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# Political Questions and Political Remedies

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***Political Questions and Political Remedies***

by Jonathan R. Siegel

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## *Abstract*

*Defenders of the political question doctrine sometimes observe that the lack of a judicial remedy for a constitutional violation does not deprive injured parties of all remedy, because injured parties can pursue a political or an electoral remedy—they can seek relief “at the ballot box” or in the political process. This essay criticizes that argument.*

*Political and electoral remedies for constitutional violations are ineffective for important practical and theoretical reasons that grow out of the different structures of the judicial, political, and electoral processes. The judicial process focuses each case on a particular issue; candidates in elections always represent a package of positions on many issues, so that voters do not actually have an opportunity to vote for or against a particular, allegedly unconstitutional action. The judicial process produces reasons for its decisions; the electoral process produces only an inscrutable result, so that even if voters managed to defeat a candidate because of unconstitutional action, no one could really know it. The judicial process operates within a system of precedent; political battles may have to be fought afresh each election cycle. The judicial process is mandatory; legislatures may choose to ignore political agitation. Finally, the judicial process operates according to law; the political and electoral processes are majoritarian and are not likely to be good vehicles for enforcing constraints on majoritarianism.*

*These differences between the judicial, political, and electoral processes demonstrate the error of arguing that the political and electoral processes provide an adequate substitute for a judicial remedy. They also show that the political insulation of judges, although very important, is only one factor supporting the institution of judicial review. Judicial review also rests on the distinctive features of the judicial process: that it is focused, that it is mandatory, that it articulates norms explicitly, and that it operates within a system of precedent. Defenders of the political question doctrine must explain not only why we should entrust constitutional questions to officials not insulated from politics, but why we should entrust them to a process lacking these other, vital features of judicial review.*

# *Political Questions and Political Remedies*

by Jonathan R. Siegel\*

The puzzling and troubling feature of the political question doctrine is the potential it seems to have to render constitutional provisions meaningless. After armed struggle and tremendous political effort, our ancestors gave us the magnificent achievement of a written Constitution that limits the powers of government.<sup>1</sup> Under the political question doctrine, however, the principal enforcement mechanism for those constitutional limits—judicial review—is not available for certain constitutional provisions. At least at first blush, therefore, it might appear that some parts of the Constitution, though ostensibly constraining the behavior of government, cannot in fact do so, because of the lack of an enforcement mechanism for the constraint.

Defenders of the political question doctrine explain this apparently troubling fact in numerous ways. They point out that the lack of judicial enforcement does not automatically render a constitutional constraint meaningless. The political branches may successfully police themselves by obeying judicially unenforceable constitutional provisions.<sup>2</sup> Indeed, some scholars argue, the political branches may have institutional advantages that make them *better* suited to apply certain constitutional provisions than the judiciary.<sup>3</sup>

The main purpose of this essay is to critique one further argument used by defenders of the

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<sup>1</sup> See *Marbury v. Madison*, 5 U.S. 137, 176 (1803) (“The powers of the legislature are defined and limited; and that those limits may not be mistaken or forgotten, the constitution is written.”).

<sup>2</sup> J. Peter Mulhern, *In Defense of the Political Question Doctrine*, 137 U. Pa. L. Rev. 97, 156-62 (1988).

<sup>3</sup> Rachel Barkow, *More Supreme than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 Colum. L. Rev. 237, 329 (2002).

political question doctrine: that, even where a constitutional provision is not judicially enforceable, it is still susceptible of *electoral* enforcement. When voters, this argument runs, have no judicial remedy for a perceived constitutional violation because of the political question doctrine, they can still take to the polls and turn offending politicians out of office. Thus, this argument suggests, we should not be overly concerned that the political question doctrine deprives the courts of enforcement power over certain constitutional provisions, because the electoral process provides an appropriate substitute.<sup>4</sup>

This essay calls attention to the flaws in this argument. The argument ignores critical differences between the judicial and the electoral processes. Not only might attempts to use the electoral process to remedy constitutional violations be utterly impractical because of the cost and effort required, but the electoral process lacks crucial structural elements provided by the judicial process that make the latter a proper mechanism for the enforcement of constitutional constraints. The judicial process is mandatory in nature; it focuses on particular issues; it provides a statement of reasons for its decisions; it operates within a system of precedent; and it operates according to law, not according to majoritarian preference. These features of the judicial process, this essay argues, are not found in the electoral process and are crucial to the appropriateness of the judicial process for resolving constitutional issues.

The primary, and modest, purpose of this essay is to demonstrate the flaws in this one, particular argument used in defense of the political question doctrine. But beyond that, the essay suggests that analyzing the flaws in the argument is of interest because it provides useful insight into the issue of the political question doctrine's ultimate validity. In cataloging the differences between

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<sup>4</sup> See *infra* Part II.

the judicial and electoral processes, we see some of the important reasons why the judicial process is so well suited to serving as the enforcement mechanism for constitutional constraints. It is not just, as is often noted, that the judicial process is insulated from politics because of the life tenure of federal judges. The other characteristics of the judicial process that distinguish it from the electoral process also play a vital role in rendering constitutional provisions meaningful. Defenders of the political question doctrine must explain why we should entrust our Constitution's enforcement to processes that lack these characteristics.

Part I of this essay prepares the ground for this argument by discussing what the political question doctrine actually is and, in particular, by rehearsing the well-known point of Professor Louis Henkin that the term "political question doctrine" should not be used when referring to cases in which a court merely holds that a challenged governmental action is not subject to legal constraint. The essence of the doctrine is that it may bar judicial enforcement of actual legal constraints on government behavior. Part II then puts forward the main argument: the electoral process cannot provide an appropriate substitute for judicial enforcement of constitutional constraints, because it lacks characteristics of the judicial process that are essential to the task of enforcing such constraints. In cataloging these characteristics, we see why the judicial process is so well suited to that task and why any doctrine that takes that task away from it bears an especially heavy burden of justification.

## **I. HOORAY FOR HENKIN**

In coming to a view about the political question doctrine, one must begin by understanding what the doctrine actually is. Unfortunately, usage reveals that the doctrine has two quite different meanings. One of these, which I shall call the *real* political question doctrine, provides that, in some circumstances, the federal courts cannot enforce legal constraints on government action, even when

the occasion for such enforcement arises in what, but for the political question doctrine, would be a proper Article III case or controversy. The other, which may be called the *bogus* political question doctrine, merely expresses the point that a plaintiff who challenges government action that is not subject to legal constraint must necessarily lose.

This observation is, of course, nothing new. In his justly famous 1976 article, *Is There a Political Question Doctrine?*, Louis Henkin pointed out that, in many cases, the political question doctrine serves no real function, but only provides a confusing and deceptive packaging of obvious principles such as that “[t]he courts are bound to accept decisions by the political branches within their constitutional authority,” and that “[t]he courts will not find limitations or prohibitions on the powers of the political branches where the Constitution does not prescribe any.”<sup>5</sup> Readers of the present volume will probably be well versed in this basic point, articulated by Henkin nearly thirty years ago. Nonetheless, I do not ask the reader’s pardon for taking a few pages to drive the point home, because the cases and the scholarly literature show that Henkin’s point is still underappreciated, and because my main line of argument requires a clear understanding of what the real political question doctrine actually does.

#### *A. The Bogus Political Question Doctrine*

Imagine that a taxpayer brought a lawsuit in federal court asserting that income tax rates are just too high and asking the court to order that they be reduced. Such a lawsuit would of course deserve immediate dismissal. The Constitution gives Congress the power to tax incomes<sup>6</sup> and imposes no constraint that would prevent Congress from imposing the current set of income tax

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<sup>5</sup> Louis Henkin, *Is There a Political Question Doctrine?*, 85 Yale L.J. 597, 622 (1976).

<sup>6</sup> U.S. Const., amend. XVI.

rates. Plaintiff would have failed to state a claim upon which relief could be granted.

A funny thing could happen, however, on the way to dismissing the plaintiff's frivolous case. Instead of simply pointing out that the plaintiff has not stated any legal reason why Congress is required to lower tax rates and therefore dismissing under Federal Rule 12(b)(6),<sup>7</sup> the court might invoke the political question doctrine. The court might remark that the choice of tax rates is "committed to the political process for resolution" and dismiss for lack of Article III jurisdiction.

Invocation of the political question doctrine in such a case would perhaps be harmless—it would not much matter precisely which label the court put on dismissal of such an obviously frivolous case—but it would surely be pointless. As Henkin observed long ago, we do not need a nebulous "doctrine" to tell us that when a plaintiff challenges a government action that is not subject to legal constraint, the plaintiff loses. Common sense and Rule 12(b)(6) tell us that. To the extent the doctrine calls for dismissal of cases *because* defendants' actions are legally unconstrained, it does no work at all.

Moreover, the principle of Occam's razor, applied to legal thinking, would warn us to avoid multiplying doctrines needlessly. Invocation of the political question doctrine where it serves no purpose is at least potentially dangerous. Because doctrines ought to do something, not nothing, courts are likely to imagine that the political question doctrine must do more than merely duplicate the concept of dismissal for failure to state a claim; they may struggle to give it content, and it may give government lawyers a weapon to dismiss lawsuits that courts should hear.<sup>8</sup> Courts should

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<sup>7</sup> See Fed. R. Civ. P. 12(b)(6) (permitting dismissal of a plaintiff's complaint for "failure to state a claim upon which relief can be granted").

<sup>8</sup> Cf. Jonathan R. Siegel, *Suing the President: Nonstatutory Review Revisited*, 97 Colum. L. Rev. 1612, 1649 (1997) (noting that, in their desire to win cases, government lawyers may urge courts to stretch jurisdictional doctrines to cover cases to which they should not really apply); Kenneth Culp Davis, *Suing the Government by Falsely Pretending*



therefore avoid the doctrine in cases in which it serves no function.

All of this would be too obvious to be worth pointing out if some cases and scholarly articles did not still, almost thirty years after Henkin, use the political question doctrine to express the point that a plaintiff must lose when there is simply no legal constraint on the government action that plaintiff challenges (or when the plaintiff, at least, points to no applicable legal constraint). The Third Circuit's decision in *New Jersey v. United States* provides an excellent, recent example of such pointless, or bogus, invocation of the political question doctrine.<sup>9</sup> The state of New Jersey alleged that the federal government's failure to enforce the immigration laws imposed unconstitutional costs on the state by compelling it to expend funds to educate illegal alien children and prosecute illegal aliens who commit crimes.<sup>10</sup> The court of appeals affirmed dismissal of the complaint.

The court's opinion was, however, curious: first it found the state's claims to be meritless, but then it held them to be political questions. For example, the court said that "there is no basis for a claim that the Constitution has been violated by the federal government's inaction, which allegedly has set in motion events that have indirectly caused the state to incur costs."<sup>11</sup> That is, the court explained why the state's claim failed on its *merits*: there is simply no legal requirement that the federal government implement the immigration laws so as to avoid imposing costs on states. Having said that, however, the court held the claim to be a nonjusticiable political question. Invoking the

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*to Sue an Officer*, 29 U. Chi. L. Rev. 435, 438-42 (1962) (same).

<sup>9</sup> 91 F.3d 463 (3d Cir. 1996).

<sup>10</sup> *Id.* at 465-66. The case was one of a spate of similar cases brought by several states at the time.

<sup>11</sup> *Id.* at 467.

well-known list of political question factors given by the Supreme Court in *Baker v. Carr*,<sup>12</sup> the court held that the Constitution commits immigration to the political branches of government, that there would be no judicially discoverable and manageable standards for resolving the issues the case presented, and that resolving the issues would express a lack of respect for a coordinate branch.<sup>13</sup>

The case presents a particularly clear example of a court's invoking the political question doctrine when it really means to say that the plaintiff's claims failed on their merits. The court all but held that the claims were political questions precisely *because* they failed on their merits.<sup>14</sup> The court determined that the issues presented were committed to the political branches because it determined that the Constitution does not constrain the enforcement discretion of the political branches with regard to immigration matters. It seem particularly egregious to say that a court cannot interpret the Constitution and resolve the claims presented by a plaintiff when the court has just finished doing exactly that.

A similar example of bogus invocation of the political question doctrine occurred in the Tenth Circuit's decision in *Schroder v. Bush*,<sup>15</sup> a case rather like the income tax hypothetical posed above. The plaintiffs in *Schroder* were farmers suffering from difficult economic conditions. They sought an order requiring the President, cabinet Secretaries, and the United States itself to "control

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<sup>12</sup> 369 U.S. 186, 217 (1962).

<sup>13</sup> 91 F.3d at 470.

<sup>14</sup> No one doubts that courts may hear constitutional challenges to immigration and naturalization laws when a plaintiff points to a legal constraint that at least might be applicable to them, such as the constraint arising from the Equal Protection Clause. *See, e.g.,* *Miller v. Albright*, 523 U.S. 420 (1998) (upholding naturalization laws against an Equal Protection challenge). Here, the real problem was not that the judiciary may never consider attacks on the immigration laws, but that the plaintiff state had not specified any legal constraint on Congress's ability to pass such laws that could even conceivably have formed the basis of such an attack.

<sup>15</sup> 263 F.3d 1169 (10<sup>th</sup> Cir. 2001).

United States currency and to maintain market conditions so as to be favorable to small farmers.”<sup>16</sup> They also asked the court to order the U.S. Trade Representative to “cooperate in negotiating and implementing foreign trade agreements that would benefit small farmers.”<sup>17</sup>

Needless to say, the court of appeals affirmed dismissal of this frivolous complaint. But rather than simply observe that plaintiffs had stated no reason why federal economic, farm, and international trade policy was unlawful, the court invoked the political question doctrine. Referring to the *Baker v. Carr* factors, the court determined that the case “presents textbook examples of political questions.”<sup>18</sup>

The court’s analysis was, however, more confusing than helpful. The court observed that the Constitution commits the regulation of commerce, the establishment of bankruptcy law, and the regulation of currency to Congress.<sup>19</sup> That is certainly true, but it has little to do with the reason the case was properly dismissed. Congress’s regulation of commerce, bankruptcy, and currency comes before the courts all the time; courts regularly pass on whether Congress has exceeded the limits of its power in these areas.<sup>20</sup> The problem was not that regulation of these issues is unreviewably committed to Congress, but that the plaintiffs had not stated any basis for review; they had not stated any reason why Congress’s actions were unlawful.

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<sup>16</sup> *Id.* at 1172.

<sup>17</sup> *Id.* at 1173 (internal quotation omitted). As if that were not enough, plaintiffs also asked the court to declare that “sub-par agricultural commodity prices shall be allowed as an affirmative defense in any action for debt.” *Id.*

<sup>18</sup> 263 F.3d at 1174.

<sup>19</sup> *Id.*

<sup>20</sup> *See, e.g.*, *United States v. Lopez*, 514 U.S. 549 (1995) (holding that Congress exceeded its powers under the Commerce Clause); *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982) (holding provisions of the bankruptcy laws unconstitutional); *Richardson v. Sullivan*, 996 F.2d 311 (10<sup>th</sup> Cir. 1993) (Table, text in Westlaw) (holding that Congress did not violate the Constitution by taking the dollar off the gold standard).

The court also said that the plaintiffs' requested relief would require "'initial policy determinations' in an area devoid of 'judicially discoverable and manageable standards' and where 'multifarious pronouncements by various departments' would lead to confusion and disaster."<sup>21</sup> This was somewhat more to the point, but was merely a long-winded way of saying, once again, that plaintiffs had not alleged the violation of any legal constraint on federal economic policy. The court's political question analysis added nothing to its decision and could provide dangerous ammunition for some future government lawyer to use in trying to get a court to dismiss a proper challenge to federal farm policy.

Pointless invocation of the political question doctrine may also be observed in the scholarly literature. In a recent symposium about *Baker v. Carr*, for example, Robert Pushaw takes the Supreme Court to task for adopting a "cavalier attitude" under which "the political question doctrine has ceased to function as a meaningful jurisdictional restraint."<sup>22</sup> Professor Pushaw laments the impact of *Baker* and recommends reinstating the "Federalist approach" to political questions, under which, he says, constitutional provisions can rebut the presumption favoring judicial review.<sup>23</sup> In describing what questions would actually be political questions under such a Federalist approach, however, Professor Pushaw observes that the doctrine would apply where the people have "entrusted their federal government representatives with complete latitude" and where, "by definition the exercise of such discretion cannot violate the Constitution."<sup>24</sup> Thus, for example, Professor Pushaw

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<sup>21</sup> 263 F.3d at 1174 (quoting *Baker v. Carr*, 369 U.S. at 217).

<sup>22</sup> Robert Pushaw, *Judicial Review and the Political Question Doctrine: Reviving the Federalist "Rebuttable Presumption" Analysis*, 80 N. Car. L. Rev. 1165, 1167 (2002).

<sup>23</sup> *Id.* at 1167-68.

<sup>24</sup> *Id.* at 1196-97.

observes that, under his view, no court could hear a claim against the President's decision to veto a bill passed by the Congress, because even though vetoes are occasionally misguided, the President's discretion with regard to the veto power is absolute.<sup>25</sup>

Such a formulation provides that the political question doctrine should apply precisely where it serves no purpose. We need no special jurisprudential doctrine to get rid of lawsuits challenging presidential vetoes as misguided. Such a challenge to a veto must fail on its merits, because, as Professor Pushaw observes, the President has plenary authority to veto any bill.

Once for all, courts and scholars should internalize Henkin's insight and cease invoking the political question doctrine for cases in which a court, having examined the relevant legal sources, concludes that there is no applicable legal constraint on the action that the plaintiff is challenging. The very fact that the court has reached that conclusion proves that the matter is not beyond judicial cognizance. The court has simply concluded, in the perfectly ordinary way, that the plaintiff has not stated a claim upon which relief can be granted.

*B. The Real Political Question Doctrine*

It would be equally wrong, however, to carry Henkin's insight too far. Courts sometimes invoke the political question doctrine in cases in which they merely hold, in the ordinary way, that defendant's actions are not unlawful, but that does not mean that they invoke the doctrine *only* in such cases. There really are cases in which a court dismisses the plaintiff's claim, not because the defendant's action is subject to no legal constraint, but because the court concludes (rightly or wrongly) that the legal constraint applicable to the defendant's actions is not judicially enforceable. Perhaps the best example of such a case—a case that very usefully illustrates the difference between

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<sup>25</sup> *Id.* at 1197.

bogus and real political question cases—is the D.C. Circuit’s decision in *Morgan v. United States*.<sup>26</sup>

The case concerned an extremely close election for a seat in the House of Representatives in 1984. The Secretary of State of Indiana certified that the Republican candidate had won by a small margin. After making its own inquiry, however, a House committee concluded that the Democratic candidate had defeated the Republican by just four votes. By a party-line vote, the House seated the Democrat. A group of Republicans brought suit seeking an injunction requiring the seating of the Republican candidate.

There can be no doubt that when either house of Congress investigates a contested election and decides which candidate to seat, its action is subject to legal constraint. The house must seat the candidate who received more lawful votes. This requirement follows from the constitutional provisions that the House of Representatives “shall be composed of members chosen every second year by the people of the several states,”<sup>27</sup> and that the Senate “shall be composed of two Senators from each state, elected by the people thereof.”<sup>28</sup> For either house to seat as a Member a candidate who actually lost the election would surely be unlawful, indeed, unconstitutional.

Nonetheless, when the *Morgan* case reached the D.C. Circuit, that court summarily held that it lacked jurisdiction. Then-Judge Scalia observed that the Constitution provides that “[e]ach House shall be the Judge of the Elections, Returns and Qualifications of its own Members.”<sup>29</sup> The command that each house shall not only judge its own elections, but shall be “*the Judge*” of them,

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<sup>26</sup> 801 F.2d 445 (D.C. Cir. 1986).

<sup>27</sup> U.S. Const., art. 1, § 2.

<sup>28</sup> U.S. Const., amend. XVII.

<sup>29</sup> U.S. Const., art. I, § 5, cl. 1.

Judge Scalia determined, excluded anyone else, including federal judges, from judging such elections. “It is difficult,” he said, “to imagine a clearer case of ‘textually demonstrable constitutional commitment’ of an issue to another branch of government to the exclusion of the courts.”<sup>30</sup>

This case, then, illustrates the *real* political question doctrine: the challenged action was undoubtedly subject to legal constraint, but the court dismissed the case on the ground that the legal constraint was not judicially enforceable.<sup>31</sup> Notice the difference from bogus political question cases. In this case, assuming the facts stated in plaintiff’s complaint to be true, the challenged government action was unlawful; indeed, it was unconstitutional. The court needed special, unusual reasoning to explain why it declined to enforce a legal constraint on the defendant’s actions.<sup>32</sup>

*Morgan* demonstrates the error of the view, taken by some scholars, that when a court dismisses a challenge to governmental action on the basis of the political question doctrine it is always, necessarily holding “that there are no legal rules constraining the validity of [the] challenged action.”<sup>33</sup> Sometimes, as *Morgan* shows, the action is subject to legal constraint. Similarly, it is not

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<sup>30</sup> 801 F.2d at 447. Judge Scalia also relied on the history of the Elections Clause, which in his view, was “entirely consistent with its plain exclusion of judicial jurisdiction.” *Id.*

<sup>31</sup> Curiously, Judge Scalia, after citing the Elections Clause, concluded that “without need to rely upon the amorphous and partly prudential doctrine of ‘political questions,’ . . . we simply lack jurisdiction to proceed.” 801 F.2d at 447. I am not sure why, in this unusual case actually involving the political question doctrine, Judge Scalia concluded that the doctrine was not involved!

<sup>32</sup> Henkin notes that, even where government action is subject to legal constraint and violates that constraint, ordinary principles of equity may cause a court to deny injunctive relief. He regards some political question cases as being explainable on that ground. Henkin, *supra* note \_\_\_, at 617-22. I cannot prove that ordinary principles of equity could not have explained the *Morgan* case, but it seems unlikely that equity would demand that a court tolerate the possibility that the losing candidate is holding a seat in Congress. *Cf. Powell v. McCormack*, 395 U.S. 486 (1969).

<sup>33</sup> Wayne McCormack, *The Political Question Doctrine—Jurisprudentially*, 70 U. Det. Mercy L. Rev. 793, 795 (1993); *see also* Wayne McCormack, *The Justiciability Myth and the Concept of Law*, 14 Hastings Const. L.Q. 595, 614, 623 (1987). Professor McCormack also says that the result of calling an issue a political question is that “there are not and never could be any judicially-enforceable constraints” on the action—a different, and tautologically true, statement.

correct to say that “the political question doctrine applies *only* in cases in which, on the merits, the government action was constitutionally permissible in any event.”<sup>34</sup> It is true that the political question doctrine is often, uselessly, invoked in such cases. Courts also, however, invoke the doctrine in cases in which it really does something: it prevents the courts from enforcing, in what would otherwise be a proper Article III case, an actual legal constraint on government conduct.

The Supreme Court’s latest major political question doctrine case, *Nixon v. United States*,<sup>35</sup> is somewhat frustrating in that it fails to take a clear position as to whether it invokes the real or bogus political question doctrine. The case concerned the claim by impeached federal judge Walter Nixon that the Senate violated its constitutional obligation to “try” his impeachment when it assigned the actual taking of evidence to a Senate committee.<sup>36</sup> The Supreme Court affirmed dismissal of Nixon’s complaint on the basis of the political question doctrine.

Some of the statements in the Court’s opinion suggest that the Court was invoking the real political question doctrine; that is, it held that the constitutional constraints imposed by the requirement that the Senate “try” impeachments are not judicially enforceable. The Court noted that

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Professor McCormack equates “legal constraints” with “judicially-enforceable constraints,” see 70 U. Det. Mercy L. Rev. at 822 (“[I]f a court is not willing to enforce a provision or principle, then that provision or principle is not law.”), but *Morgan* illustrates the difference between them. The law—specifically, the law set forth in the Constitution—requires a house of Congress deciding a disputed congressional election to seat the winner, but the D.C. Circuit determined that law to be judicially unenforceable.

<sup>34</sup> Louis Seidman, *This Essay is Brilliant / This Essay is Stupid: Positive and Negative Self-Reference in Constitutional Practice and Theory*, 46 UCLA L. Rev. 501, 529 n.60 (1998). In fairness, Professor Seidman may be referring only to the political question doctrine “in the form used in *Nixon v. United States*[, 506 U.S. 224 (1993)],” which could be construed as a bogus political question doctrine case. See *id.* But if the sentence quoted in the text above is meant to be unqualified, *Morgan* shows it to be incorrect.

<sup>35</sup> 506 U.S. 224.

<sup>36</sup> See U.S. Const., art. I § 3, cl. 6; 506 U.S. at 226-28.



the Constitution gives the Senate the “sole” power to try impeachments;<sup>37</sup> the Court held that the word “sole” has “considerable significance” and indicates that the Senate is to act “independently and without assistance or interference.”<sup>38</sup> The Court reasoned that impeachment could not properly serve as a check on the judiciary if judges could review and nullify impeachment trials.<sup>39</sup> The Court also determined that the difficulties in granting relief (difficulties that would be particularly severe following impeachment and conviction of the President) counseled against justiciability.<sup>40</sup> All of these arguments suggested that the Court was holding that, even if the Constitution constrains the procedures that the Senate may use to “try” an impeachment, no court can enforce those constraints.

On the other hand, other statements in the Court’s opinion suggest that the Court held that the constitutional provision that the Senate shall “try” impeachments simply does not impose any constraints on the procedures that the Senate may use in an impeachment trial. The Court looked at dictionary definitions of the word “try” and concluded that “we cannot say that the Framers used the word ‘try’ as an implied limitation on the method by which the Senate might proceed in trying impeachments.”<sup>41</sup> It also noted the three specific, constitutionally-imposed constraints on impeachment trial procedure<sup>42</sup> and concluded that their precise “nature suggests that the Framers did not intend to impose additional limitations on the form of the Senate proceedings by the use of the

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<sup>37</sup> U.S. Const., art. I, § 3, cl. 6; 506 U.S. at 230-231.

<sup>38</sup> 506 U.S. at 231 (quoting Webster’s Third New International Dictionary 2168 (1971)).

<sup>39</sup> *Id.* at 234-35.

<sup>40</sup> *Id.* at 236.

<sup>41</sup> 506 U.S. at 230.

<sup>42</sup> The Senators must be on oath, a two-thirds vote is required for conviction, and, when the President is tried, the Chief Justice presides. U.S. Const., art. I, § 3, cl. 6; 506 U.S. at 230.

word ‘try.’”<sup>43</sup> These statements suggest the possibility that *Nixon* is a bogus political question case that really just held that the plaintiff’s claim was meritless.<sup>44</sup> Indeed, it is hard to see what business the Court would have had even investigating the meaning of the word “try” to the extent that it did if, as is suggested by the Court’s other language, the selection of impeachment trial procedures is a political question wholly committed to the Senate for resolution. Thus, while it is possible that *Nixon* demonstrates the continued viability of the real political question doctrine, the case may also be a mere bogus political question case.<sup>45</sup>

### *C. The Importance of the Distinction*

The foregoing discussion shows that the phrase “political question doctrine” covers two entirely different situations: in one, it is no more than a needlessly complicated way to say that any plaintiff must lose who does not state some reason why a defendant’s challenged actions are unlawful; in the other, it states that courts must sometimes stay their hand even when the defendant’s actions *are* unlawful. Two such different situations should have different names. Using the same name for both can only cause confusion.

Even worse, applying the same doctrine to both situations must confound attempts to decide whether we should have a political question doctrine or not. If some people understand the doctrine

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<sup>43</sup> 506 U.S. at 230.

<sup>44</sup> Some scholars interpret the *Nixon* case just this way. *See, e.g.,* Seidman, *supra* note \_\_\_\_, at 529.

<sup>45</sup> One final possibility is worth noting: perhaps the Court was saying that the word “try” *might* impose limitations on the procedures that the Senate may use in trying an impeachment, but that it would be inappropriate for the Court to decide the question one way or the other, because the legal constraints imposed by the word, if there are any, are not judicially enforceable. If that is what the Court is saying, I would characterize the case as a real political question case. Such a disposition would leave open the possibility that the Court is declining to enforce actual legal constraints on government action, which would distinguish the case from a bogus political question case, in which a court dismisses because the challenged government action is simply not subject to any legal constraints (or at least, any that the plaintiff has invoked).

to mean that courts ought to dismiss cases in which plaintiffs challenge government actions that are not subject to legal constraint, then discussion of the doctrine is hopeless. Who could be against that? *Of course* a court should dismiss a case in which the plaintiff challenges the President's decision to veto a bill as misguided or claims that the government must run the economy for the benefit of farmers. There's nothing to discuss.

Moreover, arguments supporting dismissals in such bogus political question doctrine cases may be perfectly valid (since such cases should certainly be dismissed), yet have no application to real political question doctrine cases, because of the very different circumstances that such cases present. And yet, because the same name is used for both, one might easily be confused into thinking that an argument that supports dismissal in bogus political question cases shows that the real political question doctrine should be preserved. When this happens, the bogus political question doctrine becomes more than a complicated but harmless affectation; it is pernicious.

The political question doctrine should, therefore, be banished from cases where it does no work. It should be reserved for cases in which the challenged government action is, or at least might be, subject to a legal constraint on which the plaintiff relies, but in which a court believes that it cannot enforce the constraint. As to that conclusion, the court might be right or wrong, but at least there is an issue to discuss.

## **II. THE JUDICIAL PROCESS AND THE POLITICAL PROCESS**

Once it is understood that the real political question doctrine forecloses courts from enforcing actual legal constraints on government behavior, the doctrine raises an obvious and pressing question: how will those constraints get enforced, if at all? The very essence of our Constitution

is usually thought to lie in the constraints that it imposes.<sup>46</sup> As Chief Justice Marshall observed in *Marbury v. Madison*, “[t]o what purpose are powers limited, and to what purpose is that limitation committed to writing; if these limits may, at any time, be passed by those intended to be restrained?”<sup>47</sup> Alexander Bickel pointed out that Marshall’s argument does not immediately prove that the Constitution’s constraints must be *judicially* enforceable,<sup>48</sup> but still, the Constitution’s constraints on the political branches are supposed to be real constraints, not mere hortatory admonitions. Under the American doctrine of judicial review, the normal enforcement mechanism for these constraints is for courts to treat the Constitution as law that courts may enforce in cases that come before them.<sup>49</sup> The political question doctrine’s departure from this normal pattern is immediately troubling and demands a justification.

This essay focuses on one argument that courts sometimes use in addressing this difficulty. Courts sometimes suggest that the political question doctrine does not destroy the requisite enforceability of constitutional constraints, because the Constitution can still be enforced, as Bickel put it, “ultimately and finally [by] the people through the electoral process.”<sup>50</sup> That is, if political actors should violate legal constraints on their behavior, the people are not without a remedy, even if the political question doctrine blocks a judicial remedy. The people can always vote the offending

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<sup>46</sup> Courts sometimes apply the political question doctrine to nonconstitutional constraints on government behavior, *e.g.*, *Smith v. Reagan*, 844 F.2d 195, 200 (4th Cir. 1988) (holding that plaintiffs’ claim under the Hostage Act, 22 U.S.C. § 1732, presented a nonjusticiable political question), but this essay focuses on constitutional constraints.

<sup>47</sup> *Marbury v. Madison*, 5 U.S. 137, 176 (1803).

<sup>48</sup> Alexander Bickel, *The Least Dangerous Branch* 3 (1962).

<sup>49</sup> *E.g.*, LAURENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* 367 (3d ed. 2000); Larry D. Kramer, *The Supreme Court, 2000 Term, Foreword: We the Court*, 115 Harv. L. Rev. 1, 8 (2001).

<sup>50</sup> Bickel, *supra* note \_\_\_\_, at 3.

politicians out of office.

The Supreme Court articulated this view most clearly in *United States v. Richardson*, in which it declined to consider the plaintiff's claim that the Statement and Account Clause of the Constitution required the publication of the budget of the Central Intelligence Agency.<sup>51</sup> Although the Court based its dismissal on its determination that the plaintiff lacked standing to sue, the case is appropriately considered here because the Court's decision was so broad as to suggest strongly that no one could ever have standing to seek enforcement of the Statement and Account Clause.<sup>52</sup> As Professor Tushnet has observed, such a decision "blur[s] the lines between standing law and the political question doctrine" and "comes very close to asserting that the question presented was a political one."<sup>53</sup>

In justifying its decision that the Statement and Account Clause would effectively be insusceptible of judicial enforcement, the Court expressly suggested that the plaintiff, although debarred from suit, might use the electoral process to remedy what he perceived as a constitutional violation:

It can be argued that if respondent is not permitted to litigate this issue, no one can do so. In a very real sense, the absence of any particular individual or class to litigate these claims gives support to the argument that the subject matter is committed to the surveillance of Congress, and ultimately to the political process. \* \* \* The Constitution created a representative Government with the representatives directly

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<sup>51</sup> 418 U.S. 166 (1974). The Statement and Account Clause provides that "a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time." U.S. Const, art. I, § 9, cl. 7. *Richardson*, a U.S. taxpayer, asserted that Congress had violated the clause by providing that expenditures of the Central Intelligence Agency need not be published. The Supreme Court ordered the case dismissed.

<sup>52</sup> *Id.* at 418 (quoted *infra*). *But see Halperin v. Central Intelligence Agency*, 629 F.2d 144 (D.C. Cir. 1980) (reaching merits of constitutionality of statute exempting CIA's budget from publication where the plaintiff had sought the budget under the Freedom of Information Act).

<sup>53</sup> Mark Tushnet, *Law and Prudence in the Law of Justiciability: The Transformation and Disappearance of the Political Question Doctrine*, 80 N. Car. L. Rev 1203, 1214 (2002).

responsible to their constituents at stated periods of two, four, and six years; that the Constitution does not afford a judicial remedy does not, of course, completely disable the citizen who is not satisfied with the ‘ground rules’ established by the Congress for reporting expenditures of the Executive Branch. Lack of standing within the narrow confines of Art. III jurisdiction does not impair the right to assert his views in the political forum or at the polls. Slow, cumbersome, and unresponsive though the traditional electoral process may be thought at times, our system provides for changing members of the political branches when dissatisfied citizens convince a sufficient number of their fellow electors that elected representatives are delinquent in performing duties committed to them.<sup>54</sup>

Other courts have echoed this suggestion that the electoral process provides the appropriate enforcement mechanism for legal constraints that cannot be judicially enforced and have applied it specifically to political question doctrine cases. The D.C. Circuit, for example, invoked this argument in its opinion in the Walter Nixon impeachment case. Judge Edwards, in his dissenting opinion, argued that if impeachments pose nonjusticiable political questions, then the Senate might adopt a rule allowing it to convict and remove impeached officers by a mere majority vote.<sup>55</sup> The court replied that “if the senators try to ignore the clear requirement of a two-thirds vote for conviction, they will have to contend with public outrage that will ultimately impose its sanction at the ballot box.”<sup>56</sup> Similarly, in affirming dismissal of the election challenge in *Morgan v. United*

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<sup>54</sup> 418 U.S. at 179.

<sup>55</sup> *Nixon v. United States*, 938 F.2d 239, 256 (D.C. Cir. 1991) (Edwards, J., dissenting in part and concurring in the judgment), *aff’d*, 506 U.S. 224 (1993).

<sup>56</sup> *Id.* at 246. The court also remarked that “[i]t does not help establish justiciability to pose hypotheticals of outrageous behavior by a coordinate branch.” *Id.* It is, of course, somewhat difficult to imagine that the Senate would blatantly ignore the two-thirds voting requirement for impeachment proceedings. It is not, however, impossible to imagine that nontrivial questions might arise in the requirement’s application. What if, of 100 Senators present for an impeachment vote, 66 vote “guilty,” 33 vote “not guilty,” and one votes “present” or declines to vote? The constitutional text would seem pretty clearly to preclude a conviction (“no person shall be convicted without the concurrence of two thirds of the members present,” U.S. Const., art. I, § 3, cl. 6), but it is not impossible to imagine that the presiding officer would rule that a vote of 66 “guilty” and 33 “not guilty” is a two-thirds vote to convict. A question might also arise from a Senator’s unconventional vote, such as Senator Arlen Specter’s vote of “not proven, therefore not guilty” on the impeachment of President Clinton. See Peter Baker and Helen Dewar, *Clinton Acquitted; 2 Impeachment Articles Fail to Win Senate Majority; Five Republicans Join Democrats In Voting Down Both Charges*, Washington Post, Feb. 13, 1999, at A1.

*States*, the D.C. Circuit noted that “a substantial degree of responsibility is still provided by regular elections, [and] the interim demands of public opinion.”<sup>57</sup> Likewise, the Seventh Circuit, affirming dismissal in *Schroder v. Bush* (discussed above), approvingly quoted the district court’s remark that “[p]laintiffs’ remedies are at the polling place, not the courts.”<sup>58</sup>

Scholars too have invoked this argument in defense of the political question doctrine. Rachel Barkow, for example, asks, “are there not some constitutional questions that should be answered by the political branches precisely because these branches are accountable to the people?”<sup>59</sup> She notes statements from the Framing era suggesting that “[i]f the Congress makes laws inconsistent with the

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The D.C. Circuit left open the possibility that a claim that the Senate violated the two-thirds requirement would be justiciable. 938 F.2d at 246 n.2. Some language in the Supreme Court’s opinion suggests that it too left that possibility open, but other language in the opinion suggests that the political question doctrine would foreclose such a claim. As discussed earlier, some passages in the Supreme Court’s *Nixon* opinion contrast the clarity of the three specific constitutional requirements for impeachment trials with the open-ended nature of the word “try”; these passages hint that a claim that the Senate violated the specific requirements might be justiciable. Other parts of the opinion make arguments that are independent of the nature of the alleged defect in an impeachment trial (such as that judicial review would prevent impeachment from serving as a check on the judicial branch, that there is a compelling need for finality in impeachment cases, and that it would be difficult to fashion relief); these parts suggest that the courts could never review any judgment of conviction in an impeachment case, even if the Senate violated a clear rule such as the two-thirds requirement.

<sup>57</sup> *Morgan v. United States*, 801 F.2d 445, 450 (D.C. Cir. 1986).

<sup>58</sup> 263 F.3d 1169, 1171 (10th Cir. 2001). For more similar statements in political question doctrine cases, see, e.g., *Smith v. Reagan*, 844 F.2d 195, 200 (4th Cir. 1988) (holding that plaintiffs’ claim under the Hostage Act, 22 U.S.C. § 1732, presented a nonjusticiable political question; “[a]ccountability lies in oversight by Congress or in criticism from the electorate, but not in the judgments of the courts.”); *Flynn v. Shultz*, 748 F.2d 1186 (7th Cir. 1984) (also holding that claims under the Hostage Act present nonjusticiable political questions; “the failure of the President to take any action after a finding of a wrongful detention is made is not remediable by the courts, nor, perhaps, even Congress, but solely by the electorate”). For similar statements not actually involving the political question doctrine, see *Troxel v. Granville*, 530 U.S. 57, 91-92 (2000) (Scalia, J., dissenting) (“[W]hile I would think it entirely compatible with the commitment to representative democracy set forth in the founding documents to argue, in legislative chambers or in electoral campaigns, that the State has *no power* to interfere with parents’ authority over the rearing of their children, I do not believe that the power which the Constitution confers upon me as a judge entitles me to deny legal effect to laws that (in my view) infringe upon what is (in my view) that unenumerated right.”); *Collinson v. Gott*, 895 F.2d 994, 1006 (4th Cir. 1990) (Wilkinson, J., concurring) (“[If the defendant] overstepped the boundary of sound judgment, he should be called to account, not under § 1983, but at the ballot box.”).

<sup>59</sup> Rachel Barkow, *More Supreme than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 Colum. L. Rev. 237, 327 (2002).

Constitution . . . [a] universal resistance will ensue,” and that “[t]he ability to vote a member [of Congress] or the President out of office ‘will prove a security to [the people’s] liberties, and a most important check to the power of the general government.’”<sup>60</sup> By contrast, she notes, because Supreme Court Justices hold office for life, “the people cannot express their discontent or satisfaction at the ballot box” when the Court improperly asserts control over what ought to be a political decision.<sup>61</sup> Indeed, Larry Kramer, similarly relying on historical materials, suggests that the Constitution’s Framers conceived of popular measures, most particularly elections, and not judicial review, as the primary enforcement mechanism for the entire Constitution.<sup>62</sup>

Reliance on the electoral process forms but a small part of arguments made in defense of the political question doctrine. Courts typically use the argument as a mere fillip, with the main analysis going to the *Baker v. Carr* factors.<sup>63</sup> Professor Barkow, too, had many other more important arguments to offer.<sup>64</sup> Still, it is worth examining this argument in detail and seeing exactly what is wrong with it, because its refutation provides useful insights.

*A. The Electoral Process as a Substitute for Judicial Remedies*

The argument noted above suggests that the electoral process may provide an appropriate substitute for a judicial remedy. This suggestion cannot, however, be sustained. It ignores a host of problems that must inevitably arise in attempts to use the electoral process to enforce legal

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<sup>60</sup> *Id.* (quoting 2 Elliot’s Debates at 168; 4 Elliot’s Debates at 71).

<sup>61</sup> *Id.* at 297.

<sup>62</sup> See Kramer, *supra* note \_\_\_\_, at 26-27, 72-73.

<sup>63</sup> See, e.g., *Schroder*, 263 F.3d at 1171-76; *Morgan*, at 801 F.2d at 447-50.

<sup>64</sup> Barkow, *supra* note \_\_\_\_, at 300-35.



constraints on political behavior. Examination of these problems reminds us of the fundamental differences between political and judicial remedies—differences that go to the heart of our system of judicial review.

To begin with, the suggestion that citizens should use the electoral process to redress nonjusticiable constitutional grievances will often be entirely impractical. Perhaps Mr. Richardson, after being turned away by the judicial system, could stir up some political interest in the question of whether the United States should publish the CIA's budget, but the notion that he could use this issue to turn the President or Members of Congress out of office is plainly untenable. The issue is simply not of sufficient importance; no substantial number of voters could ever be expected to cast their votes based on it. It would be equally difficult—even for one who agreed with the merits of his constitutional claim—to imagine former Judge Nixon's "convinc[ing] a sufficient number of [his] fellow electors that elected representatives [were] delinquent"<sup>65</sup> in failing to try his impeachment before the full Senate. As these cases show, violations of the Constitution may involve rather obscure issues that would not likely have much, if any, resonance in actual election campaigns.

Nor would the case necessarily be different for truly important issues. Even in the case of the most momentous constitutional violations, there may be no practical way to use a politician's unconstitutional actions to engineer his or her subsequent electoral defeat. Few constitutional claims could be more serious than the claim that the 2000 presidential election was stolen, but voters who believe that it was may have little chance of putting the issue to work electorally. Professor Barkow, in criticizing the Supreme Court's decision to resolve the *Bush v. Gore* case, argues that the Article II questions involved in the case may have been political questions that the Court should have left

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<sup>65</sup> *Richardson*, 418 U.S. at 179.

for Congress to resolve,<sup>66</sup> and she observes that the Court, by taking the decision away from the political process, left the people with no way to “express their discontent or satisfaction at the ballot box.”<sup>67</sup> Suppose, however, that the Court had held the dispute nonjusticiable and left it for congressional resolution; would voters have used the ballot box to “express their discontent or satisfaction”? The earliest opportunity to do so was two years away, and the election dispute, momentous as it was, was subsequently drowned out by the even more momentous terrorist attacks of September 11, 2001. Even if Congress, rather than the Supreme Court, had resolved the 2000 election controversy, there seems little reason to believe that voters would have had any practical way to turn the 2002 or 2004 elections into a referendum on the validity of Congress’s decision.

This impracticality of using the electoral process to air constitutional grievances is a symptom of several vital differences between the judicial and political processes. Some such differences are very practical in nature: for example, attempting to use the electoral process to redress a constitutional grievance would obviously require a tremendous investment of time, effort, and resources, probably orders of magnitude beyond the investment necessary for litigation. There are also, however, more theoretically significant differences that emphasize the unsuitability of the electoral process for the resolution of legal grievances no matter what resources might be put into the effort.

First, the judicial process is *focused*. A plaintiff comes to court with a specific claim of right, and the judicial process provides a proceeding for the resolution of that specific claim. By contrast,

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<sup>66</sup> Barkow, *supra* note \_\_\_, at 300. Professor Barkow does not quite conclude that the questions *were* political questions; she states that “the Article II question in the *Bush* cases presented a strong candidate for application of the political question doctrine.” *Id.*

<sup>67</sup> *Id.* at 297.

the electoral process is never focused on just one issue. Congressional and presidential elections are not referendums. Each candidate always embodies a package of positions on the numerous issues facing the electorate at any given time, plus general qualities such as trustworthiness, experience, skill, and charm. For this reason, even if voters wanted to use an election to express their views on alleged constitutional violations, the process of voting would not give them a clear opportunity to do so. Voters cannot vote on discrete issues; they can vote only on the whole package that a candidate represents.<sup>68</sup>

Indeed, what if two groups of voters were simultaneously attempting to use an election to remedy two different alleged constitutional violations, each of which had been held to involve a nonjusticiable political question? Each candidate for a given office might regard one of the alleged violations as a real violation that Congress should rectify, but the other as constitutionally permissible government behavior. If the candidates had conflicting views as to which alleged violation was really a problem, voters might be able to express their dissatisfaction with one of the alleged violations only by ostensibly expressing approval for the other. Again, the upshot is that election campaigns do not present a genuine opportunity for voters to resolve legal issues.

Moreover, even if a voter's attempt to remedy constitutional violations through the electoral process were somehow successful, the legal situation would not be much different. The unfocused nature of elections points to another problem that must plague even successful efforts to right constitutional violations through the ballot box: the electoral process is *inscrutable*. Let us imagine

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<sup>68</sup> Donald Doernberg makes this point in his comments on *United States v. Richardson*. See Donald L. Doernberg, "We the People": John Locke, Collective Constitutional Rights, and Standing to Challenge Government Action, 73 Cal. L. Rev. 52, 99 (1985) ("[T]he political process . . . is particularly unresponsive to single-issue candidacies, especially at the national level. The more diverse the electorate and the more complicated the issue facing it, the less any single issue is likely to be dispositive in the electoral process.").

that a would-be plaintiff, finding her lawsuit blocked by the political question doctrine, attempts to make the alleged unconstitutionality of government action an issue in a subsequent election; more than that, let us imagine that, against all odds, she is successful! Her issue captures electoral attention, and the incumbent she attacks, who had brought about the allegedly unconstitutional action, is defeated at the polls. Now what?

The problem is that one can never really know *why* the incumbent was defeated. Even after the bum is duly thrown out, one is left to read electoral tea leaves and watch pundits opine on the “meaning” of the election. Perhaps the electorate voted the losing candidate out of office because of its anger at his allegedly unconstitutional actions, but, on the other hand, perhaps not. Perhaps the election was really about economic conditions, or national defense, or the challenger’s personal charm, or a scandal afflicting the incumbent’s political party, or any of a hundred other possibilities.

This hypothetical illustrates another critical difference between the electoral and the judicial process. A fundamental attribute of judicial decisions is that they come with a statement of reasons.<sup>69</sup> One knows not only *who* wins, but *why*; the process not only yields a result, but articulates a norm.<sup>70</sup> By contrast, even in the event that someone successfully used the electoral process to air a constitutional grievance, we could never really know it. The electoral process yields only a result. It does not tell us what caused that result, and usually there are so many contributing factors that it would be impossible to say that the election had decided a constitutional question. The electoral

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<sup>69</sup> In articulating the factors that constitute elements of a fair hearing, Judge Friendly remarked that he would put the requirement of a statement of reasons for the result “close to the top rather than near the bottom of the scale.” Henry J. Friendly, *Some Kind of Hearing*, 123 U. Pa. L. Rev. 1267, 1292 (1975).

<sup>70</sup> Cf. Richard H. Fallon, Jr., *Some Confusions about Due Process, Judicial Review, and Constitutional Remedies*, 93 Colum. L. Rev. 309, 371 (1993) (“Due process doctrine assumes that there is less of a systemic interest in ensuring correct fact-finding than in achieving judicial articulation and enforcement of generally applicable constitutional norms.”).

process does not articulate norms.

Closely related to this point is the further problem that the electoral process *does not operate within a system of precedent*. This problem follows, in part, from the last one: because elections are inscrutable and have no ascertainable meaning, they cannot set binding precedents for subsequent elections. Even if voters wanted to adhere to decisions on constitutional issues made via elections, and somehow agreed to do so, there would be no ascertainable decisions for voters to follow.

Moreover, of course, voters have no such agreement. Each election presents a new set of candidates and issues. Even assuming that, somehow, voters managed to turn some Members of Congress out of office for their perceived constitutional misbehavior, nothing guarantees a similar result the next time the issue arises. Political actors may, of course, be chastened by experience—no President, for example, has repeated President Franklin Roosevelt’s ill-fated attempt to pack the Supreme Court by adding additional Justices—but, with regard to constitutional provisions that are not susceptible of judicial enforcement, the political branches could repeat behavior even if, in the past, it had stirred up voter anger. A new electorate would have to decide what to do.

For this reason, elections are not capable of finally resolving constitutional questions and providing long-term redress for constitutional grievances in a fashion comparable to the judicial process. Of course, one might point out that, because courts may overrule past decisions, the judicial process never absolutely resolves constitutional questions either. Still, the role of precedent is obviously quite different in the two processes. A President or a Member of Congress contemplating action of a kind that the courts have held to be unconstitutional will have a quite strong expectation that the action will be unsuccessful. With regard to actions raising nonjusticiable constitutional questions that in the past led to electoral defeat (even assuming one could accurately identify the

causes of past electoral defeats), a politician may sense that the temper of the electorate has changed and that comparable action might not be electorally punished.

Finally, the electoral process is of course *majoritarian*: the electorate will pick the candidate that a majority of voters like best.<sup>71</sup> This is a virtue from the standpoint of democracy, but with regard to attempts to use the process to redress constitutional grievances, it poses a problem: the majority might like a candidate best precisely because of the candidate's willingness to ignore constitutional constraints on majoritarianism. A likely reason for politicians to violate constitutional norms in the first place is that they sense some political advantage in doing so.<sup>72</sup> Thus, while a charge of constitutional violation might have some "debate value" that could be used in the electoral process,<sup>73</sup> that debate value could be overwhelmed by the political popularity of the constitutional violation.

Moreover, whether or not a particular constitutional violation is in fact politically popular, the whole purpose of putting constraints into the Constitution was to put certain matters beyond majoritarian, political control.<sup>74</sup> The judicial process provides a forum to which plaintiffs can come with a claim of right that is independent of majority support. To require plaintiffs to resort to the

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<sup>71</sup> Actually, there are numerous impediments to the implementation of majoritarianism in the electoral process, such as the electoral college system in presidential elections, the disproportionate ability of wealthy voters to persuade their fellow citizens, and the possibility of a victory, in a three-way congressional or presidential race, of a candidate who would be the last choice for a majority of voters. But the point here is that the electoral process is predominantly majoritarian, unlike the judicial process.

<sup>72</sup> See Bickel, *supra* note \_\_\_\_, at 25 ("when the pressure for immediate results is strong enough and emotions ride high enough, men will ordinarily prefer to act on expediency rather than take the long view").

<sup>73</sup> See Mulhern, *supra* note \_\_\_\_, at 153 n. 202.

<sup>74</sup> *Marbury v. Madison*, 5 U.S. 137, 176 (1803); Doernberg, *supra* note \_\_\_\_, at 99-100; Dana S. Treister, *Standing to Sue the Government: Are Separation of Powers Principles Really Being Served*, 67 S. Cal. L. Rev. 689, 715 (1994).

political process is to require them to win current majoritarian support for a point that, if valid, should be conclusive whether it has such support or not.

This point, incidentally, demonstrates once again the vital importance of maintaining a clear distinction between real political question doctrine cases and bogus political question doctrine cases. The argument that plaintiffs should seek their remedy at the ballot box is, in fact, perfectly appropriate for the latter. Where government action is not subject to legal constraint (the hallmark of a bogus political question case), pure political struggle among competing forces legitimately determines the government's choice of action. The Constitution provides no answer to innumerable vital questions about the structure of our society, such as whether taxes should be high or low, whether the government should help farmers or let them battle market forces unaided, or whether the President should sign or veto any given bill. A plaintiff who goes to court over such a question is quite properly told to turn to the political process instead of the judicial one. The court is simply saying that the question presented is one that our legal system entrusts to unconstrained majoritarian decision. Thus, for example, the Tenth Circuit's comment that the farmer plaintiffs in *Schroder v. Bush* should seek relief "at the polling place, not the courts"<sup>75</sup> was exactly correct.

The appropriateness of such an argument in bogus political doctrine cases may, however, have the unfortunate consequence of causing courts to use the same argument in *real* political question doctrine cases, which present entirely different circumstances. The essence of a real political question case is that the plaintiff is seeking to enforce an actual legal constraint on government action. A court telling the plaintiff that his remedy lies "at the ballot box" is saying that plaintiff must attempt to use the electoral process to enforce a legal constraint on that very process.

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<sup>75</sup> 263 F.3d at 1171 (quoting district court's opinion).

The result is that plaintiffs are entitled to enforce constitutional constraints on political actions only if they can “convince a sufficient number of their fellow electors that elected representatives are delinquent,”<sup>76</sup> but the representatives may have taken the actions precisely because they were likely to win votes despite their violation of constitutional norms. Usually, we think of constitutional constraints as existing for the very purpose of reining in the political process in cases where short-term political expediency might cause government officials to take actions that deviate from our constitutional values.<sup>77</sup>

The use of the “political question” label for these two very different situations is therefore doubly unfortunate. It does more than simply lead to the application of an unnecessary layer of doctrine in those bogus political question cases that could be dismissed for failure to state a claim. It creates an inappropriate line of thinking that may spill over into the real political question cases. Courts accustomed to telling plaintiffs—rightly—they should be organizing electorally rather than litigating bogus political question cases may erroneously apply this same point in cases concerning legal constraints designed to protect plaintiffs from the results of the electoral process.

In any event, for all of the reasons stated above, the suggestion that voters might use the electoral process to remedy nonjusticiable constitutional grievances is inappropriate. The suggestion will often be entirely impractical, the electoral process provides no focused mechanism for raising legal questions, it leads to an inscrutable result, and, even if it is successful, it may need to be fought afresh every election cycle. Possibly worst of all, the majoritarian election process provides a poor mechanism for the enforcement of restraints on majoritarianism.

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<sup>76</sup> *Richardson*, 418 U.S. at 179.

<sup>77</sup> Bickel, *supra* note \_\_\_\_, at 23-28.



### *B. The Political Process as a Substitute for Judicial Remedies*

Perhaps, one might argue, the suggestions that voters may use the electoral process to remedy nonjusticiable constitutional grievances should not be taken quite so literally. Although courts have expressly referred to the remedy of “the ballot box” and the possibility of turning politicians out of office because of unconstitutional (but not judicially remediable) misbehavior, perhaps what courts really meant was that voters could attempt to obtain redress using the political process more generally, not specifically the electoral process.<sup>78</sup> Voters could simply agitate for change through legislation. Politicians might want to keep special-interest voters happy in the legislative process without testing their ultimate electoral strength.

Moreover, one might argue that the legislative process avoids some of the problems associated with the electoral process that were discussed above. In particular, the legislative process can be more focused and less inscrutable than the electoral process. Particular issues, such as whether the CIA’s budget should be published, can be brought to a clean, up-or-down vote. They need not always be entangled with other issues, as is inevitable in elections, and a particular legislative vote may provide a clear indication of the political judgment as to the constitutionality of the measure involved.

However, while the legislative process is different from the electoral process, it shares most of the problems noted above for the electoral process and adds at least one additional, very important problem not found in the judicial or electoral process. The electoral process, for all of its difficulties, is mandatory; elections are held at required intervals. The judicial process, too, has the vital

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<sup>78</sup> See, e.g., *Richardson*, 418 U.S. at 179 (referring to the plaintiff’s right to assert his views “in the political forum or at the polls”) (emphasis added).

characteristic that plaintiffs can invoke it as of right. As Chief Justice Marshall remarked in *Cohens v. Virginia*, “[t]he judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the Constitution. We cannot pass it by, because it is doubtful.”<sup>79</sup> The judiciary is obliged to give relief to a plaintiff who is entitled to it.<sup>80</sup>

There is, however, no guaranteed way to invoke the legislative process. Citizens can always ask for legislation, but there is no way to compel Congress to bring any matter to a vote. A court faced with a claim (in a properly posed case) that a statute is unconstitutional has a duty to rule on the claim—perhaps rejecting it, of course, but not ignoring it altogether. A legislature faced with a claim that it should change an existing statute because it is unconstitutional may choose to ignore the issue indefinitely.<sup>81</sup> Those making the claim would then be thrown back on the electoral process, with all of its attendant difficulties.

Moreover, the legislative process also, like the electoral process, lacks a system of precedent: what one Congress does, the next may undo. In addition, the legislative process, although capable of stating reasons for its actions, is not required to do so; Congress may pass a law with or without adopting official findings and purposes, and the legislature’s rejection of a law certainly does not necessarily imply a judgment as to its constitutional validity. Similarly, the legislative process *may* provide a clean up-or-down vote on a particular issue, but frequently it entangles many issues

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<sup>79</sup> *Cohens v. Virginia*, 19 U.S. 264, 404 (1821).

<sup>80</sup> Of course, one aspect of the political question doctrine is that, at least according to some, it affords courts discretion to decline to grant a remedy when they regard doing so as inexpedient. Moreover, as Henkin observed, courts may consider the demands of equity in deciding whether to grant certain forms of relief. But the point here is that the judiciary does not have, as the legislature does, a general discretion to do nothing in response to petitions for redress.

<sup>81</sup> *Cf.* Kramer, *supra* note \_\_\_, at 27 (noting that American colonists first challenged the Stamp Act by petitioning Parliament, but Parliament ignored the petitions and failed even to consider them).

together in a single bill, thus denying clear opportunities for resolution of particularized questions of constitutionality. And the legislative process, like the electoral process, is majoritarian in nature and can hardly be expected to serve as a good enforcement mechanism for those constitutional provisions that are intended to restrain majoritarianism.

One might argue—in fact, Justice Scalia has argued—that justiciability doctrines serve to distinguish those constitutional provisions that restrain majoritarianism by giving individuals rights against the majority from those constitutional provisions that grant rights to the people as a whole, to be exercised by a majority of the people. Justice Scalia (when a D.C. Circuit judge) argued that the doctrine of standing, with its rule against the litigation of generalized grievances, “is an essential means of restricting the courts to their assigned role of protecting minority rather than majority interests”<sup>82</sup> Where the majority, expressing its will through the political process, chooses to allow government behavior that involves no harm to individual interests, courts should, Justice Scalia claims, ignore any legal constraints that may be violated; indeed, the majority’s ability to choose to allow certain legal constraints to fall into desuetude is, he argues, one of the majoritarian process’s useful features.<sup>83</sup>

Of course, there is no guarantee that political questions will involve the kind of widely-shared injuries to which Justice Scalia’s argument is appropriate.<sup>84</sup> But even where they do, the argument

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<sup>82</sup> Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 *Suffolk Univ. L. Rev.* 881, 895 (1983).

<sup>83</sup> *Id.* at 896-97.

<sup>84</sup> Judge Nixon’s allegedly flawed removal, for example, was not a widely-shared injury. (Justice Scalia, it should be noted, made the argument with regard to standing doctrine, not the political question doctrine; the argument is invoked here only in an effort to see if it could support the suggestion that the electoral process may serve as a substitute for the judicial process in political question cases.)

still suffers from the same problem that was pointed out above with regard to the electoral process. The Constitution places certain things beyond majoritarian control; to suggest that the majority may choose when to obey constitutional constraints and when to ignore them drains those constraints of their basic purpose. The best interpretation of the Statement and Account Clause may or may not require the government to publish the CIA's budget, but it is a little hard to fathom what purpose the clause serves if it means no more than "publish that part of the budget which the Congress, acting through the normal political process, decides ought to be published." No constitutional provision is needed to tell Congress that it may publish such part of the budget as it likes; that is the default starting point under Congress's ordinary powers. Justice Scalia's argument turns certain constitutional constraints (the ones that, according to him, protect majority interests rather than individual interests) into admonitions that not only are merely hortatory, but also are pointless, in that, in his view, they do no more than redundantly confirm the majority's ability to do what it likes.

Moreover, the legislative process imposes numerous impediments to the ability of even a majority to work its will. The bicameral division of the legislature, the committee structure and the attendant power given to selected Members of Congress, the possibility of filibusters in the Senate, the ever-present press of business, and other obstacles to the passage of legislation considerably weaken the strength of the inference that if a statute that violates a constitutional provision remains on the books, the people must approve of it. Justice Scalia suggests that widely shared injuries (generalized grievances of the *Richardson* type) should be left to the political process for resolution because "[t]here is surely no reason to believe that [such injuries] would not receive fair consideration in the normal political process,"<sup>85</sup> but the obstacles imposed by the political process

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<sup>85</sup> Scalia, *supra* note \_\_\_\_, at 896.

may thwart the ability of even a majority to obtain something the Constitution was supposed to guarantee for it.

Thus, if by steering plaintiffs with nonjusticiable complaints to the electoral process, courts really meant the political process generally, including the legislative process, the result is not really better than if they meant the electoral process specifically. The general political process provides no mandatory way to raise issues; it does not operate within a system of precedent; its majoritarian nature suggests that, like the electoral process, it will not do a good job of enforcing constraints on majoritarianism; and the obstacles that the political process imposes mean that even a majority may not be able to navigate it successfully.

### *C. Implications for the Political Question Doctrine*

For these reasons, the argument that voters can use the electoral process to remedy constitutional violations should be banished from discussions of the political question doctrine. Even when used as a mere grace note to accompany more important arguments, it strikes a discordant tone. It represents an unfair appeal to our democratic instincts. Seeing the argument flash by in the brief form in which it is usually made, we are invited to think “ah, elections—voting—democracy—that must be good,” and to ignore the profound practical and theoretical difficulties that would lie in the path of any attempt to put the point to actual use. The fundamental differences between the judicial and the electoral processes mean that the ability to resort to the electoral process is not an appropriate substitute for judicial relief for constitutional violations.

Of course, this does not prove that the political question doctrine is wrong. The main point of this essay has merely been to refute one argument used in support of that doctrine. It may still be

that our Constitution does not permit judicial review of certain claims, even though it provides no adequate substitute for such review.

Still, thinking about what would actually happen if someone tried to use the electoral process to remedy a constitutional grievance perhaps provides an insight into the more general arguments over the validity of the political question doctrine. Defenders of the political question doctrine often focus on characteristics of the judicial and political branches of government that impact the suitability of the different branches for resolution of constitutional questions. Scholars and courts observe that the political branches have an institutional advantage with regard to certain questions, such as those that require extensive factfinding or choices between competing policies.<sup>86</sup> The judiciary, these defenders also note, has no monopoly on constitutional interpretation; the Constitution vests the President and Members of Congress with interpretive authority that makes the political branches suitable to enforce constitutional norms.<sup>87</sup>

The characteristic of the judiciary most prominently mentioned in these discussions is its political insulation and independence—a characteristic that is said to make the judiciary the appropriate branch to enforce some constitutional constraints, but not others.<sup>88</sup> Examination of the differences between the judicial and the electoral processes, however, brings out other, critical characteristics of the judiciary that strongly impact its suitability for the enforcement of constitutional constraints. These other characteristics—the mandatory nature of the judicial process, its focus on precisely stated issues, its articulation of reasons for decisions, and its use of

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<sup>86</sup> *E.g.*, Barkow, *supra* note \_\_\_\_, at 240, 301-02, 329.

<sup>87</sup> Mulhern, *supra* note \_\_\_\_, at 124-28.

<sup>88</sup> Barkow, *supra* note \_\_\_\_, at 325-28.

precedent—all contribute to the way in which judicial review serves to enforce the Constitution.

These other characteristics of judicial review are vital to a system in which constitutional constraints on political action are real constraints and not mere hortatory admonitions. The mandatory nature of the judicial process is obviously vital in that it creates a forum in which constitutional grievances can be aired and in which official decision makers must respond to them.<sup>89</sup> The focused nature of judicial review ensures that constitutional grievances are not lost because of the entanglement with other issues that would inevitably occur in the electoral, and might sometimes occur in the political, processes. The statement of reasons that accompanies judicial decisions ensures that the process articulates constitutional norms so that both the public and political actors can know what constraints the Constitution imposes on government behavior. The system of precedent ensures that once a constitutional norm is established, it will tend to remain established; while the force of precedent is of course not absolute, it does mean that constitutional victories once won do not have to be refought every election cycle.

These characteristics of judicial review, and their absence from the electoral and political process, must be considered by defenders of the political question doctrine. Defenders need to explain why it is appropriate to entrust the enforcement of constitutional constraints on government behavior to a process that not only, because of its majoritarian nature, seems a poor one for enforcing constraints on majoritarianism, but that lacks certain characteristics that play an important role in

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<sup>89</sup> It is for this reason that defenders of the political question doctrine have a good point when they observe that other restrictions on justiciability, such as the standing requirement, may prevent certain constitutional questions from ever coming before the judiciary in a proper Article III case. *E.g.*, Mulhern, *supra* note \_\_\_\_, at 119-21. A full answer to this point would be too long for this short essay to contain, but the brief response is that there are problems with these other justiciability doctrines as well. *See, e.g.*, Mark Tushnet, *The Sociology of Article III: A Response to Professor Brilmayer*, 93 Harv. L. Rev. 1698, 1706 (1980) (arguing for a “barebones” approach to standing doctrine); Henry Monaghan, *Constitutional Adjudication: the Who and the When*, 82 Yale L.J. 1363 (1973).

enforcing any constraints on government behavior, even constraints that might have majoritarian support. The political question doctrine cuts constitutional constraints off from the process best designed to enforce constraints.

## CONCLUSION

In justifying what he called the “deviant”<sup>90</sup> and “counter-majoritarian”<sup>91</sup> institution of judicial review, Bickel suggested that the courts’ insulation from politics puts them in a good position to enforce enduring values when such values conflict with presently expedient measures adopted by political actors.<sup>92</sup> This feature of judicial review—the Constitution’s placement of most important societal decisions in the hands of politically accountable actors, subject to review for constitutionality by judges insulated by life tenure—is indeed the chief brilliance of our constitutional system. But there is more to it than that. Judicial review works not only because of the political insulation of judges, but because of the distinctive nature of the judicial process: because the judicial process is focused, because it is mandatory, because it articulates norms explicitly, and because it operates within a system of precedent. These special characteristics of judicial review, not found in the electoral or legislative processes, impose an additional burden of explanation on those who would defend the way the political question doctrine bars judicial review of constitutional issues. They also demonstrate why defenders of the political question doctrine should not suggest, even as a minor argument, that the electoral or legislative process provides an adequate substitute for judicial review.

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<sup>90</sup> Bickel, *supra* note \_\_\_\_, at 18.

<sup>91</sup> *Id.* at 16.

<sup>92</sup> *Id.* at 23-28.