prudential view of the Court’s role would treat the political question doctrine as a means to avoid passing on the merits of a question when reaching the merits would force the Court to compromise an important principle or would undermine the Court’s authority.”); John A. Ferejohn & Larry D. Kramer, *Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint*, 77 N.Y.U. L. REV. 962, 1014 (2002) (quoting BICKEL, *supra* note 88, at 184); Matthew Edwin Miller, Note, *The Right Issue, the Wrong Branch: Arguments Against Adjudicating Climate Change Nuisance Claims*, 109 MICH. L. REV. 257, 265–66 (2010) (describing cases that highlight the prudential aspect of the political question doctrine).

<sup>95</sup> See, e.g., ERWIN CHEMERINSKY, *FEDERAL JURISDICTION* 159 (7th ed. 2016) (“[T]he political question doctrine is confusing because of the Court’s failure to articulate useful criteria for deciding what subject matter presents a nonjusticiable political question.”); see also Ferejohn & Kramer, *supra* note 94, at 1012–15 (detailing the “erratic and inconsistent course” the Court has taken in its political question cases, which has resulted in a “very confusing doctrine”); Robert F. Nagel, *Political Law, Legalistic Politics: A Recent History of the Political Question Doctrine*, 56 U. CHI. L. REV. 643, 668 (1989) (“[T]he political question doctrine is largely incomprehensible to the Court and to the academy.”); Martin H. Redish, *Judicial Review and the “Political Question”*, 79 NW. U. L. REV. 1031, 1031 (1985) (explaining that the political question doctrine is “an enigma”).

<sup>96</sup> See, e.g., Wayne McCormack, *The Justiciability Myth and the Concept of Law*, 14 HASTINGS CONST. L.Q. 595, 614 (1987) (stating that “the doctrine is more easily demonstrated to be nonexistent than any other nonjusticiability doctrine”).

<sup>97</sup> See *infra* notes 104–07 and accompanying text.

<sup>98</sup> 85 YALE L.J. 597 (1976).

<sup>99</sup> See *id.* at 597 (“That there are political questions—issues to be resolved and decisions to be made by the political branches of government and not by the courts—is axiomatic in a system of constitutional government built on the separation of powers.”).

<sup>100</sup> See *id.* at 622–63 (enumerating the five propositions believed to make up the “political question” doctrine); see also *Nielsen v. State*, No. CV93 0529695S, 1994 WL 684743, at \*8 (Conn. Super.

Henkin's five propositions assigned the label "political question doctrine" amount to judicial recognition of the constitutionality of a political branch's act rather than refusal to review it.<sup>101</sup> Other commentators, too, have suggested that the rejection of a claim as presenting a political question effectively functions as substantive acceptance of the challenged government conduct.<sup>102</sup>

Some scholars acknowledge the existence of a discernible political question doctrine but dispute its legitimacy. To them, the Court's declining to rule on a constitutional issue otherwise properly before it is a self-inflicted blow to the power of judicial review. Herbert Wechsler anticipated this position in 1959 when he asserted that the obligation of federal courts to address constitutional questions before them brooked no exceptions.<sup>103</sup> Later, Martin Redish mounted a trenchant attack on the idea that some constitutional issues lie beyond the reach of judicial review.<sup>104</sup> For Redish, the political question doctrine rested on the self-defeating implication that "one or both of the political branches may continue conduct that could conceivably be found unconstitutional, without any examination or supervision by the judicial branch."<sup>105</sup> Others have echoed the belief that the political question doctrine represents an unwarranted abdication of the

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Ct. Nov. 18, 1994) (explaining that the determination of whether an issue is justiciable "depends on the particular amendment involved and what is necessary to effectuate it—it cannot be resolved by referring to general language extracted from different cases whose only connection is that they raise justiciability issues under the political question doctrine.").

<sup>101</sup> See Henkin, *supra* note 98, at 622 ("1. The courts are bound to accept decisions by the political branches within their constitutional authority. 2. The courts will not find limitations or prohibitions on the powers of the political branches where the Constitution does not prescribe any.").

<sup>102</sup> See, e.g., Louise Weinberg, *Political Questions and the Guarantee Clause*, 65 U. COLO. L. REV. 887, 937 (1994) (stating that when a case is dismissed because it presents a nonjusticiable political question, "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"); Yaron Z. Reich, Comment, *United States v. AT&T: Judicially Supervised Negotiation and Political Questions*, 77 COLUM. L. REV. 466, 486 (1977) ("[J]udicial abstention on the basis of the political question doctrine usually leads to the same result as a ruling on the merits in favor of the political branch whose act is the subject of the challenge."); see also Richard H. Fallon, Jr., *Judicially Manageable Standards and Constitutional Meaning*, 119 HARV. L. REV. 1275, 1306 (2006) ("A holding that a category of cases is nonjusticiable in effect creates a judicially manageable standard, mandating dismissal, to guide future decisionmaking.").

<sup>103</sup> See Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 9 (1959) ("[T]he only proper judgment that may lead to an abstention from decision is that the Constitution has committed the determination of the issue to another agency of government than the courts.").

<sup>104</sup> See Redish, *supra* note 95, at 1060.

<sup>105</sup> *Id.*; see also *id.* ("The moral cost of such a result . . . far outweighs whatever benefits are thought to derive from the judicial abdication of the review function.").

Court's mandate.<sup>106</sup>

## II. STATE CONSTITUTIONAL LAW AND ITS CRITICS

The singular form of “state constitutional law” might be read to imply a monolithic body of doctrine that does not actually exist. Unlike the federal regime, which is given unified meaning by the United States Supreme Court's construction of a singular text, state constitutional law is produced by dozens of courts interpreting dozens of different documents.<sup>107</sup> In addition, it is plausible to speak of a second, broader variation: the gap between the state constitutional law and the aspirations for it by scholars. Commentary on the subject has burgeoned, and its tone is often tinged with disappointment. Much of this criticism has centered on the asserted failure of state supreme courts to develop coherent and distinctive constitutional theories that do more than merely mimic federal jurisprudence.

### A. *Salient Features of State Constitutions*

To acknowledge differences among state constitutions is not to say that they are devoid of common features. Indeed, they share with each other as well as with the federal Constitution a basic template that makes them all recognizably members of the same legal family. All share the familiar structure of separation of powers among legislative, executive, and judicial branches.<sup>108</sup> Within this structure, all save one has a bicameral legislature,<sup>109</sup> each has a governor who heads the executive branch,<sup>110</sup> and

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<sup>106</sup> See, e.g., Louis Henkin, *Lexical Priority or “Political Question”: A Response*, 101 HARV. L. REV. 524, 529–30 (1987) (“I see the political question doctrine as being at odds with our commitment to constitutionalism and limited government, to the rule of law monitored and enforced by judicial review.”); Robert J. Pushaw, Jr., *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 CORNELL L. REV. 393, 469 (1996) (arguing that justiciability doctrines allow courts to not perform their “role of enforcing federal law”).

<sup>107</sup> See G. Alan Tarr, *Interpreting the Separation of Powers in State Constitutions*, 59 N.Y.U. ANN. SURV. AM. L. 329, 332 (2003) (“[T]oday’s state constitutions were established at various points in the nation’s history, reflecting the political ideas reigning at those particular points in time, and that this in turn has affected the institutions that were created and the relationships established among them.”).

<sup>108</sup> See Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 1050 n.324 (2006) (noting the commitment of states to separation of powers (citing Jim Rossi, *Institutional Design and the Lingering Legacy of Antifederalist Separation of Powers Ideals in the States*, 52 VAND. L. REV. 1167, 1190–91 (1999))).

<sup>109</sup> See Kim Robak, *The Nebraska Unicameral and Its Lasting Benefits*, 76 NEB. L. REV. 791, 799 (1997) (noting that Nebraska is the only state that does not have a two-house legislature).

<sup>110</sup> See Norman R. Williams, *Executive Review in the Fragmented Executive: State Constitutionalism and Same-Sex Marriage*, 154 U. PA. L. REV. 565, 570 (2006) (“[E]very state has adopted a tripartite system of government with a popularly elected governor as head of the executive branch.” (footnote

every judiciary has a high court that serves as the final arbiter of the interpretation of state law.<sup>111</sup> Likewise, each state constitution contains provisions protecting basic individual liberties like free speech, equal protection, and due process.<sup>112</sup> Moreover, while each body of constitutional law is unique, state supreme courts often consult federal courts' interpretation when construing their own constitutional text.<sup>113</sup>

In addition, a commonality of special importance is that state constitutions and constitutional traditions generally possess certain features that set them apart from the United States Constitution. As a leading scholar of state constitutional law has observed, “[s]tate constitutions are not miniature versions of the federal Constitution, nor are they clones of it.”<sup>114</sup> Accordingly, state constitutions should be understood and interpreted in light of their specific history, design, and aims rather than through the prism of the federal Constitution.<sup>115</sup> Deviations from the federal model, in both text and construction, can be grouped into several categories.

### 1. Durability

The most apparent difference between a typical state constitution and the United States Constitution is sheer length. In *McCulloch v. Maryland*,<sup>116</sup> Chief Justice Marshall explained the Court's expansive construction of the Necessary and Proper Clause in the nation's sparse fundamental charter:

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omitted) (citing John Devlin, *Toward a State Constitutional Analysis of Allocation of Powers: Legislators and Legislative Appointees Performing Administrative Functions*, 66 TEMP. L. REV. 1205 (1993)).

111 See Benjamin C. Glassman, *Making State Law in Federal Court*, 41 GONZ. L. REV. 237, 256 (2006) (“[T]he highest court of the state is the final arbiter of what is state law.” (alteration in original) (quoting *West v. Am. Tel. & Tel. Co.*, 311 U.S. 223, 236 (1940))).

112 See Joseph Blocher, *Reverse Incorporation of State Constitutional Law*, 84 S. CAL. L. REV. 323, 332–33 (2011) (explaining that state constitutions often contain the same individual liberty protections as the federal Constitution).

113 See Jim Rossi, *Assessing the State of State Constitutionalism*, 109 MICH. L. REV. 1145, 1151–52 (2011) (finding that state courts will consult and accept federal interpretations of constitutional provisions in some instances). See generally Allan Erbsen, *Horizontal Federalism*, 93 MINN. L. REV. 493 (2008) (discussing the prevalence of the phenomenon of federal and state court interactions).

114 ROBERT F. WILLIAMS, *THE LAW OF AMERICAN STATE CONSTITUTIONS* 20 (2009).

115 *Id.* at 36; see also James A. Gardner, *The “States-as-Laboratories” Metaphor in State Constitutional Law*, 30 VAL. U. L. REV. 475, 484 (1996) (arguing that states should seek to find their own solution to constitutional problems rather than rely on federal precedent); Jim Rossi, *Dual Constitutions and Constitutional Duels: Separation of Powers and State Implementation of Federally Inspired Regulatory Programs and Standards*, 46 WM. & MARY L. REV. 1343, 1357 (2005) (asserting the benefits of state constitutionalism, including benefits to state governance and the ability for decisions to reflect unique state or local governmental issues).

116 17 U.S. 316 (1819).

This provision is made in a constitution intended to endure for ages to come, and, consequently, to be adapted to the various *crises* of human affairs. To have prescribed the means by which government should, in all future time, execute its powers, would have been to change, entirely, the character of the instrument, and give it the properties of a legal code.<sup>117</sup>

By contrast, state constitutions contain a breadth of detail<sup>118</sup> that makes them resemble the legal codes that Marshall thought alien to the character of the Constitution. Such relative micromanagement is feasible because provisions of state constitutions are not entrenched “for ages to come.” Unlike the cumbersome process of amendment under the federal Constitution<sup>119</sup>—which was deliberately and successfully designed to thwart frequent change<sup>120</sup>—state constitutions tend to be relatively susceptible to amendment.<sup>121</sup>

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<sup>117</sup> *Id.* at 415; *see also* U.S. CONST. art. I, § 8, cl. 1, 18 (“The Congress shall have Power . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”).

<sup>118</sup> *See* Neal Devins, *How State Supreme Courts Take Consequences into Account: Toward a State-Centered Understanding of State Constitutionalism*, 62 STAN. L. REV. 1629, 1641–42 (2010) (finding that the length and detail of state constitutions far outstrip the federal Constitution); Lawrence Schlam, *State Constitutional Amending, Independent Interpretation, and Political Culture: A Case Study in Constitutional Stagnation*, 43 DEPAUL L. REV. 269, 276–77 (1994) (noting that state constitutions elaborate more on governmental functions than the federal Constitution); Mila Versteeg & Emily Zackin, *American Constitutional Exceptionalism Revisited*, 81 U. CHI. L. REV. 1641, 1644 (2014) (“[S]tate constitutions are rather long and elaborate, and they include detailed policy choices.”).

<sup>119</sup> *See* U.S. CONST. art. V.

<sup>120</sup> *See* Donald J. Boudreaux & A.C. Pritchard, *Rewriting the Constitution: An Economic Analysis of the Constitutional Amendment Process*, 62 FORDHAM L. REV. 111, 112 (1993) (explaining that a difficult amendment process promotes the durability of the federal Constitution); Marvin Krislov & Daniel M. Katz, *Taking State Constitutions Seriously*, 17 CORNELL J.L. & PUB. POL’Y 295, 297 n.4 (2008) (describing the United States Constitution as “one of the most difficult constitutions in the world to amend”).

<sup>121</sup> *See* Jack L. Landau, *Some Thoughts About State Constitutional Interpretation*, 115 PENN ST. L. REV. 837, 839 (2011) (noting that state constitutions are “relatively easy to amend” as compared to the federal Constitution). State constitutions—or more specifically state supreme courts’ interpretation of them—can be more readily “amended” in another sense as well. Because state court judges lack the lifetime tenure of federal judges, they generally are subject to removal through electoral means that might be provoked by especially unpopular rulings. *See infra* note 159; *see also* Melissa S. May, *Judicial Retention Elections After 2010*, 46 IND. L. REV. 59, 59 (2013) (stating that elected judges may be evicted after an unpopular court decision); John L. Warren III, *Holding the Bench Accountable: Judges Qua Representatives*, 6 WASH. U. JURIS. REV. 299, 311–19 (2014) (explaining that elected judges face a dilemma: to succumb to the pressure of public opinion and retain their seat, or to adhere to, at times unpopular, law and potentially lose their seat).

## 2. *Inherent Power*

A fundamental contrast between the federal and state constitutions flows from their divergent premises about legislative power. As courts and commentators have long recognized, state legislatures possess plenary power except to the extent that they are constrained by their constitution.<sup>122</sup> By contrast, the federal government's lack of an inherent police power<sup>123</sup> means that Congress must rely on express delegations of authority in the Constitution. Thus, state constitutions largely focus on limiting otherwise untrammelled legislative power,<sup>124</sup> while the Constitution enumerates specific legislative powers that Congress may exercise.<sup>125</sup>

## 3. *Individual Rights*

It is almost inevitable that states will provide for more expansive individual rights than the United States Constitution protects. With the bulk of liberties in the Bill of Rights applicable to states through incorporation,<sup>126</sup> states can only build on this floor. Many of them have

<sup>122</sup> See, e.g., *Yellow Dog Dev., LLC v. Bibb Cty.*, 871 So. 2d 39, 42 (Ala. 2003) (finding that legislating local acts is unconstrained unless limited by the state or federal constitution); *Giss v. Jordan*, 309 P.2d 779, 783–84 (Ariz. 1957) (describing how the Arizona state legislature has plenary legislative power in Arizona unless restrained by constitutional provisions); *Howard Jarvis Taxpayers Ass'n v. Padilla*, 363 P.3d 628, 633 (Cal. 2016) (“[I]t is well established that the California Legislature possesses *plenary* legislative authority except as specifically limited by the California Constitution.”); *Lansing Sch. Educ. Ass'n v. Lansing Bd. of Educ.*, 792 N.W.2d 686, 728 (Mich. 2010) (stating that the Michigan state legislature has plenary legislative power in Michigan); FRANK P. GRAD & ROBERT F. WILLIAMS, 2 STATE CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY: DRAFTING STATE CONSTITUTIONS, REVISIONS, AND AMENDMENTS 27 (2006) (“[S]tate government is a government of plenary powers, except as limited by the state and federal constitutions.”); W. F. Dodd, *The Function of a State Constitution*, 30 POL. SCI. Q. 201, 205 (1915) (“[L]egislative power, granted in general terms, must be interpreted as conferring all governmental power, except so far as restricted by constitutional texts, i.e., that all such power inheres in the general grant.”); Helen Hershkoff, “*Just Words*”: *Common Law and the Enforcement of State Constitutional Social and Economic Rights*, 62 STAN. L. REV. 1521, 1539 (2010) (“[T]he plenary nature of state legislative power is its central characteristic . . . .”); G. Alan Tarr, *Understanding State Constitutions*, 65 TEMP. L. REV. 1169 (1992) (asserting that state power is considered plenary).

<sup>123</sup> See *Bond v. United States*, 134 S. Ct. 2077, 2086 (2014) (explaining that the federal government can only exercise power that was granted to it); *United States v. Lopez*, 514 U.S. 549, 566 (1995) (“The Constitution mandates this uncertainty by withholding from Congress a plenary police power that would authorize enactment of every type of legislation.”).

<sup>124</sup> See G. Alan Tarr, *Popular Constitutionalism in State and Nation*, 77 OHIO ST. L.J. 237, 279 (2016) (“[B]ecause state legislative power is plenary, constitution-makers have had to specify the limits imposed on that power, and they have done so in great detail.”).

<sup>125</sup> U.S. CONST. art. I, § 8.

<sup>126</sup> See Suja A. Thomas, *Nonincorporation: The Bill of Rights After McDonald v. Chicago*, 88 NOTRE

done so in one or both of two ways. First, primarily by judicial construction, they have enlarged through their state constitutions the contours of rights contained in the federal Constitution. Second, their constitutions contain guarantees of affirmative rights absent from the generally prohibitory federal Bill of Rights.

The impetus for interpreting state constitutional rights more broadly than similar federal liberties is often traced to Justice William Brennan's 1977 article urging this approach.<sup>127</sup> While state supreme courts have displayed less independence than many scholars would prefer,<sup>128</sup> they have recognized rights withheld by the Supreme Court in a significant number of instances. For example, after the Court declared in *Milkovich v. Lorain Journal Co.*<sup>129</sup> that the First Amendment does not protect opinion as such,<sup>130</sup> a number of state courts located this protection in their own constitutions.<sup>131</sup> Similarly, some courts have construed the search and seizure provisions of state constitutions less generously to the government than has the Supreme Court under the Fourth Amendment.<sup>132</sup> In some states, its supreme court has announced factors it will take into account in determining whether to interpret a state-guaranteed right more broadly

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DAME L. REV. 159, 159 (2012) (finding that all rights in the Bill of Rights have been incorporated to the states with the exception of those listed in the Fifth, Sixth, and Seventh Amendments).

<sup>127</sup> See William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 503–04 (1977) (applauding state court activism that grants greater protections to citizens than are applicable under the federal Bill of Rights).

<sup>128</sup> See *infra* notes 163–67 and accompanying text.

<sup>129</sup> 497 U.S. 1 (1990).

<sup>130</sup> See *id.* at 3, 18–19 (holding that there is no wholesale defamation exception for anything labeled as an “opinion”).

<sup>131</sup> See, e.g., *Immuno AG. v. Moor-Jankowski*, 567 N.E.2d 1270, 1278, 1280 (N.Y. 1991) (describing means for “separating actionable fact from protected opinion” and observing that the “protection afforded by the guarantees of free press and speech in the New York Constitution is often broader than the minimum required by the Federal Constitution” (internal citation and quotation marks omitted)); *Wampler v. Higgins*, 752 N.E.2d 962, 965 (Ohio 2001) (“[R]egardless of the outcome in *Milkovich*, . . . [t]he Ohio Constitution provides a separate and independent guarantee of protection for opinion ancillary to freedom of the press.” (omission and second alteration in original) (internal citation and quotation marks omitted)).

<sup>132</sup> See, e.g., *State v. Tucker*, 626 So. 2d 707, 712 (La. 1993) (explaining that the Louisiana Constitution protects individuals from “imminent actual stops” thus exceeding the Fourth Amendment protection that only protects individuals from “actual stop[s]”); *State v. Woods*, 866 So. 2d 422, 425 (Miss. 2003) (finding the Mississippi Constitution’s Fourth Amendment counterpart provides greater protection to citizens than the federal Constitution); *State v. Ferrier*, 960 P.2d 927, 932 (Wash. 1998) (requiring the government to show a “compelling need to act outside of our warrant requirement” when conducting a search into private dwellings under the Washington Constitution); see also *In re Ohio Criminal Sentencing Statutes Cases*, 849 N.E.2d 985, 995–96 (Ohio 2006) (construing the Ohio Constitution’s self-incrimination clause to provide greater protection than that afforded by the Fifth Amendment of the United States Constitution).

than its interpretation under the federal Constitution.<sup>133</sup>

In addition to more generous judicial conceptions of parallel rights provisions, state constitutions also explicitly furnish grounds for recognition of rights not afforded by the federal Constitution. It is a commonplace that the federal Constitution does not confer positive rights to benefits conducive—or even necessary—to minimal social welfare.<sup>134</sup> The federal Constitution protects negative rights by proscriptions on government infringement of individual liberty, but it does not contain guarantees of access to housing, education, medical care, or sustenance. Nor has the Court been willing to infer the existence of such rights.<sup>135</sup> By contrast, express substantive rights and affirmative government obligations can frequently be found in state constitutions.<sup>136</sup> Although judicial reticence in their enforcement can make such claims on state resources less robust than they might seem,<sup>137</sup> they supply a textual foundation to courts inclined to effectuate guarantees of this nature.

#### 4. *Separation of Powers*

State constitutions are not bound to adhere to the allocation of power among the three branches of government established by the federal Constitution.<sup>138</sup> Thus, states have not simply copied the system of co-equal

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<sup>133</sup> See, e.g., *State v. Gunwall*, 720 P.2d 808, 811 (Wash. 1986) (en banc) (explaining criteria for when the Washington State Constitution should be considered as extending broader rights than the United States Constitution). For a critique of this “criteria approach,” see WILLIAMS, *supra* note 114, at 169–77 (criticizing the idea that interpretations of the federal Constitution should be binding on interpretations of the states’ constitutions).

<sup>134</sup> See Stephen Loffredo, *Poverty, Inequality, and Class in the Structural Constitutional Law Course*, 34 *FORDHAM URB. L.J.* 1239, 1243 (2007) (acknowledging the general liberal scholarly consensus as holding that the Constitution provides no positive right to welfare).

<sup>135</sup> See, e.g., *DeShaney v. Winnebago Cty. Dep’t of Soc. Servs.*, 489 U.S. 189, 196 (1989) (“[T]he Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual.”); *Lindsey v. Normet*, 405 U.S. 56, 74 (1972) (“We do not denigrate the importance of decent, safe, and sanitary housing. But the Constitution does not provide judicial remedies for every social and economic ill. We are unable to perceive in that document any constitutional guarantee of access to dwellings of a particular quality . . .”).

<sup>136</sup> See generally Hershkoff, *supra* note 122 (inquiring whether state social and economic rights should exert influence on state court common law decision making); Jeffrey Omar Usman, *Good Enough for Government Work: The Interpretation of Positive Constitutional Rights in State Constitutions*, 73 *ALB. L. REV.* 1459 (2010) (exploring the challenges of enforcing positive rights to welfare and other social assistance that exist in state constitutions).

<sup>137</sup> See *infra* notes 281–92 and accompanying text.

<sup>138</sup> *Sweezy v. New Hampshire*, 354 U.S. 234, 255 (1957) (Frankfurter, J., concurring); *Prentis v. Atl. Coast Line Co.*, 211 U.S. 210, 225 (1908); Robert A. Schapiro, *Contingency and Universalism in State Separation of Powers Discourse*, 4 *ROGER WILLIAMS U. L. REV.* 79, 92 (1998) (“[U]nlike federal

and countervailing branches that Madison envisioned<sup>139</sup> and the Court has sought to maintain.<sup>140</sup> Exercising this latitude, states have adopted diverse approaches to delineating boundaries among the branches.<sup>141</sup> Even at a basic categorical level, state separation of powers schemes largely resist generalization. For example, the widespread presence in state constitutions of explicit separation of powers provisions,<sup>142</sup> as well as pronouncements by some supreme courts,<sup>143</sup> point to rigorous compartmentalization of the three branches. Helen Hershkoff, however, has observed that in practice separation of powers at the state level “tends . . . toward blended functions that allow for complementary and overlapping activity by the different branches and foci of power.”<sup>144</sup> Prominent among these transcending functions is judicial policymaking—a contradiction under federal theory—through the common law.<sup>145</sup> Similarly, many states have altered their

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individual rights precedent, federal separation of powers doctrine does not apply directly to the states.”).

<sup>139</sup> See THE FEDERALIST NO. 48, at 308 (James Madison) (Isaac Kramnick ed., 1987) (“[T]he powers properly belonging to one of the departments ought not to be directly and completely administered by either of the other departments.”); THE FEDERALIST NO. 51, *supra*, at 318–22 (James Madison) (describing how the three branches will serve as a check against each other).

<sup>140</sup> See *Bowsher v. Synar*, 478 U.S. 714, 725 (1986) (“The fundamental necessity of maintaining each of the three general departments of government entirely free from the control or coercive influence . . . of either of the others . . . is hardly open to serious question. So much is implied in the very fact of the separation of the powers of these departments by the Constitution; and in the rule which recognizes their essential co-equality.” (quoting *Humphrey’s Ex’r v. United States*, 295 U.S. 602, 629–30 (1935)); *United States v. Nixon*, 418 U.S. 683, 707 (1974) (“In designing the structure of our Government and dividing and allocating the sovereign power among three co-equal branches, the Framers of the Constitution sought to provide a comprehensive system . . .”).

<sup>141</sup> See WILLIAMS, *supra* note 114, at 238 (“State constitutional separation of powers questions . . . call for a *state-specific* form of analysis rather than one applying a more generalized, or universalist, American-constitutional separation of powers doctrine.”); Linde, *supra* note 7, at 188 (“[S]tate constitutions display a far greater (in fact, a bewildering) structural variety compared with that of the United States.”); Tarr *supra* note 107, at 329 (“The most cursory examination of state constitutions confirms how distinctive state constitutions and governments are.”).

<sup>142</sup> See Tarr, *supra* note 107, at 337 (“Most states subsequently admitted to the Union likewise constitutionalized the separation of powers, and states have retained their separation-of-powers provisions . . . even when they have replaced their early constitutions.”).

<sup>143</sup> See, e.g., *State ex rel. King v. Morton*, 955 So. 2d 1012, 1019–20 (Ala. 2006) (noting that the Alabama Constitution has an express separation-of-powers provision whereas the United States Constitution does not); *Bates v. Dep’t of Behavioral & Developmental Servs.*, 863 A.2d 890, 911 (Me. 2004) (“[T]he separation of governmental powers mandated by the Maine Constitution is much more rigorous than the same principle as applied to the federal government.” (alteration in original) (quoting *State v. Hunter*, 447 A.2d 797, 799 (Me. 1982))); *Ex parte Perry*, 483 S.W.3d 884, 894–95 (Tex. Crim. App. 2016) (suggesting that state would “more aggressively enforce” separation of powers than the federal government would (quoting *State v. Rhine* 297 S.W.3d 301, 315 (Tex. Crim. App. 2009) (Keller, P.J., concurring))).

<sup>144</sup> Hershkoff, *supra* note 17, at 1905.

<sup>145</sup> See Ann Woolhandler & Michael G. Collins, *Judicial Federalism and the Administrative States*, 87 CALIF.

constitutions to empower the governor to exert a degree of control over spending that would amount to executive encroachment on legislative prerogative in the federal setting.<sup>146</sup>

More fluid conceptions of boundaries between branches also contribute to wider access to state courts.<sup>147</sup> Doctrines such as prohibitions on deciding moot cases and issuing advisory opinions often pose less formidable obstacles to state judiciaries than in Article III courts.<sup>148</sup> Another potential bar to justiciability, standing, also operates in many instances to allow suits that would be excluded by federal courts. Broader standing at the state level is due in substantial part to the existence of rights under state constitutions that are absent from the United States Constitution.<sup>149</sup> In addition, however, state constitutional law often permits standing on such bases as taxpayer or citizenship status<sup>150</sup> that are typically inadequate in federal suits.<sup>151</sup>

### 5. Legislation

Enactment of federal statutes must conform to the constitutionally prescribed process of bicameral passage by Congress and signature by the President or by a two-thirds vote of each house over the President's veto.<sup>152</sup> The Supreme Court has refused to condone deviations from this "single, finely wrought and exhaustively considered, procedure."<sup>153</sup> By contrast,

L. REV. 613, 619–20 (1999) (describing judicial policymaking by reviewing administrative actions); *see also* Republican Party of Minn. v. White, 536 U.S. 765, 784 (2002) (explaining that state-court judges have the power not only to make common law but also influence states' constitutions).

<sup>146</sup> *See* Tarr, *supra* note 107, at 338–39 (describing the line-item veto used in the vast majority of states).

<sup>147</sup> *See* Usman, *supra* note 136, at 1518 ("Justiciability restrictions on the state level are less than those limiting federal courts.").

<sup>148</sup> *See* Hershkoff, *supra* note 17, at 1859–61 (discussing state court resolution of issues that federal courts deem moot); *id.* at 1844–52 (discussing state court administration of advisory opinions); *see also* G. ALAN TARR & MARY CORNELIA ALDIS PORTER, STATE SUPREME COURTS IN STATE AND NATION 43 (1988) (arguing that state constitutions' lack of language resembling Article III case or controversy requirement permits a greater range of judicial review).

<sup>149</sup> *See supra* notes 134–38 and accompanying text.

<sup>150</sup> *See* Hershkoff, *supra* note 17, at 1852–59 (explaining some of the bases for standing in state courts, including one's status as a citizen, taxpayer, or legislator).

<sup>151</sup> *See, e.g.*, Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 227–28 (1974) (holding that neither citizenship nor taxpayer status alone is sufficient to grant standing in federal court); United States v. Richardson, 418 U.S. 166, 176–77 (1974) (requiring that an individual has more than a "generalized grievance" that is applicable to common members of the public).

<sup>152</sup> U.S. CONST. art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."); *id.* § 7, cl. 2 (explaining how bills become law); *id.* § 7, cl. 3 (describing the presidential veto).

<sup>153</sup> *INS v. Chadha*, 462 U.S. 919, 951 (1983).

most states have mechanisms that allow for the alternative of direct participatory democracy. Lawmaking through initiative or referendum is widely available.<sup>154</sup>

### 6. *Judicial Independence*

Insulation from political pressure is a hallmark of the federal judiciary.<sup>155</sup> Life tenure<sup>156</sup> for appointed<sup>157</sup> judges was designed to safeguard fundamental principles from being trampled on by majoritarian passions.<sup>158</sup> On the other hand, state judges by and large enjoy no such security; the selection or retention of the great majority of them is determined through elections.<sup>159</sup> Numerous critics have charged that reliance on popular approval to gain or hold judicial office forms an inherent impediment to impartial judgment.<sup>160</sup> Some commentators have marshaled evidence said to support a correlation between judicial behavior

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<sup>154</sup> K.K. DuVivier, *The United States as a Democratic Ideal? International Lessons in Referendum Democracy*, 79 TEMP. L. REV. 821, 833 (2006).

<sup>155</sup> See Michael R. Dimino, *Pay No Attention to That Man Behind the Robe: Judicial Elections, the First Amendment, and Judges as Politicians*, 21 YALE L. & POL'Y REV. 301, 306 (2003) (noting that “[t]he protection of judicial independence is . . . perhaps the foundational principle” of Article III); The Honorable R. David Proctor, *An Overview of Judicial Independence from Impeachments to Court-Packing*, 47 U. MEM. L. REV. 1147, 1149 (2017) (“The pillars of judicial independence are well-known, well-settled, and well-established in our federal Constitution.”).

<sup>156</sup> U.S. CONST. art. III, § 1 (providing that judges shall hold office “during good Behaviour”).

<sup>157</sup> *Id.* art. II, § 2, cl. 2 (providing for appointment by president with advice and consent of the Senate).

<sup>158</sup> See THE FEDERALIST NO. 78, *supra* note 139, at 226 (Alexander Hamilton) (describing the “independence of the judges” as “equally requisite to guard the Constitution and the rights of individuals” from the ever-changing whims of the majority).

<sup>159</sup> See Rachel Caufield, *Judicial Elections: Today's Trends and Tomorrow's Forecast*, 46 JUDGES' J., Winter 2007, at 6 (“Nationwide, thirty-nine states use some form of election to select or retain their judges.”). See generally AM. JUDICATURE SOC'Y, JUDICIAL SELECTION IN THE STATES: APPELLATE AND GENERAL JURISDICTION COURTS (2013), [http://www.judicialselection.us/uploads/documents/Judicial\\_Selection\\_Charts\\_1196376173077.pdf](http://www.judicialselection.us/uploads/documents/Judicial_Selection_Charts_1196376173077.pdf) (showing the selection methods for judges in each state).

<sup>160</sup> See, e.g., Erwin Chemerinsky, *Evaluating Judicial Candidates*, 61 S. CAL. L. REV. 1985, 1988 (1988) (“The paramount function of courts is to protect social minorities and individual rights. But judges cannot be expected to perform this countermajoritarian function if their ability to keep their prestigious, highly sought after positions depends on popular approval of their rulings.”); Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689, 694 (1995) (“When those charged with checking the majority are themselves answerable to, and thus influenced by, the majority, the question arises how individual and minority protection is secured.”); Charles Gardner Geyh, *Why Judicial Elections Stink*, 64 OHIO ST. L.J. 43, 51 (2003) (explaining the impact that the pressure of judicial elections has on judicial decision making); Gerald F. Uelman, *Crocodiles in the Bathtub: Maintaining the Independence of State Supreme Courts in an Era of Judicial Politicization*, 72 NOTRE DAME L. REV. 1133, 1133 (1997) (comparing the situation of a judge deciding controversial cases while facing reelection to “finding a crocodile in your bathtub” in that “it’s hard to think about much else while you’re shaving”).

and the prospect of reelection.<sup>161</sup> In particular, data exists to support the inference that decision making by elected judges is responsive to campaign contributors and other constituencies.<sup>162</sup> Whatever the exact force of these critiques, it is hard to dispute that federal judges are equipped to conduct their business with much more aloofness from popular opinion than the overwhelming majority of state judges.

### B. Criticism of State Courts' Constitutionalism

It can fairly be said that state constitutional jurisprudence has come in for a great deal of scholarly scorn. Much of this criticism has accused state courts of a blinkered perspective in construing their constitutions. A particularly frequent refrain is that too often these courts simply decide in “lockstep” with federal court interpretations of comparable provisions of the United States Constitution rather than exercising independent judgment.<sup>163</sup> Such condemnation is not universal; some commentators have cited extenuating circumstances for this phenomenon,<sup>164</sup> while others have expressed approval of it.<sup>165</sup> Still, the dominant sentiment among

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<sup>161</sup> See Stephen B. Bright & Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 B.U. L. REV. 759, 793–94 (1995) (contrasting the rates of overriding jury recommendations of life without parole and imposing death penalty by judges subject to election and those not subject to election, with the latter showing a much greater incidence of overriding jury recommendations); Gregory A. Huber & Sanford C. Gordon, *Accountability and Coercion: Is Justice Blind When It Runs for Office?*, 48 AM. J. POL. SCI. 247, 258 (2004) (finding an increase in sentences handed down by judges as reelection approaches).

<sup>162</sup> See, e.g., Joanna M. Shepherd, *Money, Politics, and Impartial Justice*, 58 DUKE L.J. 623, 649 (2009) (examining “whether judges bend their rulings to appeal to those who will be deciding whether they keep their jobs”); see also Lynne H. Rambo, *High Court Pretense, Lower Court Candor: Judicial Impartiality After Caperton v. Massey Coal Co.*, 13 CARDOZO PUB. L., POL'Y & ETHICS J. 441, 460–61 (2015) (explaining the data regarding increased spending on judicial election campaigns and the influence it has on judges); Chris W. Bonneau, *A Survey of Empirical Evidence Concerning Judicial Elections*, FEDERALIST SOC'Y, Mar. 2012, at 7, [http://www.fed-soc.org/library/doclib/20120719\\_Bonneau2012WP.pdf](http://www.fed-soc.org/library/doclib/20120719_Bonneau2012WP.pdf) (“One area where the evidence is pretty clear is that elected judges are responsive to their constituencies when it comes time to make decisions on the bench.”).

<sup>163</sup> See, e.g., Joshua A. Douglas, *The Right to Vote Under State Constitutions*, 67 VAND. L. REV. 89, 121–29 (2014) (arguing for rejection of a lockstep approach to interpreting state constitutional right to vote); Robert F. Williams, *In the Supreme Court's Shadow: Legitimacy of State Rejection of Supreme Court Reasoning and Result*, 35 S.C. L. REV. 353, 402–04 (1984) (accusing state courts of abdicating judicial responsibility by mimicking United States Supreme Court constitutional interpretation).

<sup>164</sup> See, e.g., Lawrence Friedman, *Path Dependence and the External Constraints on Independent State Constitutionalism*, 115 PENN ST. L. REV. 783, 818–31 (2011) (ascribing state courts' lack of independent constitutional analysis primarily to strong path dependence).

<sup>165</sup> See, e.g., James A. Gardner, *State Constitutional Rights as Resistance to National Power: Toward a Functional Theory of State Constitutions*, 91 GEO. L.J. 1003, 1061 (2003) (“Lockstep analysis . . . need not represent an absence of independent constitutional judgment; it can just as easily represent the outcome of a fully-informed exercise of independent state judicial judgment.”); Earl M. Maltz,

scholars of the area appears to be that “[t]here is no . . . reason for a lockstep jurisprudence in interpreting the structural provisions of state constitutions . . . [or] in interpreting their rights guarantees.”<sup>166</sup>

On the contrary, they typically regard as misguided reliance on federal doctrine as a baseline for comparison. As Hans Linde put it:

[T]o ask when to diverge from federal doctrines is quite a different question from taking a principled view of the state’s constitution; in fact, this supplemental or interstitial approach prevents a coherent development of the state’s law.

. . . .

The right question is not whether a state’s guarantee is the same as or broader than its federal counterpart as interpreted by the Supreme Court. The right question is what the state’s guarantee means and how it applies to the case at hand.<sup>167</sup>

Proposed methodologies for construing state constitutions vary. Robert Williams, for example, has urged sensitivity to the distinctive text, history, and legal culture of the state constitution under review.<sup>168</sup> Taking a consequentialist approach, Neal Devins describes how state supreme courts can assess the risk of backlash against their decisions by consulting unique features of their constitution, their state’s political norms, and other states’ experiences.<sup>169</sup> More comprehensively, James Gardner has advanced a philosophy of interpreting state constitutions through the filter of states’ role in the federal system.<sup>170</sup> Regardless of which of these or other theories<sup>171</sup> such scholars adopt, they are based on the premise that state supreme courts should forge constitutional analysis that is principled and autonomous rather than derivative.

All too often, however, state constitutionalism—at least according to observers—has fallen far short of this ideal. The title of Gardner’s *The Failed Discourse of State Constitutionalism*<sup>172</sup> captures a harsh but hardly extreme version of this view, as does his thesis that contemporary state constitutional law is a “vast wasteland of confusing, conflicting, and essentially

*Lockstep Analysis and the Concept of Federalism*, 496 ANNALS AM. ACAD. POL. & SOC. SCI. 98, 101–02 (1988) (noting that lockstep analysis is consistent with state autonomy).

<sup>166</sup> See, e.g., Tarr, *supra* note 107, at 331.

<sup>167</sup> Linde, *supra* note 7, at 178–79.

<sup>168</sup> See generally WILLIAMS, *supra* note 114.

<sup>169</sup> See Devins, *supra* note 118, at 1674–91.

<sup>170</sup> See generally JAMES A. GARDNER, INTERPRETING STATE CONSTITUTIONS: A JURISPRUDENCE OF FUNCTION IN A FEDERAL SYSTEM (2005).

<sup>171</sup> See, e.g., Usman, *supra* note 136, at 1520–23 (arguing for an interpretation of state constitutions’ positive rights that is deferential but not as permissive as rational basis review).

<sup>172</sup> 90 MICH. L. REV. 761 (1992).

unintelligible pronouncements.”<sup>173</sup> A portrait of incoherence is also conveyed by another observer’s description of state constitutional law treatments of state-guaranteed individual rights as reflecting a “seemingly random heterogeneity.”<sup>174</sup> Often considered parochial and lacking vision, state constitutions themselves have been blamed for contributing to the asserted inadequacies of state supreme courts’ decision making.<sup>175</sup> In short, then, the examination of aspects of state constitutional law that follows takes place against the backdrop of much scholarly skepticism of the enterprise.

### III. THE PERVASIVE IMPACT OF FEDERAL PRECEDENT ON STATE POLITICAL QUESTION DOCTRINE

Critics of the lockstep approach to state constitutional law can make a forceful case that state supreme courts should carve out their own distinctive conceptions of political questions. In practice, however, state courts still widely look to *Baker v. Carr*<sup>176</sup> and other Supreme Court precedent in their articulation of formal doctrine.<sup>177</sup> Even nominally independent state standards often carry echoes of Supreme Court rulings.<sup>178</sup> In some instances where state court discussion of political questions diverges from the federal version, it is not clear that the court is applying a coherent idea of the doctrine.<sup>179</sup>

A fundamental argument against wholesale transplantation of Supreme Court political question doctrine to state court decision making is that federal preoccupations are largely irrelevant to state concerns. At a basic level, states’ often more permeable notions of separation among branches<sup>180</sup>

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<sup>173</sup> *Id.* at 763.

<sup>174</sup> Patrick O. Gudridge, *Random Heterogeneous Materials? The Robert Williams Book, News from Florida, the Stuff of State Constitutional Law Reconceived*, 41 RUTGERS L.J. 931, 933 (2010); see also James W. Diehm, *New Federalism and Constitutional Criminal Procedure: Are We Repeating the Mistakes of the Past?*, 55 MD. L. REV. 223, 244 (1996) (“[C]onstitutional criminal procedure has been transformed into a perplexing melange of disparate constitutional principles.”).

<sup>175</sup> See James A. Gardner, *What is a State Constitution?*, 24 RUTGERS L.J. 1025, 1025–26 (1993) (“Typically, state constitutions do not seem to have resulted from reasoned deliberation on issues of self-governance, or to express the fundamental values or unique character of distinct polities.”); see also Linde, *supra* note 7, at 196 (“Most state constitutions are dusty stuff—too much detail, too much diversity, too much debris of old tempests in local teapots, too much preoccupation with offices, their composition and administration, and forever with money, money, money. In short, no grand vision, no overarching theory . . .”).

<sup>176</sup> 369 U.S. 186 (1962). For a discussion of this case, see *supra* Section I.A.2.

<sup>177</sup> See *infra* notes 195–205 and accompanying text.

<sup>178</sup> See *infra* notes 206–11 and accompanying text.

<sup>179</sup> See *infra* notes 218–26 and accompanying text.

<sup>180</sup> See *supra* notes 147–52 and accompanying text.

alleviate concerns about judicial overreaching that drive federal doctrine.<sup>181</sup> Moreover, widespread state constitutional positive rights<sup>182</sup> and common law rights create grounds for enforceability for which there are no federal constitutional counterparts.<sup>183</sup> Similarly, the relatively detailed nature of state constitutions<sup>184</sup> increases courts' ability to discern in them principled and manageable standards.<sup>185</sup> Finally, the practical finality of almost all Supreme Court constitutional rulings<sup>186</sup> that inhibits judicial intervention in doubtful cases does not obtain among state supreme courts, whose interpretations can be overturned or undermined with comparative ease.<sup>187</sup>

Consistent with such reasoning, state supreme courts have occasionally disavowed reliance on a federal template in determining whether an issue presents a political question. In the course of rejecting *Baker v. Carr's* relevance to a claim before it, the Colorado Supreme Court noted that it had “cited or applied the *Baker* justiciability analysis only in rare circumstances.”<sup>188</sup> The Massachusetts Supreme Judicial Court similarly asserted that it had “never explicitly incorporated the Federal doctrine [of political questions] into [its] State jurisprudence.”<sup>189</sup> More bluntly, the Wyoming Supreme Court declared that “[t]he federal doctrine of nonjusticiable political question, as discussed and applied in *Baker* and later

<sup>181</sup> See *supra* notes 88–89.

<sup>182</sup> See *supra* Section II.A.3.

<sup>183</sup> See Hershkoff, *supra* note 17, at 1863 (“[S]tate common law courts . . . tend to hear an array of questions that would be nonjusticiable under federal law.”); Ellen A. Peters, *Getting Away from the Federal Paradigm: Separation of Powers in State Courts*, 81 MINN. L. REV. 1543, 1558 (1997) (“State courts regularly are called upon to enforce state constitutional obligations that . . . federal courts have declined to enforce. Because these state constitutional rights impose affirmative obligations on the state, they differ from federal civil rights guarantees, in kind as well as in text.” (internal citations omitted)); see also Hans A. Linde, *Judges, Critics, and the Realist Tradition*, 82 YALE L.J. 227, 248 (1972) (“[T]here are hardly any state analogues to the self-imposed constraints on justiciability, ‘political questions,’ and the like that occupy students of the Supreme Court.”).

<sup>184</sup> See *supra* note 118 and accompanying text.

<sup>185</sup> See Daniel B. Rodriguez, *The Political Question Doctrine in State Constitutional Law*, 43 RUTGERS L.J. 573, 585 (2013) (“[S]tate constitutional rules are comparatively more detailed; we can therefore expect courts to find in the documents more discernible and manageable standards.”).

<sup>186</sup> See Walter Dellinger, *The Legitimacy of Constitutional Change: Rethinking the Amendment Process*, 97 HARV. L. REV. 386, 414–15 (1983) (emphasizing how few constitutional amendments had the effect of overruling Supreme Court decisions); Kathleen M. Sullivan, *Constitutional Constancy: Why Congress Should Cure Itself of Amendment Fever*, 17 CARDOZO L. REV. 691, 693 (1996) (“[O]nly four [constitutional] amendments were enacted to overrule decisions of the Supreme Court . . .”).

<sup>187</sup> See Rodriguez, *supra* note 185, at 584 (noting the amenability of state constitutions to amendment, the incidence of legislative overruling, and the frequently wide “gap between a judicial interpretation and the implementation of the decision”).

<sup>188</sup> *Lobato v. State*, 218 P.3d 358, 368 (Colo. 2009) (en banc).

<sup>189</sup> *Backman v. Sec’y of the Commonwealth*, 441 N.E.2d 523, 527 (Mass. 1982).

federal decisions, has no relevancy and application in state constitutional analysis.”<sup>190</sup>

Such pronouncements, however, do not reflect the extent to which state courts have looked to United States Supreme Court jurisprudence in conceptualizing political questions. Most notably, cases in which courts have recited *Baker’s* indicia in their entirety are legion.<sup>191</sup> Some state high courts have repeatedly invoked these factors wholesale over a course of years, as if to signal that a recitation of *Baker’s* formulation is requisite to any valid analysis of a political question claim.<sup>192</sup> Even this evidence understates the impact of *Baker* on state courts’ approaches; courts also often look to other portions of the *Baker* opinion besides its six-prong test to reach their conclusions.<sup>193</sup> Moreover, the pervasiveness of *Baker’s* elements

<sup>190</sup> *State v. Campbell Cty. Sch. Dist.*, 32 P.3d 325, 334 (Wyo. 2001). *See also State ex rel. Cooper v. Caperton*, 470 S.E.2d 162, 170–71 (W. Va. 1996) (rejecting as inapplicable to amendment procedures under the West Virginia State’s Constitution a Supreme Court holding in *Coleman v. Miller* that the aspect of amendment to United States Constitution presented a political question).

<sup>191</sup> Support for this characterization of the frequency of this approach can be found in a partial compilation of such cases from across the nation. *See, e.g.*, *Meyer v. Lamm*, 846 P.2d 862, 872 (Colo. 1993) (en banc); *Roger Sherman Liberty Ctr., Inc. v. Williams*, 28 A.3d 1026, 1033–34 (Conn. Super. Ct. 2011); *Ford v. Leithead-Todd*, 384 P.3d 905, 911 (Haw. Ct. App. 2016); *Cent. Austin Neighborhood Ass’n v. City of Chicago*, 1 N.E.3d 976, 982–83 (Ill. App. Ct. 2013); *Freeman v. Grain Processing Corp.*, 848 N.W.2d 58, 93–94 (Iowa 2014); *Kan. Bldg. Indus. Workers Comp. Fund v. State*, 359 P.3d 33, 43 (Kan. 2015); *Philpot v. Haviland*, 880 S.W.2d 550, 553 (Ky. 1994); *Sawyer v. Legislative Council*, No. Civ.A. CV-04-97, 2005 WL 2723817, at \*3–4 (Me. Super. Ct. Mar. 16, 2005); *Jones v. Anne Arundel Cty.*, 69 A.3d 426, 433 (Md. 2013); *Cruz-Guzman v. State*, 892 N.W.2d 533, 539 (Minn. Ct. App. 2017); *Ghane v. Mid-S. Inst. Self Def. Shooting, Inc.*, 137 So. 3d 212, 217–18 (Miss. 2014); *Progress Mo., Inc. v. Mo. Senate*, 494 S.W.3d 1, 5–6 (Mo. Ct. App. 2016); *Neb. Coal. Educ. Equity & Adequacy (Coal.) v. Heineman*, 731 N.W.2d 164, 177 (Neb. 2007); *N. Lake Tahoe Fire Prot. Dist. v. Washoe Cty. Bd. of Cty. Comm’rs*, 310 P.3d 583, 587 (Nev. 2013); *Mental Health Ass’n v. Corbett*, 54 A.3d 100, 104 (Pa. Commw. Ct. 2012); *Bredesen v. Tenn. Judicial Selection Comm’n*, 214 S.W.3d 419, 435 (Tenn. 2007); *Freeman v. Am. K-9 Detection Servs., L.L.C.*, 494 S.W.3d 393, 400 (Tex. App. 2015); *Skokos v. Corradini*, 900 P.2d 539, 541 n.1 (Utah Ct. App. 1995); *Turner v. Shumlin*, 163 A.3d 1173, 1180–81 (Vt. 2017); *State v. Jensen*, 681 N.W.2d 230, 244 (Wis. Ct. App. 2004).

<sup>192</sup> *See, e.g.*, *Office of the Governor v. Select Comm. of Inquiry*, 858 A.2d 709, 747–48 (Conn. 2004); *Seymour v. Region One Bd. of Educ.*, 803 A.2d 318, 323–24 (Conn. 2002); *Nielsen v. State*, 670 A.2d 1288, 1291–92 (Conn. 1996); *Pellegrino v. O’Neill*, 480 A.2d 476, 482 (Conn. 1984); *Salera v. Caldwell*, 375 P.3d 188, 201 (Haw. 2016); *Nelson v. Hawaiian Homes Comm’n*, 277 P.3d 279, 286 (Haw. 2012); *Trustees of the Office of Hawaiian Affairs v. Yamasaki*, 737 P.2d 446, 455 (Haw. 1987); *William Penn Sch. Dist. v. Pa. Dep’t of Educ.*, 170 A.3d 414, 436 (Pa. 2017); *Robinson Twp. v. Commonwealth*, 83 A.3d 901, 928 (Pa. 2013); *Marrero ex rel. Tabalas v. Commonwealth*, 739 A.2d 110, 112 (Pa. 1999); *Blackwell v. City of Philadelphia*, 684 A.2d 1068, 1071 (Pa. 1996).

<sup>193</sup> *See, e.g.*, *State v. Tongass Conservation Soc’y*, 931 P.2d 1016, 1018–19 (Alaska 1997) (addressing the relationship between the judiciary and coordinate branches of government highlighted as an essential element of a political question, as noted in *Baker*); *Cent. Austin Neighborhood Ass’n*, 1 N.E.3d at 981–82 (highlighting the Supreme Court’s separation of powers analysis for determining justiciability in *Baker*); *Kan. Bldg. Indus. Workers Comp. Fund*, 359 P.3d at 42–43 (emphasizing *Baker’s*

should not be dismissed as unreflective or default references. Numerous courts have explicitly announced their judgment that *Baker*'s standard warrants adoption by their state.<sup>194</sup>

Nor is state courts' reliance on Supreme Court political question jurisprudence confined to adoption and application of the *Baker* test. References to other Court expositions on the subject are sprinkled liberally through state court opinions as well. These include *Coleman v. Miller*,<sup>195</sup> *Powell v. McCormack*,<sup>196</sup> *Nixon v. United States*,<sup>197</sup> and other cases in which the

description of the political question doctrine as a "tool" that should not be used to promote disorder); *Cooper v. Berger*, 809 S.E.2d 98, 107, 128 (N.C. 2018) (highlighting the importance of courts exercising caution when delving into the realm of political settlements); *Segars-Andrews v. Judicial Merit Selection Comm'n*, 691 S.E.2d 453, 460 (S.C. 2010) (analyzing the Supreme Court's definition of "political" in *Baker* and the role the definition plays in the political question analysis).

<sup>194</sup> See, e.g., *Kanuk ex rel. Kanuk v. State*, 335 P.3d 1088, 1096 (Alaska 2014) ("Drawing exact boundaries between the political and the justiciable is not possible, but we come as close as we can by applying the test announced . . . in *Baker v. Carr*." (internal citations omitted)); *Kan. Bldg. Indus. Workers Comp. Fund*, 359 P.3d at 42 ("The seminal . . . case on the political question doctrine is *Baker v. Carr* . . ."); *Philpot*, 880 S.W.2d at 553 (incorporating standards outlined in *Baker v. Carr* for "determining whether an issue is an appropriate subject for resolution by the courts or whether it is a 'political question' which the judiciary ought not adjudicate"); *Jones*, 69 A.3d at 433 ("In *Baker v. Carr* . . . the Supreme Court outlined the essential aspects of a political question . . ."); *Neb. Coal. for Educ. Equity & Adequacy*, 731 N.W.2d at 176 ("[W]e have not previously adopted the U.S. Supreme Court's justiciability tests under [*Baker v. Carr*], which we do now."); *N. Lake Tahoe Fire Prot. Dist.*, 310 P.3d at 585 ("To assist with [assessing whether the political question doctrine applies], we take this opportunity to adopt the factors set forth in *Baker v. Carr* . . ."); *Robinson Twp.*, 83 A.3d at 928 ("[W]e customarily reference the several formulations by which the U.S. Supreme Court has described a 'political question' in *Baker v. Carr* . . .").

<sup>195</sup> 307 U.S. 433, 454–55 (1939) (elaborating upon the political question doctrine beyond the discussion in *Baker*); see also *Nielsen*, 670 A.2d at 1291–92 (discussing further the Supreme Court's political question reasoning in *Coleman*); *Segars-Andrews*, 691 S.E.2d at 460 (discussing the additional political question considerations presented in *Coleman*). For a discussion of *Coleman*, see *supra* notes 37–42 and accompanying text.

<sup>196</sup> 395 U.S. 486, 518–22 (1969) (analyzing additional important considerations under the political question doctrine); see also *Select Comm. of Inquiry*, 858 A.2d at 730–31 (proposing that *Powell* supports a political question or separation of powers analysis as the "ultimate expression of respect for equality among the branches . . ."); *Fletcher v. Commonwealth*, 163 S.W.3d 852, 860 (Ky. 2005) (drawing upon the reasoning in *Powell* to argue that, in conducting its political question analysis, the Court should refrain from interfering with discretion assigned to another branch in the Constitution); *Jones*, 69 A.3d at 433 (relying upon *Powell* in addition to *Baker* to conduct its political question analysis); *Smigiel v. Franchot*, 978 A.2d 687, 701 (Md. 2009) (using the reasoning in *Powell* to inform its separation of powers analysis); *Cooper*, 809 S.E.2d at 107 (discussing *Powell*'s integration of the separation of powers analysis into the political question doctrine); *Blackwell*, 684 A.2d at 1071 (discussing the separation of powers mandate in *Powell*). For a discussion of *Powell*, see *supra* notes 69–72 and accompanying text.

<sup>197</sup> 506 U.S. 224, 240–41 (1993) (White, J., concurring) (calling into question the Court's role in judicial review given that there are nonjusticiable issues); see also *Birmingham-Jefferson Civic Ctr. Auth. v. City of Birmingham*, 912 So. 2d 204, 215–16, 218 (Ala. 2005) (discussing the political question doctrine analysis in *Nixon*); *State v. Maestas*, 417 P.3d 774, 777, 781–82 (Ariz. 2018)

Court has addressed the nature of political questions.<sup>198</sup> Even the Court's early caution in *Marbury*<sup>199</sup> against judicial intrusions into the political branches' domain<sup>200</sup> has been invoked from time to time.<sup>201</sup>

Even some state high courts that have squarely staked out an independent doctrine of political questions have simultaneously drawn heavily from Supreme Court jurisprudence. While insisting that it owed no deference to the United States Supreme Court, the Montana Supreme Court candidly acknowledged that "we look to the federal precedent for guidance in developing our own doctrine."<sup>202</sup> Similarly, though locating Colorado's political question doctrine in the state's Constitution, the Colorado Supreme Court determined that the indicia of a nonjusticiable political question "have been most clearly identified in *Baker v. Carr*."<sup>203</sup> Along these lines, courts in New Hampshire and New Jersey have identified separation of powers provisions in the states' constitutions as the source of their respective political question doctrines but then highlighted *Baker*'s formulation.<sup>204</sup> In a variation of this theme, the Arizona Supreme Court cited the state Constitution's muscular version of separation of powers as the

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(analyzing the non-justiciable standard in *Nixon*); *Colo. Med. Soc'y. v. Hickenlooper*, 353 P.3d 396, 399 (Colo. App. 2012) (referencing the lack of judicially discoverable and manageable standards for resolution discussed in *Nixon* as a bar to justiciability); *Horton v. McLaughlin*, 821 A.2d 947, 949 (N.H. 2003) (quoting *Nixon*, 506 U.S. at 252–53). For a discussion of *Nixon*, see *supra* notes 53–60 and accompanying text.

<sup>198</sup> These cases include *Vieth v. Jubelirer*, 541 U.S. 267, 276–78 (2004); *U.S. Dep't of Commerce v. Montana*, 503 U.S. 442, 456–59 (1992); *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 229–30 (1986); and *Gilligan v. Morgan*, 413 U.S. 1, 8–11 (1973). See, e.g., *Magee v. Boyd*, 175 So. 3d 79, 105 (Ala. 2015) (citing *Japan Whaling Ass'n*, 478 U.S. at 230); Forty-Seventh Legislature v. Napolitano, 143 P.3d 1023, 1026 (Ariz. 2006) (en banc) (citing *Montana*, 503 U.S. at 458); *Hickenlooper*, 353 P.3d at 399 (citing *Gilligan*, 413 U.S. at 9–10); *Fletcher*, 163 S.W.3d at 860 (citing *Vieth*, 541 U.S. at 276); *Ghane v. Mid-S. Inst. of Self Def. Shooting, Inc.*, 137 So. 3d 212, 217 (Miss. 2014) (citing *Japan Whaling Ass'n*, 478 U.S. at 230); *Neb. Coal. for Educ. Equity & Adequacy*, 731 N.W.2d at 176 n.43 (citing *Vieth*, 541 U.S. at 277); *Bacon v. Lee*, 549 S.E.2d 840, 854 (N.C. 2001) (citing *Japan Whaling Ass'n*, 478 U.S. at 230); *S.C. Pub. Interest Found. v. Judicial Merit Selection Comm'n*, 632 S.E.2d 277, 278 (S.C. 2006) (citing *Japan Whaling Ass'n*, 478 U.S. at 230).

<sup>199</sup> *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 166 (1803).

<sup>200</sup> See *supra* notes 21–23 and accompanying text.

<sup>201</sup> See, e.g., *Ghane*, 137 So. 3d at 217; *Skokos v. Corradini*, 900 P.2d 539, 541 (Utah Ct. App. 1995).

<sup>202</sup> *Columbia Falls Elementary Sch. Dist. No. 6 v. State*, 109 P.3d 257, 260 (Mont. 2005).

<sup>203</sup> *Colo. Common Cause v. Bledsoe*, 810 P.2d 201, 205 (Colo. 1991) (en banc).

<sup>204</sup> See *Baines v. N.H. Senate President*, 876 A.2d 768, 774–75 (N.H. 2005) (relying on reasoning in *Baker* in addition to its local precedent); *Loigman v. Trombadore*, 550 A.2d 154, 157–58 (N.J. Super. Ct. App. Div. 1988) (drawing upon *Baker*'s reasoning in conjunction with local precedent); see also *Miles v. Idaho Power Co.*, 778 P.2d 757, 761 (Idaho 1989) (asserting that the issue of judicial abstention from a dispute was "more correctly viewed" under the Idaho State Constitution's separation of powers provision but recognizing that "[i]n deciding such questions, we have relied upon the considerations described in *Baker v. Carr*").

basis for its political question doctrine while noting that its conception of political questions flowed from the same reasoning as the *Baker* Court's.<sup>205</sup>

Another respect in which state courts have generally followed the Supreme Court's lead is in eschewing a literal or expansive notion of "political" when determining whether an issue meets this description. *Baker* was emphatic on this point: "The doctrine of which we treat is one of 'political questions,' not one of 'political cases.' The courts cannot reject as 'no law suit' a bona fide controversy as to whether some action denominated 'political' exceeds constitutional authority."<sup>206</sup> In principle, state courts could adopt a broader view of nonjusticiability in which the sensitivity of judicial insertion into the political process could play a substantial role. In practice, however, state courts have often invoked *Baker*'s articulation of the distinction between nonjusticiable issues and the mere presence of political elements in cases when dismissing challenges to politically charged suits.<sup>207</sup> Drawing from another portion of the *Baker* opinion, the Connecticut Supreme Court affirmed that "the mere fact that [a] suit seeks protection of a political right does not mean it presents a

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<sup>205</sup> See *Kromko v. Ariz. Bd. of Regents*, 165 P.3d 168, 170–71 (Ariz. 2007) (en banc); cf. *Alexander v. Houston*, 744 S.E.2d 517, 519–20 (S.C. 2013) (quoting from both South Carolina Supreme Court precedent and *Baker* in determining whether a political question is presented); *Neeley v. W. Orange-Cove Consol. Indep. Sch. Dist.*, 176 S.W.3d 746, 779 (Tex. 2005) (assuming but declining to decide that Texas Constitution incorporates *Baker*'s test for political questions).

<sup>206</sup> *Baker v. Carr*, 369 U.S. 186, 217 (1962).

<sup>207</sup> See e.g., *Walleri v. City of Fairbanks*, 964 P.2d 463, 467–68 (Alaska 1998) (adopting *Baker*'s prioritization of constitutional commitment of an issue to another branch over the political nature of an issue); *Kaho'ohanohano v. State*, 162 P.3d 696, 729 (Haw. 2007) (adhering to the political question analysis as stated in *Baker*); *Ford v. Leithead-Todd*, 384 P.3d 905, 912–13 (Haw. Ct. App. 2016) (finding that a determination of whether an occupant of office was legally qualified to hold office did not present a political question); *Kluk v. Lang*, 531 N.E.2d 790, 797 (Ill. 1988) (delineating limitations on how the presence of political elements preclude the Court's adjudication); *House Speaker v. Governor*, 506 N.W.2d 190, 199 (Mich. 1993) (emphasizing that the mere presence of political components does not preclude judicial adjudication); *Baines*, 876 A.2d at 774–75 (examining the types of political considerations that render an issue nonjusticiable); see also *City of Derby v. Garofalo*, No. CV085004821S, 2010 WL 1565520, at \*4 (Conn. Super. Ct. Mar. 24, 2010) ("This case may be connected to the political sphere, but does not raise political questions of the kind that would place the court in conflict with the primary authority of a coordinate branch of government."); *Kaho'ohanohano*, 162 P.3d at 729 ("[A]ll constitutional interpretations have political consequences." (quoting *Board of Educ. v. Waihee*, 768 P.2d 1279, 1285 (Haw. 1989))); *Dye v. State ex rel. Hale*, 507 So. 2d 332, 339 (Miss. 1987) ("That great constitutional and legal questions may become topics of political and even partisan controversy should never be employed by this Court as an excuse to duck its responsibility to adjudicate the legal and constitutional rights of the parties."); *State v. Chvala*, 678 N.W.2d 880, 896 (Wis. Ct. App. 2004) (quoting *Baker*'s test and concluding that a determination of whether a legislator violated a prohibition on campaigning activity during working hours did not present a political question).

political question.”<sup>208</sup> Likewise, the Arizona Supreme Court, resolving a dispute between the governor and legislature, quoted the United States Supreme Court’s observation in *INS v. Chadha*<sup>209</sup> that “the presence of constitutional issues with significant political overtones does not automatically invoke the political question doctrine.”<sup>210</sup> Of course it is possible for a constitutional political question to arise out of a political issue, but such rulings do not typically appear to conflate the two.<sup>211</sup>

Echoes of the narrow scope of the federal political question concept can also be found in cases where a party invokes the doctrine outside the constitutional sphere. In these instances, state courts tend to effectively dismiss out of hand assertions of nonjusticiability. Thus, in a suit involving claims of trespass and negligence, the Iowa Supreme Court summarized precedent as establishing that “actions for damages are relatively immune to efforts to dismiss based upon the political question doctrine.”<sup>212</sup> A Missouri court further brought into focus the line between justiciable and nonjusticiable questions when ruling on claims for damages against operators of a radiopharmaceutical processing plant that had allegedly caused the plaintiffs’ injuries: “The propriety of nuclear related activities is a political question properly committed to the legislative and executive branches of our government. Nonetheless, individual tort recoveries stemming from those activities normally are not precluded by the political question doctrine.”<sup>213</sup>

As the above-quoted passage suggests, state courts occasionally deviate from the specific confines of *Baker*’s formal conception of political questions. In that instance, the Missouri court seemed to blur if not collapse the ideas

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<sup>208</sup> *Nielsen v. Kezer*, 652 A.2d 1013, 1020 n.19 (Conn. 1995) (quoting *Baker*, 369 U.S. at 209).

<sup>209</sup> 462 U.S. 919 (1983). For a discussion of this case, see *supra* notes 79–85 and accompanying text.

<sup>210</sup> *Id.* at 942–43; *Brewer v. Burns*, 213 P.3d 671, 675 (Ariz. 2009) (en banc) (quoting *Chadha*, 462 U.S. at 942–43); see also *Bysiewicz v. DiNardo*, No. HHD–CV–10–6008194S, 2010 WL 1838604, at \*13 (Conn. Super. Ct. May 5, 2010) (refusing to characterize as posing a political question a suit by candidate for Attorney General seeking confirmation of her eligibility to serve in that office), *rev’d on other grounds*, 6 A.3d 726 (Conn. 2010); *Jones v. Anne Arundel Cty.*, 69 A.3d 426, 432–33 (Md. 2013) (“The existence of politics in a case, however, does not define whether a case involves a political question.” (emphasis added) (citing *Chadha*, 462 U.S. at 942–43)).

<sup>211</sup> See, e.g., *Edgington v. City of Overland Park*, 815 P.2d 1116, 1124 (Kan. Ct. App. 1991) (dismissing on political question grounds a challenge by a nominee to a City Council vacancy following the rejection of his nomination); see also *Kanuk ex rel. Kanuk v. State*, 335 P.3d 1088, 1097–99 (Alaska 2014) (designating a minors’ claims that the state failed to fulfill its duty to take steps to employ the “best available science” to mitigate effects of climate change as nonjusticiable political question).

<sup>212</sup> *Freeman v. Grain Processing Corp.*, 848 N.W.2d 58, 93 (Iowa 2014).

<sup>213</sup> *Bennett v. Mallinckrodt, Inc.*, 698 S.W.2d 854, 864 (Mo. Ct. App. 1985) (citation omitted) (citing *McKay v. United States*, 703 F.2d 464, 470 (10th Cir. 1983)).

of wholesale abstention under the political question doctrine with deferential approval on the merits. While it has been argued that the distinction between the two lacks substance,<sup>214</sup> the formal doctrine assumes its existence.<sup>215</sup> Thus, for example, there was some tension between the Pennsylvania Supreme Court's simultaneously dismissing a suit brought under the state's education clause as presenting a political question and the court's affirming that the challenged scheme did not "*clearly, palpably, and plainly violate*" this provision.<sup>216</sup> In *North Lake Tahoe Fire Protection District v. Washoe County Board of County Commissioners*,<sup>217</sup> the Nevada Supreme Court similarly cast its affirmation of the authority of county officials to undertake a certain action in terms of the language of political questions.<sup>218</sup> Quite pointedly, a Washington court ruled that a challenge to a state statute presented a political question while pointing to both state and federal precedent endorsing the proposition that courts will defer to the legislature on the wisdom of legislation.<sup>219</sup>

These departures from orthodox doctrine, however, appear to be more the product of imprecision than conscious defiance of that doctrine. Support for this inference can be found in cases where state courts apply political question analysis to statutory rather than constitutional interpretation.<sup>220</sup> Courts in these instances do not announce an explicit break from the Supreme Court's conception of political questions; indeed, these are often cases in which courts point to *Baker* as a guidepost.<sup>221</sup>

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<sup>214</sup> See *supra* notes 98–101 and accompanying text.

<sup>215</sup> See Henkin, *supra* note 98, at 599 (“[I]n ‘pure theory’ a political question is one in which the courts forego their unique and paramount function of judicial review of constitutionality.”).

<sup>216</sup> *Marrero ex rel. Tabalas v. Commonwealth*, 739 A.2d 110, 112–13 (Pa. 1999) (internal quotation marks and citations omitted).

<sup>217</sup> 310 P.3d 583 (Nev. 2013).

<sup>218</sup> See *id.* at 588–90.

<sup>219</sup> See *Nw. Animal Rights Network v. State*, 242 P.3d 891, 895–96 (Wash. Ct. App. 2010) (noting the Washington courts will defer to the decision of the legislature regarding its legislation in order to remain consistent with the separation of powers).

<sup>220</sup> See, e.g., *Troutner v. Kempthorne*, 128 P.3d 926, 931 (Idaho 2006) (discussing an alleged violation of statutory provisions governing eligibility for judicial council); *Des Moines Register & Tribune Co. v. Dwyer*, 542 N.W.2d 491, 503 (Iowa 1996) (rejecting suit seeking compliance with state's open records law); *N.Y. State Inspection, Sec. & Law Enf't Emps. v. Cuomo*, 475 N.E.2d 90, 93–94 (N.Y. 1984) (holding that employees' suit to enjoin the scheduled closing of a correctional facility threatened the separation of powers); *People v. Ohrenstein*, 549 N.Y.S.2d 962, 981 (N.Y. App. Div. 1989) (per curiam) (dismissing the prosecution of legislative aides for violating a statutory restriction on participating in political campaigns); see also *Blackwell v. City of Philadelphia*, 660 A.2d 169, 173 (Pa. Commw. Ct. 1995) (acknowledging that the suit under review “is not based on any alleged constitutional deprivation”).

<sup>221</sup> See, e.g., *Des Moines Register*, 542 N.W.2d at 495 (listing factors, discussed in *Baker*, that show the existence of a political question); *Ohrenstein*, 549 N.Y.S.2d at 971 (stating a political question is not

Rather, they seem to reflect a casual assumption that the political question doctrine encompasses a range of issues that raise considerations of separation of powers.

#### IV. EDUCATION, SPENDING, AND THE PROBLEM OF NON-SELF-EXECUTING GUARANTEES

Notwithstanding the debt owed to federal political question jurisprudence, state courts must carve out distinct ground when addressing the justiciability of provisions that have no parallel in the United States Constitution. A salient example of this phenomenon is the guarantee of a sufficient public education found in many state constitutions. Three principal overlapping grounds exist for dismissing suits to enforce such guarantees as presenting political questions. First, the broad terms in which education clauses are typically framed<sup>222</sup> raise doubts about the capacity of courts to translate them into concrete requirements in a principled way. Second, education clauses generally are not self-executing. That is, in contrast to the usually automatic remedy for violation of negative rights such as freedom of speech<sup>223</sup>—invalidation of the offending law or action—enforcement of positive rights entails policy formulation normally associated with the legislative and executive branches. Third, redress for states' breach of their duty under an education clause inevitably involves decisions about public finance. All these features raise serious concerns about judicial overreach under the scheme of separation of powers from which the political question doctrine stems. Nevertheless, judicial responses to such suits have been far from uniformly negative. State court rulings have varied on the issue of justiciability—an example of the larger fragmentation that marks state constitutionalism.<sup>224</sup> Whether this variety signifies a healthy vindication of states as laboratories of democracy<sup>225</sup> or the conceptual incoherence that scholars allege<sup>226</sup> is an open question.

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always easily defined); *Blackwell*, 660 A.2d at 172–73 (noting *Baker's* discussion on whether a question is a political question).

<sup>222</sup> See *infra* notes 231–34 and accompanying text.

<sup>223</sup> The difference between negative and positive rights is discussed at *supra* notes 134–37 and accompanying text.

<sup>224</sup> See *supra* notes 11–13 and accompanying text.

<sup>225</sup> See *New State Ice Co. v. Liebman*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (arguing that a state should be able to experiment with new social and economic policies).

<sup>226</sup> See *supra* notes 172–76 and accompanying text.

### A. *The Problem of Standards*

Suits under state constitutions seeking judicially ordered improvements in public education were largely sparked by the Supreme Court's decision in *San Antonio Independent School District v. Rodriguez*<sup>227</sup> rejecting an equal protection challenge to disparities in funding among Texas school districts.<sup>228</sup> Plaintiffs seized upon states' provision for an adequate public education to argue that existing arrangements, especially in financing, failed to satisfy this guarantee.<sup>229</sup> The commonly applied *Baker* test, however, offers several potential grounds for defeating such claims. A court might view a constitutional legislative obligation to maintain a suitable system of education as representing a "textually demonstrable constitutional commitment of the issue to a coordinate political department."<sup>230</sup> Moreover, while the language of education clauses varies among states,<sup>231</sup> they are all couched in terms general enough to raise the question of whether they supply to courts "judicially discoverable and manageable standards"<sup>232</sup> for effectuating this right.<sup>233</sup> Nor is it difficult to

<sup>227</sup> See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 55 (1973) (holding a Texas school-financing system satisfies the Equal Protection Clause standard).

<sup>228</sup> See Christine M. O'Neill, Note, *Closing the Door on Positive Rights: State Court Use of the Political Question Doctrine to Deny Access to Educational Adequacy Claims*, 42 COLUM. J.L. & SOC. PROBS. 545, 550–52 (2009) (stating that similar strategies used in *San Antonio Independent School District* were used around the country in state education finance litigation).

<sup>229</sup> For recent overviews of this subject, see, for example, William S. Koski, *Beyond Dollars? The Promises and Pitfalls of the Next Generation of Educational Rights Litigation*, 117 COLUM. L. REV. 1897, 1901–23 (2017) (discussing the shift in educational finance reform litigation from equal protection litigation to equity litigation to adequacy litigation). See Madeline Davis, *Off the Constitutional Map: Breaking the Endless Cycle of School Finance Litigation*, 2016 BYU EDUC. & L.J. 117, 119–40 (2016) (discussing plaintiffs' success in bringing adequacy arguments in school finance litigation in New Hampshire); see also Julia A. Simon-Kerr & Robynn K. Sturm, *Justiciability and the Role of Courts in Adequacy Litigation: Preserving the Constitutional Right to Education*, 6 STAN. J. C.R. & C.L. 83, 90–120 (2010) (discussing *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973), *McDuffy v. Secretary of the Executive Office of Education*, 615 N.E.2d 516 (Mass. 1993), and *Rose v. Council for Better Education*, 790 S.W. 186 (Ky. 1989), where plaintiffs found success using adequacy arguments in school finance litigation).

<sup>230</sup> *Baker v. Carr*, 369 U.S. 186, 217 (1962).

<sup>231</sup> Gershon M. Ratner, *A New Legal Duty for Urban Public Schools: Effective Education in Basic Skills*, 63 TEX. L. REV. 777, 815–16 (1985) (categorizing four "basic groups" of state constitutional education provisions).

<sup>232</sup> *Baker*, 369 U.S. at 217.

<sup>233</sup> See Ratner, *supra* note 231, at 815–16 (after classifying four "basic groups" of state constitutional education programs, describing as "stronger and more specific" than the first two groups' provisions a third group such as the requirement that the legislature "promote public schools and to adopt all means which they may deem necessary and proper to secure . . . the advantages . . . of education" and deeming exemplary of the fourth group's "strongest commitment to education" the mandate that "[i]t is the paramount duty of the state to make ample provision for the

imagine a court's concluding that deciding whether a state's education scheme violated its education clause would inevitably entail "an initial policy determination of a kind clearly for nonjudicial discretion."<sup>234</sup>

The Nebraska Supreme Court's decision in *Nebraska Coalition for Educational Equity and Adequacy (Coalition) v. Heineman*<sup>235</sup> illustrates how a court can invoke such grounds to avoid assessing legislative compliance with an education mandate. At issue was whether the state's education funding system violated two provisions of the Nebraska Constitution: (1) "Religion, morality, and knowledge, however, being essential to good government, it shall be the duty of the Legislature to pass suitable laws . . . to encourage schools and the means of instruction."<sup>236</sup> and (2) "The Legislature shall provide for the free instruction in the common schools of this state of all persons between the ages of five and twenty-one years."<sup>237</sup> Dismissing the suit under the political question doctrine, the court first determined that since these duties were directed to the legislature, their discharge had been constitutionally committed to that branch of government.<sup>238</sup> In the court's eyes, this interpretation was bolstered by the conclusion that there existed "no qualitative, constitutional standards for public schools that this court could enforce," other than the availability of free public education to all minors.<sup>239</sup> As a corollary, the court approvingly quoted the Illinois Supreme Court:

It would be a transparent conceit to suggest that whatever standards of quality courts might develop would actually be derived from the constitution in any meaningful sense. Nor is education a subject within the judiciary's field of expertise . . . . Rather, the question of educational quality is inherently one of *policy* involving philosophical and practical considerations that call for the exercise of legislative and administrative discretion.<sup>240</sup>

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education of all children residing within its borders . . . ." (alterations in original) (internal citation and quotation marks omitted)).

<sup>234</sup> *Baker*, 369 U.S. at 217. See generally Anthony Bilan, Note, *The Runaway Wagon: How Past School Discrimination, Finance, and Adequacy Case Law Warrants a Political Question Approach to Education Reform Litigation*, 91 NOTRE DAME L. REV. 1225 (2016) (urging courts to take a political question approach to suits alleging educational inadequacy to avoid judicial intrusion into policy formulation).

<sup>235</sup> 731 N.W.2d 164 (Neb. 2007).

<sup>236</sup> *Id.* at 169 (omission in original) (quoting NEB. CONST. art. I, § 4).

<sup>237</sup> *Id.* (quoting NEB. CONST. art. VII, § 1).

<sup>238</sup> See *id.* at 178 (noting that the Nebraska Constitution delegated responsibility to determine the methods and means to provide free instruction to the Legislature).

<sup>239</sup> *Id.* at 179.

<sup>240</sup> *Id.* at 181 (omission in original) (emphasis added) (quoting *Comm. for Educ. Rights v. Edgar*, 672 N.E.2d 1178, 1191 (Ill. 1996)).

The constitutional provision to which the Illinois Supreme Court referred required the state to maintain a system of “high quality” education<sup>241</sup>—arguably a more plausible invitation to judicial scrutiny than the more generic provisions in Nebraska. Echoing *Baker*, however, the Illinois court averred that the meaning of the term and its best mode of implementation “cannot be ascertained by any judicially discoverable or manageable standards.”<sup>242</sup> Other state high courts, construing varying language in their education clauses, have likewise acted on the same impulse that the judiciary is neither assigned nor equipped to undertake the task of overseeing a state’s education system. For example, Rhode Island’s constitution charged the legislature with the “duty . . . to adopt all means which it may deem necessary and proper to secure to the people the advantages and opportunities of education and public library services.”<sup>243</sup> In basing their challenge to the state’s system for financing public education on this charge, the plaintiffs were ruled to have “asked the judicial branch to enforce policies for which there are no judicially manageable standards.”<sup>244</sup> The Oklahoma Supreme Court similarly dismissed a suit alleging inadequate funding of public schools brought to enforce the legislature’s duty to “establish and maintain a system of free public schools.”<sup>245</sup> Ruling the matter solely within the province of the legislature, the court deemed the suit to present a nonjusticiable political question.<sup>246</sup> In the same vein, the Indiana Supreme Court held that the legislature’s constitutional obligation to provide “for a general and uniform system” of public schools<sup>247</sup> left to legislative discretion the standard of education to be achieved.<sup>248</sup>

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<sup>241</sup> *Edgar*, 672 N.E.2d at 1183 (internal quotation marks).

<sup>242</sup> *Id.* at 1191.

<sup>243</sup> *City of Pawtucket v. Sundlun*, 662 A.2d 40, 49–50 (R.I. 1995) (quoting R.I. CONST. art. XII, § 1).

<sup>244</sup> *Id.* at 58.

<sup>245</sup> *Okla. Educ. Ass’n v. State ex rel. Okla. Legislature*, 158 P.3d 1058, 1064 (Okla. 2007) (quoting OKLA. CONST. art. XIII, § 1).

<sup>246</sup> *Id.* at 1065–66.

<sup>247</sup> *Bonner ex rel. Bonner v. Daniels*, 907 N.E.2d 516, 520 (Ind. 2009) (quoting IND. CONST. art. VIII, § 1).

<sup>248</sup> *Id.* at 522; *see also Cruz-Guzman v. State*, 892 N.W.2d 533, 539–40 (Minn. Ct. App. 2017) (rejecting claim of inadequate education under constitutional provision similar to Indiana’s on the grounds that a determination of quality was committed to the legislature, a determination of the applicable standard would entail a policy determination inappropriate for the judiciary, and the court lacked discoverable and manageable standards for resolving claims). For criticism of reliance on the political question doctrine to dismiss suits brought under state constitutional provisions, *see Helen Hershkoff & Stephen Loffredo, State Courts and Constitutional Socio-Economic Rights: Exploring the Underutilization Thesis*, 115 PENN ST. L. REV. 923, 958–60 (2011).

Nevertheless, most state courts confronted with claims under education clauses<sup>249</sup> have not been daunted by the challenge of fashioning standards.<sup>250</sup> For example, a number of high courts have found the concept of efficiency in education ascertainable enough to furnish a judicially enforceable touchstone. Notably, the Texas Supreme Court in a suit over school financing weighed the justiciability of a legislative obligation to make “suitable provision” for an “efficient” system of public schools to ensure “[a] general diffusion of knowledge.”<sup>251</sup> The court rejected the contention that these terms were so imprecise as to make them unsusceptible to judicial interpretation.<sup>252</sup> For the Ohio Supreme Court, the provision at issue directed the legislature to maintain a “thorough and efficient” public school system.<sup>253</sup> That court refused to “dodge our responsibility” by deeming the case to present a political question.<sup>254</sup> Facing an almost identically worded provision, the Pennsylvania Supreme Court rebutted at length the proposition that it was incapable of construing this constitutional mandate in a principled manner.<sup>255</sup> In other instances,

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<sup>249</sup> This analysis does not address cases in which courts have found challenges to educational funding schemes justiciable under other state constitutional provisions. *See, e.g.*, *Seymour v. Region One Bd. of Educ.*, 803 A.2d 318, 325 (Conn. 2002) (finding justiciable standards for determining equal protection and due process challenges to requirement that taxpayers contribute educational funding); *Bd. of Educ. v. Waihee*, 768 P.2d 1279, 1285 (Haw. 1989) (finding justiciable standards for determining whether state officials’ decisions on the state education budget alleged separation of powers violation).

<sup>250</sup> Pursuant to the scope of this Article, the discussion below does not include state court decisions prior to 1985 that rule on the merits of various state constitutional claims involving education. *See, e.g.*, *Serrano v. Priest*, 557 P.2d 929, 947–48 (Cal. 1976) (en banc) (ruling on state equal protection claim); *McDaniel v. Thomas*, 285 S.E.2d 156, 163–66 (Ga. 1981) (addressing claims brought under guarantees of equal protection and “adequate education”); *Thompson v. Engelking*, 537 P.2d 635, 652 (Idaho 1975) (involving suit based on guarantee of equal protection and requirement of “uniform system of public schools”); *Hornbeck v. Somerset Cty. Bd. of Educ.*, 458 A.2d 758, 770 (Md. 1983) (interpreting guarantees of equal protection and of “thorough and efficient system of free public schools” (internal quotation marks omitted)); *Seattle Sch. Dist. No. 1 v. State*, 585 P.2d 71, 90–93 (Wash. 1978) (en banc) (deciding scope of state duty to “make ample provision for the education of all resident children”); *Pauley v. Kelly*, 255 S.E.2d 859, 878 (W. Va. 1979) (construing guarantees of equal protection and of “thorough and efficient system of free schools” (internal quotation marks omitted)).

<sup>251</sup> *Neeley v. W. Orange-Cove Consol. Indep. Sch. Dist.*, 176 S.W.3d 746, 752 (Tex. 2005) (quoting TEX. CONST. art. VII, § 1).

<sup>252</sup> *Id.* at 776 (citing *Kirby v. Edgewood Indep. Sch. Dist.*, 761 S.W.2d 859, 867 (Tex. App. 1989), *rev’d*, 777 S.W.2d 391 (Tex. 1989)).

<sup>253</sup> *DeRolph v. State*, 677 N.E.2d 733, 736 (Ohio 1997) (quoting OHIO CONST. art. VI, § 2).

<sup>254</sup> *Id.* at 737; *see id.* at 741 (“This court has construed the words ‘thorough and efficient’ in light of the constitutional debates and history surrounding them.”).

<sup>255</sup> *See William Penn Sch. Dist. v. Pa. Dep’t of Educ.*, 170 A.3d 414, 457 (Pa. 2017) (stating a court is capable of giving meaning and force to a constitutional mandate to provide a specific quality of education without intruding into legislative duties).

courts have simply resolved whether a state's education funding scheme supplied a "thorough and efficient" school system without first examining their power to do so.<sup>256</sup>

Comparably sweeping if not amorphous mandates of educational quality have also been ruled justiciable. The Montana Supreme Court was not deterred by the task of gauging whether the legislature had met its obligation to provide a "basic system of free *quality* public . . . schools."<sup>257</sup> While conceding the legislature's prerogative to define "quality" in the first instance, the court reserved the power to determine that the state's funding system fell short of the constitutional requirement.<sup>258</sup> A Kansas claim relied on provisions directing the legislature to "provide for intellectual, educational, vocational and scientific improvement" through public schools and to "make suitable provision for finance of the educational interests of the state."<sup>259</sup> Though containing considerable verbiage, these directives do not afford the judiciary obvious means for determining whether the legislature has complied with its duties. Nevertheless, the Kansas Supreme Court, examining several *Baker* factors, found each inapplicable to the case.<sup>260</sup> State supreme courts have also brushed aside justiciability challenges to claims based on duties to provide "'a thorough and uniform' system" of public schools;<sup>261</sup> to assure that all public school students receive "equal opportunities;"<sup>262</sup> to maintain "a competent number of schools" or make "other provisions for the convenient instruction of youth;"<sup>263</sup> to provide for "the maintenance, support and eligibility standards" of a free public school system in light of the state's recognition of "the inherent value of education;"<sup>264</sup> and to establish free public schools to "secure . . . the advantages and opportunities of education."<sup>265</sup> Other state supreme courts

<sup>256</sup> See, e.g., *Skeen v. State*, 505 N.W.2d 299, 315 (Minn. 1993); *Abbott ex rel. Abbott v. Burke*, 575 A.2d 359, 412 (N.J. 1990).

<sup>257</sup> *Colum. Falls Elementary Sch. Dist. No. 6 v. State*, 109 P.3d 257, 260 (Mont. 2005) (emphasis added) (quoting MONT. CONST. art. X, § 1).

<sup>258</sup> *Id.* at 260, 262.

<sup>259</sup> *Gannon v. State*, 319 P.3d 1196, 1219 (Kan. 2014) (quoting KAN. CONST. art. VI, §§ 1–2).

<sup>260</sup> *Id.* at 1219–29.

<sup>261</sup> *Lobato v. State*, 218 P.3d 358, 372 (Colo. 2009) (en banc).

<sup>262</sup> *Leandro v. State*, 488 S.E.2d 249, 254 (N.C. 1997) (quoting N.C. CONST. art. IX, § 2(1)).

<sup>263</sup> *Brigham v. State*, 889 A.2d 715, 717 n.2 (Vt. 2005) (quoting VT. CONST. ch. II, § 68); see also *Haridopolos v. Citizens for Strong Schs., Inc.*, 81 So. 3d 465, 472 (Fla. Dist. Ct. App. 2011) (asserting judicial enforceability of duty to provide a "uniform, efficient, safe, secure, and high quality system of free public schools that allows students to obtain a high quality education" (quoting *Sch. Bd. of Miami-Dade Cty. v. King*, 940 So. 2d 593, 602 (Fla. Dist. Ct. App. 2006))).

<sup>264</sup> *Tenn. Small Sch. Sys. v. McWherter*, 851 S.W.2d 139, 150 (Tenn. 1993) (quoting TENN. CONST. art XI, § 12).

<sup>265</sup> *Davis v. State*, 804 N.W.2d 618, 623 (S.D. 2011) (quoting S.D. CONST. art. VIII, § 1).

have tacitly assumed justiciability by ruling on education clause claims like these.<sup>266</sup>

For some courts, the bare requirement of a public school system has sufficed to imply standards for judging legislative compliance. Thus, the Connecticut Supreme Court was prepared to infer substantive content from the constitutional command that the legislature implement “by appropriate legislation” the principle that “[t]here shall always be free public elementary and secondary schools.”<sup>267</sup> The court rebutted at length the applicability of each of *Baker’s* factors.<sup>268</sup> Indeed, the court specifically emphasized that that “[t]here are *easily* discoverable and manageable judicial standards for determining the merits of the plaintiffs’ claim[s].”<sup>269</sup> Four years later, the South Carolina Supreme Court was similarly dismissive of a justiciability challenge to a suit brought to enforce the constitution’s edict that the legislature “provide for the maintenance and support of a system of free public schools”: “Courts may experience difficulty in determining the precise parameters of constitutionally acceptable behavior; however, this imprecision does not necessarily signify that courts cannot determine when a party’s actions . . . fall outside the boundaries of such constitutional parameters.”<sup>270</sup> In Arizona and Minnesota, courts measured state education finance schemes against the constitutional prescription of a “general and uniform” public school system without wrestling with the issue of jurisdiction.<sup>271</sup>

### B. *The Problem of Self-Execution*

The question of standards to enforce education clauses implicates an issue closely related to the political question doctrine: judicial treatment of

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<sup>266</sup> See, e.g., *Comm. for Educ. Equal. v. State*, 294 S.W.3d 477, 505 (Mo. 2009) (en banc) (“A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the general assembly shall establish and maintain free public schools . . .” (quoting MO. CONST. art. XI, § 1(a)); *Kukor v. Grover*, 436 N.W.2d 568, 589 (Wis. 1989) (“The legislature shall provide by law for the establishment of district schools, which shall be as nearly uniform as practicable . . .” (quoting WIS. CONST. art. X, § 3)).

<sup>267</sup> *Conn. Coal. for Justice in Educ. Funding, Inc. v. Rell*, 990 A.2d 206, 211 (Conn. 2010) (quoting CONN. CONST. art. VIII, § 1).

<sup>268</sup> *Id.* at 217.

<sup>269</sup> *Id.* at 223 (alteration in original) (emphasis added) (quoting *Seymour v. Region One Bd. of Educ.*, 803 A.2d 318, 325 (Conn. 2002)).

<sup>270</sup> *Abbeville Cty. Sch. Dist. v. State*, 767 S.E.2d 157, 160, 163 (S.C. 2014) (quoting S.C. CONST. art. XI, § 3) (assuming the requirement of “minimally adequate education”).

<sup>271</sup> See *Roosevelt Elementary Sch. Dist. No. 66 v. Bishop*, 877 P.2d 806, 808 (Ariz. 1994) (en banc) (quoting ARIZ. CONST. art. XI, § 1); *Skeen v. State*, 505 N.W.2d 299, 308 (Minn. 1993).

non-self-executing clauses.<sup>272</sup> The distinction between self-executing and non-self-executing constitutional provisions is articulated in Thomas Cooley's classic treatise. A provision is self-executing if it "supplies a sufficient rule by means of which the right given may be enjoyed and protected, or the duty imposed may be enforced," whereas it is not self-executing if it "merely indicates principles, without laying down rules by means of which those principles may be given the force of law."<sup>273</sup> Thus, a court's perception that a provision conferring an affirmative right is non-self-executing will often prompt the court to reject a suit seeking to enforce this right.<sup>274</sup> This abstention may operate as the equivalent of nonjusticiability; a conspicuous example is a guarantee of a clean or healthy environment.<sup>275</sup>

Conversely, the willingness of many state courts to view their education clauses as justiciable suggests an inclination to consider them self-executing as well. The link between the two was reflected by the Texas Supreme Court's decision in *Neeley v. West Orange-Cove Consolidated Independent School District*.<sup>276</sup> There, the court emphatically rejected the notion that it was incapable of determining whether the legislature had made "'suitable' provision for an 'efficient' system" of public schools.<sup>277</sup> Finding the question justiciable, the court declared the legislature's duty "not committed unconditionally to the legislature's discretion, but instead is accompanied by standards."<sup>278</sup> In subsequent discussion, the court separately addressed the issue of whether the state's education clause was non-self-executing and therefore unable to support the court's jurisdiction.<sup>279</sup> Unsurprisingly if not inevitably, the court concluded that the provision was "self-executing insofar as it prohibits any system that fails

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<sup>272</sup> See José L. Fernandez, *State Constitutions, Environmental Rights Provisions, and the Doctrine of Self-Execution: A Political Question?*, 17 HARV. ENVTL. L. REV. 333, 382–84 (1993).

<sup>273</sup> THOMAS M. COOLEY, 1 A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 167–68 (Walter Carrington ed., 8th ed. 1927).

<sup>274</sup> See, e.g., *Nielsen v. State*, No. CV93 0529695S, 1994 WL 684743, at \*7 (Conn. Super. Ct. Nov. 18, 1994) ("If a provision is nonself-executing then the question becomes, should the matter be decided by a non-elected member of the judiciary or should the issue be referred to the legislature whose members can be removed from office by the ballot box if the people determine their will is being thwarted."); *id.* (dismissing as nonjusticiable suit to compel legislative action to comply with alleged constitutional mandate).

<sup>275</sup> See Fernandez, *supra* note 272, at 343–45. See generally Oliver A. Pollard, III, *A Promise Unfulfilled: Environmental Provisions in State Constitutions and the Self-Execution Question*, 5 VA. J. NAT. RESOURCES L. 351 (1986).

<sup>276</sup> 176 S.W.3d 746 (Tex. 2005).

<sup>277</sup> See *id.* at 776.

<sup>278</sup> *Id.* (quoting *Edgewood Indep. Sch. Dist. v. Kirby*, 777 S.W.2d 391, 394 (Tex. 1989)).

<sup>279</sup> See *id.* at 781–83.

to meet [the provision's] standards.”<sup>280</sup>

The significance of such threshold victories for plaintiffs, however, should not be overstated; even if an education clause is self-executing as well as justiciable, ultimate success is hardly assured. On the contrary, of course, plaintiffs who establish justiciability may well be thwarted on the merits. The aftermath of *Neeley* provides a telling example. In the culmination of a suit that originated in the early 1970s,<sup>281</sup> the Texas Supreme Court affirmed its authority to assess the constitutionality of the state's education system<sup>282</sup> while upholding that system against a variety of attacks. The Connecticut Supreme Court similarly rejected a state constitutional challenge to the state's public school system eight years after affirming the suit's justiciability.<sup>283</sup> Moreover, even plaintiffs who formally prevail may find their victory to be at best provisional. In *Rose v. Council for Better Education, Inc.*,<sup>284</sup> for example, the Kentucky Supreme Court promulgated criteria for the “efficient” system of public schools required by the state's constitution<sup>285</sup> and declared that the legislature had not met them.<sup>286</sup> Rather than order a specific remedy, however, the court announced that it would be the responsibility of the legislature—“using its own judgment and exercising its own power and constitutional duty”—to establish an efficient system.<sup>287</sup> The North Carolina Supreme Court similarly stated its duty to address an education clause claim<sup>288</sup> then remanded the case with instructions to grant “every reasonable deference” to the state's coordinate branches when weighing whether they had fulfilled their obligation to provide children with a sound education.<sup>289</sup> Even when the court found violations of this obligation in a later case,<sup>290</sup> it overturned the trial court's remedial orders and remanded the suit “ultimately into the

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<sup>280</sup> *Id.* at 783; *see also* Colum. Falls Elementary Sch. Dist. No. 6 v. State, 109 P.3d 257, 260, 260–63 (Mont. 2005) (holding that while the state constitution's requirement of “quality” public education was non-self-executing and therefore nonjusticiable in the first instance, the absence of a legislative definition of “quality” authorized the court to rule that the funding system for schools violated the clause).

<sup>281</sup> *See* Edgewood Indep. Sch. Dist. v. Meno, 917 S.W.2d 717, 752 n.6 (Tex. 1995) (Enoch, J., concurring in part and dissenting in part).

<sup>282</sup> *See* Morath v. Tex. Taxpayer & Student Fairness Coal., 490 S.W.3d 826, 846–47 (Tex. 2016).

<sup>283</sup> Conn. Coal. for Justice in Educ. Funding, Inc. v. Rell, 176 A.3d 28, 49 (Conn. 2018).

<sup>284</sup> 790 S.W.2d 186 (Ky. 1989).

<sup>285</sup> *Id.* at 212–13.

<sup>286</sup> *Id.* at 189.

<sup>287</sup> *Id.* at 203–04.

<sup>288</sup> Leandro v. State, 488 S.E.2d 249, 253–54 (N.C. 1997).

<sup>289</sup> *Id.* at 261.

<sup>290</sup> Hoke Cty. Bd. of Educ. v. State, 599 S.E.2d 365, 390–91 (N.C. 2004).

hands of the legislative and executive branches.”<sup>291</sup> It seems conceivable that these courts and others, while asserting the prerogative to review education systems for compliance with their state’s education clause, harbor doubts about their capacity to actually enforce it.<sup>292</sup>

To the extent that such hesitation exists, it may be driven largely by concerns over courts’ ability to upset legislatures’ budgetary decisions. Remedies for a violation of constitutional standards of quality, for example, could include major expenditures necessitating an increase in taxes, cutbacks in funding for other programs, or both. The manner in which spending on education is allocated may also be thought to lie beyond judicial prerogative or competence.<sup>293</sup> Perhaps the Nebraska Supreme Court had such considerations partly in mind when it “refuse[d] to wade into that Stygian swamp” of “continuous litigation and challenges to . . . school funding systems.”<sup>294</sup> Moreover, judicial reluctance to overturn spending decisions about education exemplifies a broader desire to plunge into issues with implications for fiscal policy. For example, state courts have dismissed as presenting political questions suits alleging the inadequacy of funds appropriated for a presidential preference primary<sup>295</sup> and for services required under the state’s mental health and intellectual disability law.<sup>296</sup> Even a superficially precise mandate like a constitutional limit on state spending may confront a court with the impossible task of defining terms like “[g]eneral budget expenditure,” “increase in inflation,” and “increase in personal income.”<sup>297</sup> While state courts do not categorically shy away from ruling on the propriety of public expenditures,

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<sup>291</sup> *Id.* at 397.

<sup>292</sup> A notable exception has been the New Jersey Supreme Court’s approach to the state constitution’s requirement of a “thorough and efficient” public school system. N.J. CONST. art. VIII, § 4, cl. 1; *see, e.g.*, *Abbott ex rel. Abbott v. Burke*, 790 A.2d 842, 854 (N.J. 2002) [hereinafter *Abbott VIII*]; *Abbott ex rel. Abbott v. Burke*, 693 A.2d 417, 425 (N.J. 1997) [hereinafter *Abbott IV*]; *see also* Joy Chia & Sarah A. Seo, *Battle of the Branches: The Separation of Powers Doctrine in State Education Funding Suits*, 41 COLUM. J.L. & SOC. PROBS. 125, 142–43 (2007) (reviewing series of rulings by New Jersey Supreme Court ordering changes in state’s public school system).

<sup>293</sup> *See* Rodriguez, *supra* note 185, at 589.

<sup>294</sup> *Neb. Coal. for Educ. Equity & Adequacy (Coal.) v. Heineman*, 731 N.W.2d 164, 183 (Neb. 2007).

<sup>295</sup> *See* *Beaufort Cty. v. S.C. State Election Comm’n*, 718 S.E.2d 432, 438 (S.C. 2011).

<sup>296</sup> *See* *Mental Health Ass’n v. Corbett*, 54 A.3d 100, 105–06 (Pa. Commw. Ct. 2012).

<sup>297</sup> *Nielsen v. State*, No. CV93 0529695S, 1994 WL 684743, at \*7 (Conn. Super. Ct. Nov. 18, 1994) (internal quotation marks omitted); *see also* *Roger Sherman Liberty Ctr., Inc. v. Williams*, 28 A.3d 1026, 1035–36 (Conn. Super. Ct. 2011) (deeming “general budget expenditures” in constitutional balanced budget provision to present political question). For an argument that a proposed balanced budget amendment to the United States Constitution would be judicially unenforceable, *see* Gay Aynesworth Crosthwait, *Article III Problems in Enforcing the Balanced Budget Amendment*, 83 COLUM. L. REV. 1065, 1105–07 (1983).

intervention is more likely to occur where the issue involves questions and language amenable to traditional judicial interpretation.<sup>298</sup>

## V. DEFERENCE TO INTERNAL GOVERNANCE OF COORDINATE BRANCHES

In *Powell v. McCormack*,<sup>299</sup> the United States Supreme Court rejected a challenge by the House of Representatives to the Court's authority to review the House's refusal to seat Adam Clayton Powell.<sup>300</sup> In contrast, state courts have broadly refrained from assessing the inner workings of coordinate political branches. This restraint has been especially evident in courts' ruling as nonjusticiable actions to invalidate legislative proceedings and to overturn elections.

As might be expected, state courts have been profoundly wary of striking down laws on grounds of the allegedly unconstitutional process by which they were adopted.<sup>301</sup> Thus, Maryland's high court refused to entertain a claim that a statute was invalid because Senate passage occurred during a session not sanctioned by the state's constitution.<sup>302</sup> Such judicial intrusion into a legislative "internal procedural issue" would represent a "fail[ure] to respect a coordinate branch of government" and therefore rendered the claim nonjusticiable.<sup>303</sup> The Alabama Supreme Court followed similar reasoning in dismissing a challenge to a law charging that it had not received the requisite votes for passage. Because the legislature was entitled to rely upon "its own rules and procedures," the validity of a statute enacted in this fashion was ruled a nonjusticiable political

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<sup>298</sup> See, e.g., *Brewer v. Burns*, 213 P.3d 671, 675–76 (Ariz. 2009) (en banc) (rejecting justiciability challenge to the governor's petition for an order directing the legislature to immediately present final budget bills to the governor pursuant to a process prescribed by state constitution); *Schabarum v. Cal. Legislature*, 70 Cal. Rptr. 2d 745, 748 (Cal. Ct. App. 1998) (ruling on the question of whether certain funds must be included in the legislative budget in an action alleging violation of a state constitutional spending cap); *Nelson v. Hawaiian Homes Comm'n*, 277 P.3d 279, 287 (Haw. 2012) (permitting a suit alleging unconstitutionally insufficient spending on administrative and operating expenses for the state home lands department where the state constitutional convention set forth specific standards); see also *Busse v. City of Golden*, 73 P.3d 660, 665–67 (Colo. 2003) (en banc) (asserting judicial authority to resolve a claim that the city's expenditures of bond proceeds were contrary to the purpose approved by voters).

<sup>299</sup> 395 U.S. 486 (1969).

<sup>300</sup> See generally *id.* For a further discussion of *Powell*, see *supra* notes 69–72 and accompanying text.

<sup>301</sup> This philosophy represents a continuity with the period before 1985 earlier surveyed. See Stern, *supra* note 9, at 102.

<sup>302</sup> *Smigiel v. Franchot*, 978 A.2d 687, 694–95, 701 (Md. 2009) (involving an Extraordinary Session held without constitutionally required approval by House).

<sup>303</sup> *Id.* at 701.

question.<sup>304</sup> This philosophy and outcome were echoed by the Vermont Supreme Court in a suit to overturn a law whose passage involved approval by legislators allegedly ineligible to vote on the bill.<sup>305</sup> In New Hampshire, an attempt to challenge the constitutional validity of the method employed to enact a statute likewise foundered on the political question doctrine. The claim was nonjusticiable, ruled the New Hampshire Supreme Court, because “[t]he authority to adopt procedural rules for passing legislation is demonstrably committed to the legislative branch.”<sup>306</sup>

Nor are state courts inclined to review alleged legislative procedural irregularities even before they culminate in formal laws which courts are loath to upset. For example, the Washington Supreme Court dismissed an action to compel the lieutenant governor, in his capacity as president of the Senate, to forward a Senate bill to the House of Representatives.<sup>307</sup> The suit challenged the lieutenant governor’s parliamentary ruling that the bill’s passage required approval by two-thirds of the Senate rather than the simple majority it received.<sup>308</sup> Declaring the dispute to present a political question, the court announced that it would “*not interfere in the internal proceedings of a legislative house to overturn a ruling on a point of order.*”<sup>309</sup> Applying this philosophy, the Mississippi Supreme Court recently refused to grant an

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<sup>304</sup> Jefferson Cty. Comm’n v. Edwards, 32 So. 3d 572, 584 (Ala. 2009) (involving a dispute over the proper calculation of a two-thirds vote required for the enactment of a bill in a special session); see also Birmingham-Jefferson Civic Ctr. Auth. v. City of Birmingham, 912 So. 2d 204, 221 (Ala. 2005) (ruling that the question of whether statutes were unconstitutional because they were enacted without a constitutionally required majority was nonjusticiable).

<sup>305</sup> See Brady v. Dean, 790 A.2d 428, 431 (Vt. 2001) (denying to resolve a suit concerning plaintiffs seeking disqualification of House members who allegedly participated in a betting pool over prospects of an earlier vote on a bill).

<sup>306</sup> Sumner v. N.H. Sec’y of State, 136 A.3d 101, 106 (N.H. 2016) (quoting Baines v. N.H. Senate President, 876 A.2d 768, 776 (N.H. 2005)); see also Starr v. Governor, 910 A.2d 1247, 1249–52 (N.H. 2006) (rejecting as nonjusticiable a challenge to law based on the legislature’s alleged procedural impropriety on the ground that “the legislature, alone, has complete control and discretion whether it shall observe, enforce, waive, suspend, or disregard its own rules of procedure”); Baines, 876 A.2d at 775–77 (holding nonjusticiable a claim that law was enacted in violation of statutory procedures for passing legislation because the state constitution “grants the legislature the authority to establish such procedures”); Harrisburg Sch. Dist. v. Hickok, 762 A.2d 398, 412–17 (Pa. Commw. Ct. 2000) (applying Baker factors for determining a political question in declining to review a claim that the legislature employed a constitutionally forbidden process in enacting law); Dintzis v. Hayden, 606 A.2d 660, 662 (Pa. Commw. Ct. 1992) (deeming nonjusticiable a claim that a representative violated House rules through means of recording a vote supporting challenged law); Mayhew v. Wilder, 46 S.W.3d 760, 773–74 (Tenn. Ct. App. 2001) (refusing to void bills that were allegedly products of prohibited, secret legislative meetings on the ground, *inter alia*, that the question of when to close sessions was “a purely political question”).

<sup>307</sup> See generally Brown v. Owen, 206 P.3d 310 (Wash. 2009) (en banc).

<sup>308</sup> See *id.* at 314–16.

<sup>309</sup> *Id.* at 317–18.

injunction to bar the Speaker of the House of Representatives from using a high-speed electronic reading device for legislative bills in alleged violation of the constitutional requirement that “every bill shall be read in full immediately before the vote on its final passage upon the demand of any member.”<sup>310</sup> According to the plaintiff, this method rendered the bills incomprehensible and thus violated the constitutional requirement that “every bill shall be read in full immediately before the vote on its final passage” upon a member’s demand.<sup>311</sup> For the court, the requested order was barred by the political question doctrine because it sought to “involve the judiciary in legislative procedural matters.”<sup>312</sup> The Kentucky Supreme Court similarly rebuffed a suit charging Senate violation of a constitutional provision allowing “any member” to call up a bill that a committee “refuses or fails to report . . . in a reasonable time.”<sup>313</sup> Under Senate rules, effectuation of this procedure required that a majority of senators agree that the bill had been held an unreasonable time.<sup>314</sup> Despite the surface clash between the constitutional prerogative conferred on “any member” and the Senate rule’s far higher threshold, the court deferred to the Senate’s disposition of the question. Just as the United States Supreme Court had deemed a political question what constitutes a reasonable time for ratification of a proposed constitutional amendment, so the Kentucky Senate had plenary discretion to determine what qualifies as a “reasonable time” for a committee to submit proposed legislation.<sup>315</sup> Other courts, too, have dismissed as nonjusticiable suits inviting them to intervene in the way the legislature conducts business.<sup>316</sup>

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<sup>310</sup> *Gunn v. Hughes*, 210 So. 3d 969, 970 (Miss. 2017) (quoting MISS. CONST. art. IV, § 59).

<sup>311</sup> *Id.*

<sup>312</sup> *Id.* at 973–74.

<sup>313</sup> *Philpot v. Haviland*, 880 S.W.2d 550, 552 (Ky. 1994) (quoting KY. CONST. § 46).

<sup>314</sup> *Id.*

<sup>315</sup> *See id.* at 553–54 (citing *Coleman v. Miller*, 307 U.S. 433, 453–54 (1939)). For a discussion of *Coleman*, see *supra* notes 37–42 and accompanying text.

<sup>316</sup> *See, e.g., Progress Mo., Inc. v. Mo. Senate*, 494 S.W.3d 1, 5–6 (Mo. Ct. App. 2016) (dismissing a claim that the Missouri Senate’s restriction on recording committee meetings violated state sunshine law); *Hughes v. Speaker of N.H. House of Representatives*, 876 A.2d 736, 744 (N.H. 2005) (“Statutes relating to the internal proceedings of the legislature ‘are not binding upon the Houses. . . . Either branch . . . is free to disregard or supersede such statutes by unicameral action.’” (first omission in original) (internal citation omitted)); *In re Judicial Conduct Comm.*, 751 A.2d 514, 516–17 (N.H. 2000) (per curiam) (designating as a political question an issue concerning the manner in which witnesses are deposed in a legislative committee’s investigation into possible impeachment of a judge); *Blackwell v. City of Philadelphia*, 684 A.2d 1068, 1071 (Pa. 1996) (“Under the political question doctrine, courts generally refuse to scrutinize a legislature’s choice of, or compliance with, internal rules and procedures.”); *S.C. Pub. Interest Found. v. Judicial Merit Selection Comm’n*, 632 S.E.2d 277, 279–80 (S.C. 2006) (dismissing as a

Admittedly, state courts have occasionally reviewed the propriety of legislatures' procedures, but these rulings reflect no fundamental impulse to encroach on legislative prerogatives of self-governance. In a Pennsylvania case, several citizen groups were allowed to press their claim that certain transportation laws were enacted through means that violated provisions of the state's constitution.<sup>317</sup> However, the opinion could hardly be described as a judicial invasion of legislative procedures. First, the constitutional provisions at issue appeared to lend themselves to straightforward interpretation rather than second-guessing legislative judgment.<sup>318</sup> Moreover, the court took pains to affirm that the legislature "has exclusive power over its internal affairs and proceedings."<sup>319</sup> Finally, while analyzing the petitioners' claims under eight separate provisions of the constitution, the court ultimately dismissed each of them for failure to state a claim upon which relief may be granted.<sup>320</sup> In Michigan, a court found justiciable the issue of whether a legislative committee's prohibition on videotaping its meeting violated state law and even adjudged the ban a violation.<sup>321</sup> Nevertheless, the result represented an exceedingly modest victory for judicial supervision of legislative proceedings. The court ruled the committee's chair immune from liability,<sup>322</sup> refused to grant the plaintiffs the injunction they sought barring future violations,<sup>323</sup> and emphasized that the plaintiffs "did not seek to enforce or interpret any legislatively

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political question the issue of whether a legislatively established body followed the proper process in determining that a candidate for judicial office was qualified); *see also* *Hussey v. Say*, 384 P.3d 1282, 1288–89 (Haw. 2016) (deeming nonjusticiable a suit alleging that legislator did not meet state constitutional residency requirement).

<sup>317</sup> *See generally* *Common Cause/Pa. v. Commonwealth*, 710 A.2d 108 (Pa. Commw. Ct. 1998), *aff'd*, 757 A.2d 367 (Pa. 2000).

<sup>318</sup> *Id.* at 113 n.7 ("No amendment to bills by one House shall be concurred in by the other, except by the vote of a majority of the members elected thereto, taken by yeas and nays, and the names of those voting for and against recorded upon the journal thereof, and reports of committees of conference shall be adopted in either House only by the vote of a majority of the members elected thereto, taken by yeas and nays, and the names of those voting recorded upon the journals." (quoting PA. CONST. art. III, § 5)).

<sup>319</sup> *Id.* at 118.

<sup>320</sup> *Id.* at 119–23; *see also* *Magee v. Boyd*, 175 So. 3d 79, 104–15 (Ala. 2015) (asserting the justiciability of a claim that the procedure by which a bill was enacted as law violated the state constitution but concluding that the procedure was valid); *Pa. AFL-CIO v. Commonwealth*, 691 A.2d 1023, 1033 (Pa. Commw. Ct. 1997) (allowing a claim that a legislative process used to enact a bill did not conform to constitutional requirements but holding that the process did not amount to a violation), *aff'd on other grounds*, 757 A.2d 917 (Pa. 2000).

<sup>321</sup> *Wilkins v. Gagliardi*, 556 N.W.2d 171, 176 (Mich. Ct. App. 1996).

<sup>322</sup> *Id.* at 176–79.

<sup>323</sup> *Id.* at 180.

determined rules of the House.”<sup>324</sup>

Other cases of judicial review of internal legislative rules have involved special circumstances that did not detract from courts’ general unwillingness to enter that thicket. In one, the defendant legislator unsuccessfully invoked the political question doctrine as a shield against his prosecution for violating a legislative rule that distinguished between legislative and political activity.<sup>325</sup> Whatever the potential for ambiguity in other contexts, the court found the rule’s unambiguous application to the legislator’s alleged conduct a sufficient basis for prosecution.<sup>326</sup> Additionally, a New York case implicated the familiar principle of heightened judicial willingness to intervene where the challenged conduct appears to undermine the political process itself.<sup>327</sup> There, members of the minority party in the legislature challenged internal rules that allocated funds in a manner that favored political interests of the majority party.<sup>328</sup> While acknowledging the judiciary’s “reluctan[ce] to intervene in intra-branch disputes,” the court rejected the defendants’ political question defense because the challenged practices allegedly impaired the plaintiffs’ ability to adequately represent their constituents.<sup>329</sup>

Moreover, state courts’ responses to suits to overturn executive processes—though such actions are apparently fewer—display the same

<sup>324</sup> *Id.* at 176.

<sup>325</sup> See *State v. Chvala*, 678 N.W.2d 880 (Wis. Ct. App. 2004); accord *State v. Jensen*, 681 N.W.2d 230, 253 (Wis. Ct. App. 2004); see also *People v. Norman*, 789 N.Y.S.2d 613, 622–23 (N.Y. Sup. Ct. 2004) (upholding prosecution of a state legislator for allegedly filing false travel expenses and rejecting defense that a determination of propriety of obtaining payments at issue was a political question); *Hamilton v. Hennessey*, 783 A.2d 852, 856, 859–60 (Pa. Commw. Ct. 2001) (finding justiciable an action against an incumbent legislative candidate for failure to report as campaign expenses the cost of alleged “political advertisements” as required by statute (internal quotation marks omitted)).

<sup>326</sup> See generally *Chvala*, 678 N.W.2d 880.

<sup>327</sup> See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) (“[L]egislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation [may] be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation.”); JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 105 (1980) (calling on courts to interpret a constitutional principle that requires “[c]learing the [c]hannels of [p]olitical [c]hange”); David A. Strauss, *Is Carolene Products Obsolete?*, 2010 U. ILL. L. REV. 1251, 1268 (“The *Carolene Products* footnote . . . [directs that] the political process must stay open, and it is the courts’ job to keep it open.”).

<sup>328</sup> See *Urban Justice Ctr. v. Pataki*, 810 N.Y.S.2d 826, 830 (N.Y. Sup. Ct. 2005), *aff’d*, 828 N.Y.S.2d 12 (N.Y. App. Div. 2006).

<sup>329</sup> *Id.* at 836; cf. *Chavez v. Brewer*, 214 P.3d 397, 404–05 (Ariz. Ct. App. 2009) (ruling justiciable an action alleging that the Secretary of State’s certification of certain voting machines violated Arizona’s Constitution and statutes).

underlying restraint seen in the legislative setting. Thus, the Mississippi Supreme Court refused to overturn a pardon issued by the governor for failure to comply with a constitutional publication requirement.<sup>330</sup> Despite apparently acknowledging the violation,<sup>331</sup> the court based its decision on the principle that “compliance with constitutional provisions that are procedural in nature and committed solely to another branch of government is not justiciable.”<sup>332</sup> This philosophy has been perhaps most notable where the executive conduct in question impinged on the judiciary itself. In one instance, the Tennessee Supreme Court dismissed an equal protection claim against the governor for alleged racial discrimination in his selection of nominees to that court.<sup>333</sup> Such interference with judicial appointments, the court held, would violate the first two prongs of the *Baker* test.<sup>334</sup> It is true that as with suits challenging legislative proceedings, no rigid rule categorically bars state courts from reviewing executive procedures. Still, as in that arena, plaintiffs who establish justiciability seem unlikely to replicate their success on the merits.<sup>335</sup>

## VI. THE TRANSCENDENT PRINCIPLE OF JUDICIAL SUPREMACY

As is evident just from cases noted in this Article, the political question doctrine has served as a buffer to constitutional claims with much more frequency in state than in federal courts. This disparity, however, does not reflect a deferential conception by state judiciaries of their role. Rather state judges, like their federal counterparts, invoke the political question doctrine as an incident of their function as definitive arbiter of constitutional law.

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<sup>330</sup> *In re Hooker*, 87 So. 3d 401, 414 (Miss. 2012).

<sup>331</sup> *See id.* at 403 (“[T]he controlling issue is not whether Section 124 [of the Mississippi Constitution] requires applicants for pardons to publish notice—it clearly does.”).

<sup>332</sup> *Id.* at 406.

<sup>333</sup> *Bredesen v. Tenn. Judicial Selection Comm’n*, 214 S.W.3d 419, 436 (Tenn. 2007).

<sup>334</sup> *Id.* at 435–36; *see also Loigman v. Trombadore*, 550 A.2d 154, 157–59 (N.J. Super. Ct. App. Div. 1988) (rejecting as nonjusticiable a suit brought under the state constitution’s judicial appointments clause challenging the procedure by which the governor obtained recommendations from the state bar association).

<sup>335</sup> *See, e.g., Fuller v. Republican Cent. Comm.*, 120 A.3d 751, 759, 764 (Md. 2015) (authorizing an action to challenge the mode of submitting names to the governor to fill, and approve nominees for, vacancies in the legislature); *News & Observer Publ’g Co. v. Easley*, 641 S.E.2d 698, 700 (N.C. Ct. App. 2007) (permitting a suit to compel records of clemency applications but affirming the governor’s authority to withhold records). *See generally Nielsen v. Kezer*, 652 A.2d 1013 (Conn. 1995) (rejecting a political question defense in a suit to compel the Secretary of State to place plaintiff’s name on a ballot as a political party candidate but upholding the exclusion of plaintiff).

As discussed earlier, the United States Supreme Court has invoked the political question to abstain from resolving constitutional issues only rarely in the decades since promulgating its standard in *Baker v. Carr*.<sup>336</sup> Conversely, the Court when rejecting the political question defense has emphasized that “it is the responsibility of this Court to act as the ultimate interpreter of the Constitution.”<sup>337</sup> Indeed, the Court’s unwillingness to assign to other branches responsibility for resolving certain constitutional issues has drawn charges of judicial aggrandizement. Criticizing the Court’s near-monopoly on constitutional construction, Rachel Barkow has objected to the view that “all constitutional questions are matters for independent judicial interpretation and that Congress has no special institutional advantage in answering aspects of particular questions.”<sup>338</sup>

Whatever the merits of this critique, its assessment of judicial primacy may even be understated. For it is not only when deciding a substantive issue that the Court exerts its power, but also when making the threshold determination of justiciability *vel non*. As the Court recognized in *Baker*, “[d]eciding whether a matter has in any measure been committed by the Constitution to another branch of government . . . is itself a delicate exercise in constitutional interpretation.”<sup>339</sup> The assertion of judicial prerogative thus occurs even when the Court decides—however infrequently—that an issue presents a political question. If a coordinate branch is occasionally authorized to resolve a constitutional question, it is only by leave of the Court. In this sense, “the modern political question doctrine is a species of—not a limitation on—judicial supremacy.”<sup>340</sup> A similar analysis can be—and has been—applied to the doctrine’s operation in state courts.<sup>341</sup>

Moreover, while state courts may find constitutional issues to present political questions more often than the Supreme Court, they also have more occasion to do so. In particular, the susceptibility of positive rights claims to political question challenges arises only in the state context.<sup>342</sup>

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<sup>336</sup> 369 U.S. 186 (1962); see *supra* Part I-A(2)(3).

<sup>337</sup> *Powell v. McCormack*, 395 U.S. 486, 549 (1969) (citing *Baker*, 369 U.S. at 211).

<sup>338</sup> See Barkow, *supra* note 89, at 302.

<sup>339</sup> *Baker*, 369 U.S. at 211.

<sup>340</sup> Grove, *supra* note 24, at 1915.

<sup>341</sup> See Stern, *supra* note 9, at 412 (“[I]n classifying electoral disputes as ‘political questions,’ state courts are not assuming a posture of passive deference to the political branches. Rather, judicial detachment in this context represents the state courts’ reaffirmation of their preeminent role as guardian of the strict boundaries that state constitutions have erected between the branches of government.”).

<sup>342</sup> See *supra* notes 134–36 and accompanying text.

These exceptional instances, however, should not obscure the widespread powerful presumption of justiciability among the states' judiciary. A Pennsylvania court captured this principle: "The political question doctrine should not be invoked . . . unless it is clear that a court is incapable of rendering a decision because it would otherwise be plainly inconsistent with *Marbury v. Madison's* basic assumption that the Constitution is judicially declarable law."<sup>343</sup> The prevalence of this philosophy is evidenced by the frequency with which state courts reject claims of political questions by reciting *Marbury's* classic maxim that "[i]t is emphatically the province and duty of the judicial department to say what the law is."<sup>344</sup> Applying essentially the same reasoning, other courts have invoked *Marbury* while restating the principle of its most famous passage.<sup>345</sup> Even when not explicitly citing *Marbury*, numerous state courts when dismissing the political question defense have asserted the judiciary's preeminent place in constitutional construction in terms reminiscent of the case.<sup>346</sup>

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<sup>343</sup> Elliot v. Cruz, 137 A.3d 646, 650 (Pa. Commw. Ct. 2016).

<sup>344</sup> *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803); see, e.g., *Ariz. Indep. Redistricting Comm'n v. Brewer*, 275 P.3d 1267, 1275 (Ariz. 2012); *Forty-Seventh Legislature v. Napolitano*, 143 P.3d 1023, 1026 (Ariz. 2006) (en banc); *Colo. Gen. Assembly v. Lamm*, 704 P.2d 1371, 1378 (Colo. 1985) (en banc) (paraphrasing slightly the passage from *Marbury*); *Office of the Governor v. Select Comm. of Inquiry*, 858 A.2d 709, 730 (Conn. 2004); *Makowski v. Governor*, 852 N.W.2d 61, 65 (Mich. 2014); *Abbeville Cty. Sch. Dist. v. State*, 767 S.E.2d 157, 163 (S.C. 2014).

<sup>345</sup> See, e.g., *Magee v. Boyd*, 175 So. 3d 79, 105 (Ala. 2015) ("The legislature's exclusive power over its internal rules does not give the legislature the right to usurp the function of the judiciary as ultimate interpreter of the Alabama Constitution."); *Miles v. Idaho Power Co.*, 778 P.2d 757, 762 (Idaho 1989); *DeRolph v. State*, 677 N.E.2d 733, 737 (Ohio 1997) ("Under the long-standing doctrine of judicial review, it is our sworn duty to determine whether the General Assembly has enacted legislation that is constitutional."); *William Penn Sch. Dist. v. Pa. Dep't of Educ.*, 170 A.3d 414, 418 (Pa. 2017) ("[I]t has been well-established that the separation of powers in our tripartite system of government typically depends upon judicial review to check acts or omissions by the other branches in derogation of constitutional requirements.").

<sup>346</sup> See, e.g., *Schabarum v. Cal. Legislature*, 70 Cal. Rptr. 2d 745, 750 (Cal. Ct. App. 1998) ("[A] challenge to the constitutionality of an act is inherently a judicial rather than political question and neither the Legislature, the executive, nor both acting in concert can validate an unconstitutional act or deprive the courts of jurisdiction to decide questions of constitutionality." (alteration in original) (quoting *Cal. Radioactive Materials Mgmt. Forum v. Dep't of Health Servs.*, 19 Cal. Rptr. 2d 357, 377 (Cal. Ct. App. 1993)); *Salera v. Caldwell*, 375 P.3d 188, 201 (Haw. 2016) ("This case . . . concerns . . . 'constitutional interpretation' . . . which is considered 'generally judicial fare.'" (internal quotation marks and citation omitted)); *Bd. of Educ. v. Waihee*, 768 P.2d 1279, 1285 (Haw. 1989) ("[T]he matter at hand [is] textual interpretation, which undoubtedly constitutes judicial fare . . ."); *Sarpy Cty. Farm Bureau v. Learning Cmty.*, 808 N.W.2d 598, 607 (Neb. 2012) ("[W]e are specifically asked to determine whether the Legislature's chosen means of implementing a particular policy violate specific provisions of the state Constitution. This is a judicial function which this court is obligated to perform."); *Baines v. N.H. Senate President*, 876 A.2d 768, 775 (N.H. 2005) ("It is our constitutional duty, however, to review whether laws passed by the legislature are constitutional. . . . 'We are the final arbiter of

## CONCLUSION

This Article makes no pretense to having revealed a massive upheaval in state courts' approach to political question claims during the three-and-a-half-decade period reviewed. Yet, to dismiss the significance of the developments that have occurred is to ignore their broader context. With the federal political question doctrine producing scant jurisprudence, state judiciaries are a forum in which courts' capacity to resolve constitutional issues remains actively debated. Their analysis of this fundamental issue is especially illuminating in addressing growing litigation over positive state constitutional rights like education. The importance of such phenomena is reflected by a burgeoning body of scholarship subjecting state constitutional law to intense scrutiny. If the landscape of the political question doctrine in state courts has not radically shifted, it still underscores the role and value of states as enclaves of exploration in our federal system.

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State constitutional disputes.” (internal citation omitted); Pa. AFL-CIO v. Commonwealth, 691 A.2d 1023, 1033 (Pa. Commw. Ct. 1997) (“[T]he General Assembly [does not have] the right to usurp the judiciary’s function as ultimate interpreter of the Constitution.”); Turner v. Shumlin, 163 A.3d 1173, 1181 (Vt. 2017) (“[C]ourts possess power to review either legislative or executive action that transgresses [the] identifiable textual limits [of the Constitution].” (alterations in original) (quoting Nixon v. United States, 506 U.S. 224, 238 (1993))).