
POLITICAL QUESTIONS, PUBLIC RIGHTS, AND SOVEREIGN IMMUNITY

Since the very early republic, federal judges have considered “political questions” beyond the scope of Article III.¹ Not until 1962, however, did the Supreme Court attempt to congeal that rhetoric into a comprehensive rule. In *Baker v. Carr*,² the Court held that voters had a cause of action under the Equal Protection Clause to challenge a state representative apportionment scheme.³ In order to reach that result, however, Justice William Brennan needed at least four of his colleagues to agree that the case was justiciable. This was no small feat; the venerable Justice Felix Frankfurter held the opposite view, and had made it known through a lengthy memo to the other Justices.⁴ Ultimately, Justice Brennan won his majority by way of an extensive survey of the “political question doctrine,” supposedly illustrating that it was not at play.⁵

For the next half century, *Baker*’s distillation provided definitive rule language to judges attempting to detect nonjusticiable political questions.⁶ The opinion combined a hodgepodge of precedents into six basic categories. The first category indicates nonjusticiability where one of the “political department[s]” has “a textually demonstrable constitutional” power to resolve the controversy.⁷ The second category deems courts incapable of resolving questions without “judicially discoverable and manageable standards” for doing so.⁸ Cases in the third category cannot be heard because they require some “initial policy determination” beyond judicial discretion.⁹ Deciding a case from the fourth category would “express[] lack of the respect due coordinate branches.”¹⁰ In the fifth category, some “political decision already made” requires “unquestioning adherence” from the courts.¹¹ And fi-

¹ See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803) (“Questions, in their nature political . . . can never be made in this court.”).

² 369 U.S. 186 (1962).

³ *Id.* at 187–88, 237.

⁴ See Tara Leigh Grove, *The Lost History of the Political Question Doctrine*, 90 N.Y.U. L. REV. 1908, 1960 (2015).

⁵ *Id.* at 1961–62; see also *Baker*, 369 U.S. at 208–37 (describing the doctrine in detail).

⁶ See, e.g., *Vieth v. Jubelirer*, 541 U.S. 267, 277–78 (2004) (plurality opinion); *Nixon v. United States*, 506 U.S. 224, 228 (1993); *INS v. Chadha*, 462 U.S. 919, 941 (1983); *Powell v. McCormack*, 395 U.S. 486, 518–19 (1969); *Hopson v. Kreps*, 622 F.2d 1375, 1378 & n.2 (9th Cir. 1980); *Sanders v. McClellan*, 463 F.2d 894, 897 & n.5 (D.C. Cir. 1972); cf. *Zivotofsky ex rel. Zivotofsky v. Clinton (Zivotofsky I)*, 132 S. Ct. 1421, 1437 (2012) (Breyer, J., dissenting).

⁷ *Baker*, 369 U.S. at 217.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

nally, judgment on the sixth category of cases would produce “embarrassment from multifarious pronouncements” among the three branches.¹² Despite dutifully citing this passage, however, federal judges have found *Baker* notoriously difficult to apply.¹³

*Zivotofsky ex rel. Zivotofsky v. Clinton*¹⁴ (*Zivotofsky I*) exposed that difficulty. Along *Zivotofsky I*'s tortured journey through the courts, a deep division emerged among the federal bench regarding the political question doctrine's scope and justifications.¹⁵ The judges fell into two basic camps. One group maintained that the political question doctrine created a jurisdictional barrier, probably attributable to a controversy's subject matter.¹⁶ Despite *Baker*'s distinction between justiciability and jurisdiction,¹⁷ these judges observed that courts have tended to conclude they lack subject matter jurisdiction after finding a case nonjusticiable.¹⁸ The opposing camp, however, saw a “[c]rucial [d]istinction” between justiciability and jurisdiction.¹⁹ These judges contended that “[t]he political question doctrine embraces a limited exception” to the duty federal courts generally have to exercise the full scope of their authority.²⁰ Though the first *Baker* category — and possibly the second — concerned the limits of this authority, the other four or five categories merely made hearing a case inappropriate for reasons of “prudence” or judicial “[in]competence.”²¹

The Supreme Court's ultimate resolution in *Zivotofsky I* walked the line between these factions. The Court first confirmed the frequently invoked maxim that “the Judiciary has a responsibility to decide cases properly before it, even those it ‘would gladly avoid.’”²² It

¹² *Id.*

¹³ See, e.g., *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 803 n.8 (D.C. Cir. 1984) (Bork, J., concurring) (“That the contours of the doctrine are murky and unsettled is shown by the lack of consensus about its meaning among the members of the Supreme Court and among scholars.” (citations omitted)).

¹⁴ 132 S. Ct. 1421 (2012).

¹⁵ See *Zivotofsky ex rel. Zivotofsky v. Sec'y of State*, 610 F.3d 84, 84–88 (D.C. Cir. 2010) (Edwards, J., statement regarding the court's denial of en banc review); *Zivotofsky ex rel. Zivotofsky v. Sec'y of State*, 571 F.3d 1227, 1230–33 (D.C. Cir. 2009), *vacated sub nom. Zivotofsky I*, 132 S. Ct. 1421 (2012); *id.* at 1233–40 (Edwards, J., concurring); *Zivotofsky ex rel. Zivotofsky v. Sec'y of State*, 511 F. Supp. 2d 97, 102–07 (D.D.C. 2007); *Zivotofsky ex rel. Zivotofsky v. Sec'y of State*, Nos. 03-1921, 03-2048, 2004 WL 5835212, at *3–4 (D.D.C. Sept. 7, 2004), *vacated on other grounds sub nom. Zivotofsky ex rel. Ari Z. v. Sec'y of State*, 444 F.3d 614 (D.C. Cir. 2006).

¹⁶ See, e.g., *Zivotofsky*, 571 F.3d at 1232–33; *Zivotofsky*, 511 F. Supp. 2d at 107.

¹⁷ See *Baker*, 369 U.S. at 198–200.

¹⁸ See *Zivotofsky*, 571 F.3d at 1233 n.3.

¹⁹ *Id.* at 1236 (Edwards, J., concurring).

²⁰ *Id.* at 1235 (citing *New Orleans Pub. Serv., Inc. v. Council of New Orleans*, 491 U.S. 350, 358 (1989)).

²¹ *Zivotofsky I*, 132 S. Ct. 1421, 1432 (2012) (Sotomayor, J., concurring in part and concurring in the judgment).

²² *Id.* at 1427 (majority opinion) (quoting *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821)).

then identified the political question doctrine as “a narrow exception to that rule.”²³ Nevertheless, the Court described nonjusticiability as a lack of “*authority* to decide the dispute.”²⁴ The Court then listed only the first two of the six political question categories from *Baker* in presenting the doctrine — conspicuously omitting those categories most identified with prudence.²⁵ The Court ultimately denied that the doctrine applied, holding that Zivotofsky’s case simply asked it to interpret a statute, which is “what courts do.”²⁶

This disagreement on the bench reflected a larger debate ongoing in the academy for decades. Indeed, scholars examining the precedent have sometimes identified two *separate* doctrines altogether. One version, the “classical” doctrine, describes a firm barrier to judicial review rooted in constitutional text.²⁷ The other, the “prudential” doctrine, merely acknowledges the courts’ limitations in confronting complex issues of popular government.²⁸ Professors Alexander Bickel and Herbert Wechsler famously divided along this axis, concentrating academic debate on just “how ‘principled’ use of the doctrine must be.”²⁹ Within this debate, virtually every commentator has noted the dissonance between the political question doctrine and the judicial review power.³⁰ Not surprisingly, that perceived inconsistency has led some to question whether the doctrine actually exists at all, and argue that perhaps it shouldn’t even if it does.³¹

Those who thought the Court’s omission of *Baker*’s prudential factors in *Zivotofsky I* validated the classical doctrine and discarded the prudential doctrine found support two years later in *Lexmark International, Inc. v. Static Control Components, Inc.*³² Writing for a unanimous Court, Justice Scalia bluntly undermined prudence’s relevance to Article III standing. He observed the “tension” between the prudential standing doctrine and the Court’s “recent reaffirmation” that Article III tribunals have a “virtually unflagging” duty to “hear and decide’

²³ *Id.*

²⁴ *Id.* (emphasis added).

²⁵ *Id.* at 1427–28.

²⁶ *Id.* at 1430.

²⁷ 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, 248–53 (2002).

²⁸ *Id.* at 253–58.

²⁹ Martin H. Redish, *Judicial Review and the “Political Question”*, 79 NW. U. L. REV. 1031, 1031 (1985); *id.* at 1031–32, 1031 n.3; see also ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* (1962); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

³⁰ See, e.g., Barkow, *supra* note 27, at 242.

³¹ See Louis Henkin, *Is There a “Political Question” Doctrine?*, 85 YALE L.J. 597, 597, 600–01 (1976); Redish, *supra* note 29, at 1033; see also Barkow, *supra* note 27, at 267 & nn.156–57 (describing and compiling scholarly criticism).

³² 134 S. Ct. 1377 (2014).

cases within [their] jurisdiction.”³³ The Court upheld that duty in *Lexmark* by declaring that it “cannot limit a cause of action that Congress has created merely because ‘prudence’ dictates.”³⁴ *Lexmark* therefore confirmed what *Zivotofsky I* hinted at: the Roberts Court does not consider prudence a legitimate hindrance to Article III power. With prudence now apparently out of the picture, however, scholars have questioned the political question doctrine’s continued import. Indeed, some have dubbed it a nullity that almost invariably leads to judicial review on the merits³⁵ and aggrandizes the federal judiciary in the process.³⁶

This Note argues that classical political question doctrine does in fact identify a principled limit to Article III power. In short, the doctrine disallows litigation when the Constitution’s three-branch structure combines with the common law principle of sovereign immunity to prevent the federal courts from establishing *personal* jurisdiction over another branch. Part I examines the early political question cases, illustrating how jurists first fashioned the political question doctrine as a necessary limitation on judicial review. Part II tracks how prudential political question doctrine emerged as an unnecessary and misguided innovation on that original idea. Part III then backtracks to connect the classical political question doctrine with the public rights doctrine of administrative law. That Part shows the public rights doctrine as merely extending the political question doctrine to the administrative sphere. It then applies the sovereign immunity framework at the core of public rights doctrine to the political question doctrine. In so doing, that Part illustrates how the political branches enjoy certain unwaivable grants of sovereign agency over which the federal courts may not tread. Part IV uses this principle to resolve two modern controversies: how to enforce the Natural Born Citizen Clause³⁷ and the Origination Clause.³⁸ Part V concludes.

I. THE BIRTH OF POLITICAL QUESTION DOCTRINE AND JUDICIAL REVIEW

Given the obvious friction between the political question doctrine and judicial review, it may be surprising to find their roots in a shared pot. The seedling case, of course, was *Marbury v. Madison*.³⁹ The

³³ *Id.* at 1386 (quoting *Sprint Commc’ns, Inc. v. Jacobs*, 134 S. Ct. 584, 591 (2013)).

³⁴ *Id.* at 1388.

³⁵ Gwynne Skinner, *Misunderstood, Misconstrued, and Now Clearly Dead: The “Political Question Doctrine” as a Justiciability Doctrine*, 29 J.L. & POL. 427, 428–32, 480 (2014).

³⁶ Grove, *supra* note 4, at 1973.

³⁷ U.S. CONST. art. II, § 1, cl. 5.

³⁸ *Id.* art. I, § 7, cl. 1.

³⁹ 5 U.S. (1 Cranch) 137 (1803).

question was whether the Supreme Court could issue a writ of mandamus compelling the Secretary of State to deliver William Marbury's commission as a justice of the peace for the District of Columbia.⁴⁰ Chief Justice John Marshall — who, as former Secretary of State, had not quite gotten around to delivering Marbury's papers⁴¹ — undertook a famously circuitous route to dismissal. Before deciding that the Court lacked mandamus power in this instance,⁴² Chief Justice Marshall questioned whether mandamus was enough in the first place.⁴³ He figured that mandamus could not issue if the Secretary, acting as the President's agent, had discretion to withhold the commission.⁴⁴ Finding such discretion would have ended the case because “[q]uestions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made” in the courts.⁴⁵ The Chief Justice concluded, however, that the Secretary did not have the required discretion,⁴⁶ and the rest is history.

The judicial review power would lie dormant for the next fifty years,⁴⁷ but the political question doctrine matured substantially in the meantime. Indeed, as the country expanded, the doctrine proved indispensable to settling property disputes involving federal land acquisitions. In *Foster v. Neilson*,⁴⁸ Chief Justice Marshall invoked the doctrine again; this time, it was dispositive. Foster and Neilson both claimed title to the same 3000 arpents⁴⁹ near the Mississippi River.⁵⁰ Resolving their dispute required the Court to determine whether Spain had maintained possession of the land in 1804, or if instead the United States had acquired it from France in 1803.⁵¹ The Court found, however, that the political branches had already resolved that issue through law and international discourse, leaving only one option for the judiciary.⁵²

⁴⁰ See *id.* at 153–54.

⁴¹ GORDON S. WOOD, *EMPIRE OF LIBERTY* 440–41 (2009).

⁴² See *Marbury*, 5 U.S. (1 Cranch) at 180.

⁴³ See *id.* at 162–64.

⁴⁴ See *id.* at 165–66.

⁴⁵ *Id.* at 170.

⁴⁶ See *id.* at 173.

⁴⁷ See, e.g., Barkow, *supra* note 27, at 321 (“Between *Marbury* in 1803 and *Dred Scott* in 1856, the Supreme Court did not invalidate a single federal act.”).

⁴⁸ 27 U.S. (2 Pet.) 253 (1829), *overruled in part* by United States v. Percheman, 32 U.S. (7 Pet.) 51 (1833).

⁴⁹ An “arpent” is an archaic unit — not quite one acre — used to measure land in French North America. *Arpent*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/arpent> [https://perma.cc/TFQ2-BB27].

⁵⁰ *Foster*, 27 U.S. (2 Pet.) at 254–55.

⁵¹ *Id.* at 300–04.

⁵² See *id.* at 307. Not surprisingly, Congress had annulled Spain's land grants in the disputed territory. *Id.* at 313. This doomed Foster's claim. *Id.* at 317.

The same issue returned to the Court almost a decade later in *Garcia v. Lee*.⁵³ The new Chief Justice, Roger Taney, made plain that border disputes raised “question[s] for the political departments” and that “the courts of the United States were bound to regard the boundary determined on by them as the true one.”⁵⁴ Chief Justice Taney described the issue in separation of powers terms: though courts had dominion over resolving claims to real property, passing on the determinations of the other two branches regarding sovereign borders “would . . . subvert[] those principles which govern the relations between the legislature and judicial departments, and mark the limits of each.”⁵⁵

In a similar way, the Court employed the doctrine to protect the President’s unilateral power to recognize foreign sovereigns. In *Williams v. Suffolk Insurance Co.*,⁵⁶ the Court relied on the political question doctrine to determine who should pay for two schooners seized by the Buenos Ayrean government while engaged in commerce near the Falkland Islands.⁵⁷ Much like it had done in the cession cases above, the Court saw its hands tied by the President’s determinations of foreign sovereignty.⁵⁸ Without this rule, the different branches might disagree on important questions of foreign affairs, a “principle so unwise, and so destructive of national character[,]” that “[n]o well regulated government has ever sanctioned” it.⁵⁹

Though it is fair to describe *Foster*, *Garcia*, *Williams*, and similar cases as merely establishing rules of decision based on coordinate branch action,⁶⁰ the significance of that point is worth exploring. What part of Article III compels this result? Indeed, given that Chief Justice Marshall asserted the Court’s power to interpret and even *nullify* law, he might have felt equally justified in scrutinizing the various real property transactions at issue in *Foster*. Had he done so, the *Williams* court might have endeavored to independently adjudicate the issue of which government controlled the Falklands. After all, sovereignty is — at bottom — a legal conclusion regarding the possession and property rights of peoples and governments.⁶¹ But Chief Justices

⁵³ 37 U.S. (12 Pet.) 511 (1838).

⁵⁴ *Id.* at 516.

⁵⁵ *Id.* at 517–18.

⁵⁶ 38 U.S. (13 Pet.) 415 (1839).

⁵⁷ *See id.* at 419.

⁵⁸ *Id.* at 420.

⁵⁹ *Id.*

⁶⁰ *See Grove*, *supra* note 4, at 1917–24.

⁶¹ *Cf. United States v. Rice*, 17 U.S. (4 Wheat.) 246, 254 (1819) (“By the conquest and military occupation of Castine, the enemy acquired that firm possession which enabled him to exercise the fullest rights of sovereignty over that place. The sovereignty of the United States over the territo-

Marshall and Taney also believed that the Constitution left certain decisions to legislative and executive judgment. Necessarily, then, some matters could not come into court without collapsing Articles I and II into Article III.

That conclusion makes much more sense in historical context. Indeed, though today we view judicial review as the rule and political question doctrine as the exception, that was not the case in the young republic. Early Americans distrusted courts, and the move to make judges politically accountable was already underway.⁶² Even the Supreme Court, though insulated from electoral process, did not rise above politics. The first Chief Justice, John Jay, also served simultaneously as Secretary of State for a short time.⁶³ And Chief Justice Marshall himself had a political target on his back during the Jefferson Administration, having served as a proud Federalist in both the Adams Administration and the Congress.⁶⁴ Thus, though judicial review was not all that far-fetched in America's innovative constitutional arrangement, its countermajoritarian character weighed even more heavily against its exercise in the fledgling Union than it does today.⁶⁵

If the major difference between federal judges and other politicians was accountability, the major difference between judicial and political power was that the courts had neither initiative nor enforcement capacities.⁶⁶ The Court might thus have respected coordinate branch decisions out of loyalty or fear. Regardless, it certainly benefited from identifying the areas where even traditional litigation between private parties over land or insurance money might run afoul of the nation's elected leaders acting in their constitutional roles.

In this way, political question doctrine and judicial review were *both* necessary to fix the status of the courts in the tripartite system. Judges had to respect the Constitution above all else, and therefore could not sanction its violation by Congress or the President.⁶⁷ But they could not allow private citizens to litigate against constitutionally delegated political discretion either. Accordingly, political question doctrine as understood in the early republic sought to identify cases

ry was, of course, suspended, and the laws of the United States could no longer be rightfully enforced there . . .").

⁶² WOOD, *supra* note 41, at 400–01, 412, 452.

⁶³ *Id.* at 414.

⁶⁴ *Id.* at 423, 435.

⁶⁵ See WOOD, *supra* note 41, at 447.

⁶⁶ THE FEDERALIST NO. 78 (Alexander Hamilton) (Clinton Rossiter ed., 2003) ("The judiciary . . . can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL but merely judgment . . .") *Id.* at 464.)

⁶⁷ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 178–79 (1803) ("Could it be the intention of those who gave this power, to say that, in using it, the constitution should not be looked into? . . . This is too extravagant to be maintained." *Id.* at 179.)

that implicitly or explicitly challenged the judgment, rather than the authority, of federal officials. As the next section shows, however, later jurists would exercise abundant prudence at the expense of their own constitutional mandate.

II. OF POLITICS AND PRUDENCE

The next phase of the political question doctrine's development arose from much more dramatic circumstances than the preceding cases. In 1842, Rhode Island was in turmoil. Operating under its colonial charter from 1663 had severely restricted the state's electorate.⁶⁸ Amidst the post-Jacksonian democratic fervor, reform was in the air.⁶⁹ But those seeking change decided that, rather than work from within, they would form a whole new government under a "People's Constitution."⁷⁰ The potential for violent conflict between the rebels⁷¹ and the old guard seemed remote, but President John Tyler eventually sent federal troops to Rhode Island anyway to keep the situation in check.⁷² Eventually it all blew over.⁷³

Seven years later, a trespass action between one of the rebel leaders and an officer of the establishment government reached the Supreme Court. In *Luther v. Borden*,⁷⁴ plaintiff Martin Luther claimed that his house had been broken into by the defendant, Luther M. Borden.⁷⁵ Borden justified his actions under color of law.⁷⁶ Chief Justice Taney soon recognized that to entertain Luther's complaint he would have to decide which faction legitimately governed Rhode Island in 1842.⁷⁷ Again, the Chief Justice might have seen this as a somewhat uncommon but nonetheless necessary judicial exercise, vital to resolving a trespass case. Instead, he saw demons around every corner. On Chief Justice Taney's estimation, finding that the establishment government was illegitimate would have overturned every action of that government — legislation, taxation, and spending of all kinds.⁷⁸ Thankfully, he reasoned that the question was really one of state law that the

⁶⁸ DANIEL WALKER HOWE, WHAT HATH GOD WROUGHT 599–600 (2007).

⁶⁹ *Id.*

⁷⁰ *Id.* at 600.

⁷¹ The episode has gone down in history as the "Dorr Rebellion," or alternatively, the "Dorr War," after the movement's leader, Thomas Dorr. *Id.* at 599.

⁷² *Id.* at 601–02.

⁷³ *Id.* at 601.

⁷⁴ 48 U.S. (7 How.) 1, 34 (1849).

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.* at 38–39.

⁷⁸ *Id.*

Rhode Island Supreme Court had already answered for him.⁷⁹ He needed only to defer and it would all go away.

Yet Chief Justice Taney did not stop there. Indeed, he went on expounding the case's difficulties in several more pages of dicta. Among his comforts were the political tradition of adopting and amending state constitutions, as well as the U.S. Constitution's Guarantee Clause.⁸⁰ He observed that in matters of constitutional legitimacy, political bodies had always led and judicial bodies had always followed.⁸¹ Moreover, he thought that the Guarantee Clause gave *Congress* the power to decide the legitimacy of state governments by seating their delegates.⁸² Since the rebellion was so short-lived that Congress never had occasion to do so, its statutory instruction to the President to quell insurrection in such instances bound the Court as well.⁸³

Though Chief Justice Taney's dicta comported with the earlier political question cases by identifying some textual hook to frustrate jurisdiction, *Luther* ultimately blazed the trail for the doctrine's prudential form. Indeed, the *Luther* Court showed substantial concern for its own *institutional capacity* vis-à-vis the other branches.⁸⁴ Moreover, it declared itself incapable of carrying out a constitutional duty committed not to the President or Congress, but to the "United States."⁸⁵

Thus, when the Guarantee Clause came under direct scrutiny half a century later, the Court claimed merely to follow precedent in dismissing a case on essentially prudential grounds.⁸⁶ *Pacific States Telephone & Telegraph Co. v. Oregon*⁸⁷ concerned Oregon's decision to give voters initiative and referendum power.⁸⁸ After determining that the case boiled down to the meaning of "Republican Form of Government" in the Guarantee Clause, the Court described the "inconceivable expansion" of the judiciary and "ruinous destruction" of Congress that would result if it could interpret that provision.⁸⁹ That discussion mirrored Chief Justice Taney's "parade of horrors" from *Luther*, focusing on all the government actions that would supposedly come undone

⁷⁹ *Id.* at 40.

⁸⁰ U.S. CONST. art. IV, § 4 ("The United States shall guarantee to every State in this Union a Republican Form of Government . . .").

⁸¹ *Luther*, 48 U.S. (7 How.) at 39.

⁸² *Id.* at 42.

⁸³ *Id.* at 43.

⁸⁴ *Id.* at 42–43; see also Barkow, *supra* note 27, at 256–57.

⁸⁵ U.S. CONST. art. IV, § 4; see *Luther*, 48 U.S. (7 How.) at 47.

⁸⁶ *Pac. States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118, 133 (1912).

⁸⁷ 223 U.S. 118.

⁸⁸ *Id.* at 133–34.

⁸⁹ *Id.* at 141.

through finding that Oregon's government was no longer republican.⁹⁰ Thus, rather than examining the merits, the Court reasoned that it had no jurisdiction because Congress had seated Oregon's delegation consistently since the state had adopted the initiative and referendum.⁹¹ According to the Court, this congressional acquiescence affirmed the republican character of Oregon's government.⁹² It was a short leap from *Luther* and *Pacific States* to *Coleman v. Miller*,⁹³ in which the Court cited only a lack of judicial capacity as preventing it from setting a time limit on states ratifying a constitutional amendment.⁹⁴ Importantly, the Court was not satisfied to rely on the text of the Constitution, which gives Congress the power to propose amendments and make laws necessary and proper to that end.⁹⁵ Doing so would have resolved the matter, as Congress had *not* set a time limit in this instance.⁹⁶ The Court instead declared a political question to reach the same result.

Pacific States and *Coleman* stray from constitutional language in a way that cases like *Foster* and *Williams* do not. Regarding the Guarantee Clause, the idea that seating a congressional delegation involves some review of a state government's structure smacks of legal fiction. *Pacific States* — like *Luther* before it — fails to explain how the refusal to seat legislators actually guarantees republican government to a state's populace. On the contrary, Article IV contains the Constitution's "treaty" provisions — those that restrict state sovereignty under the federal charter.⁹⁷ Read next to the Full Faith and Credit Clause and the Privileges and Immunities Clause, the Guarantee Clause more logically establishes a mutual defense compact. Were a state to fall under authoritarian control, the rest of the Union would be obligated to act. Of course, Congress has some role in ensuring republican government when it admits new states. But section 4 refers to "Invasion" and "domestic Violence," not constitutional amendment.⁹⁸

So too, scrutinizing a state law — whether constitutional or statutory — for consistency with the federal Constitution is quintessential ju-

⁹⁰ Barkow, *supra* note 27, at 257; *see also Pac. States*, 223 U.S. at 141–42.

⁹¹ *See Pac. States*, 223 U.S. at 150–51; *see also* Barkow, *supra* note 27, at 255–58 (discussing the increasing importance of prudence in the doctrine starting with *Luther* and *Pacific States*).

⁹² *See Pac. States*, 223 U.S. at 150.

⁹³ 307 U.S. 433 (1939).

⁹⁴ *Id.* at 452–53; *see also* Barkow, *supra* note 27, at 260 ("What is interesting about *Coleman* is the extent to which the Justices relied on prudential factors alone to reach their conclusion.").

⁹⁵ U.S. CONST. art. V; *id.* art. I, § 8, cl. 18.

⁹⁶ *Coleman*, 307 U.S. at 452.

⁹⁷ U.S. CONST. art. IV, §§ 1–2.

⁹⁸ *Id.* § 4.

dicial review.⁹⁹ Within that framework, judicial refusal to enforce a law has never required catastrophic nullification of all government action. Indeed, if we accept judicial review as part of the constitutional system, then the Guarantee Clause preserves a role for the federal courts to delimit republican government as expressed through law.

Coleman, for its part, looks something like an anti-*Foster* in the way that the Court relied on prudential abstention despite an available statutory rationale. The *Coleman* opinion thus seems to cut directly against Chief Justice Marshall's understanding of the line between judicial review and political questions. Rather than just say that Congress had the power to set a time limit and had not done so, the Court promoted the idea that political question doctrine rested, first and foremost, on a need for finality and a "lack of satisfactory criteria for a judicial determination."¹⁰⁰

As mentioned above, *Zivotofsky I* appears to reject the prudential doctrine as expounded in cases like *Pacific States* and *Coleman*. But scholars who claim that the political question doctrine is now dead as a result misapprehend the modern relevance of early opinions that focused on constitutional text. Seeing the continued salience of Chief Justice Marshall's limiting principle for judicial review, however, requires understanding exactly what — if not prudence — supports that principle. The next section rediscovers sovereign immunity as the reason for denying jurisdiction over political questions.

III. THE PUBLIC RIGHTS CONNECTION

The problem with most accounts of the political question doctrine is that they leave out a critical strand of its development: its extension to the administrative state. By tracing that line of descent, this Part finds the forgotten link between the political question doctrine and common law sovereign immunity. Considered in light of this pedigree, the political question doctrine does render cases nonjusticiable for lack of jurisdiction — *personal* jurisdiction.

A. From Congress to Customs Agents

The next important political question case after *Luther* does not appear in the *Baker* survey at all. In *Den ex rel. Murray v. Hoboken Land & Improvement Co.*¹⁰¹ — popularly known as "*Murray's Lessee*" — the Supreme Court threw out a complaint when it discovered that granting the requested relief would subvert lawful *adminis-*

⁹⁹ See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 178 (1803) ("This is of the very essence of judicial duty."); see also *Zivotofsky I*, 132 S. Ct. 1421, 1430 (2012) ("This is what courts do.").

¹⁰⁰ *Coleman*, 307 U.S. at 454–55.

¹⁰¹ (*Murray's Lessee*), 59 U.S. (18 How.) 272 (1856).

trative process. It all started when the Treasury Department audited Samuel Swartwout — a customs agent for the Port of New York — and found that he had embezzled roughly \$1.3 million.¹⁰² The federal government placed a lien on Swartwout's properties, and a court marshal sold a tract of Swartwout's land to the Hoboken Land and Improvement Company to help satisfy his debt.¹⁰³ John Den, who leased that same tract from James B. Murray, went to court claiming title under the theory that Swartwout had sold the property to Murray several weeks before the marshal sold it to Hoboken Land.¹⁰⁴ Den did not contend that Treasury had botched the job.¹⁰⁵ Instead, he argued that the entire audit and lien process was unconstitutional because it vested judicial power in the executive branch, thereby subverting due process.¹⁰⁶

The Court traced the Due Process Clause back to the laws of England and Magna Carta, finding evidence of similar executive process against “the body, lands, and goods of the king's debtor.”¹⁰⁷ Comparable practices existed in the colonies, the states, and the young federal government.¹⁰⁸ But Article III had brought “controversies to which the United States is a party”¹⁰⁹ within the class of “subject-matter” susceptible to adjudication before the Article III courts.¹¹⁰ The Court therefore wondered whether this particular process of collecting from revenue agents was “necessarily, and without regard to the consent of congress, a judicial controversy.”¹¹¹ Had the Constitution outlawed this tradition for dealing with public servants like Swartwout?

The Court did not believe so.¹¹² Den had assumed that “the entire subject-matter is or is not . . . a judicial controversy” regardless of congressional will.¹¹³ But he had assumed wrongly, because “[t]hrough a private person . . . is directly responsible for his acts to the proper judicial tribunals[,] . . . a public agent . . . cannot be made responsible in a judicial tribunal for obeying the lawful command of the government; and the government itself, which gave the command, cannot be

¹⁰² *Id.* at 274–75. Evidently, President Andrew Jackson — who pioneered the use of the spoils system to mobilize electoral support — had personally selected Swartwout for this post. HOWE, *supra* note 68, at 334.

¹⁰³ *Murray's Lessee*, 59 U.S. (18 How.) at 274–75.

¹⁰⁴ *Id.* at 274.

¹⁰⁵ *Id.* at 275.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 277.

¹⁰⁸ *Id.* at 278–79.

¹⁰⁹ *Id.* at 280.

¹¹⁰ *Id.* at 281.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.* at 283.

sued without its own consent.”¹¹⁴ Simply put, the sovereign power of the federal government shielded it from defending its treatment of Swartwout in court. It would appear before the bench on its own terms, if at all.¹¹⁵

The Court explained this outcome as following from principles of direct and collateral sovereign immunity. First it explained that “there are matters, involving public rights [between citizens and the government] . . . which congress may or may not bring within the cognizance of the courts of the United States.”¹¹⁶ So too, “even in a suit between private persons to try a question of private right, the action of the executive power, upon a matter committed to its determination by the constitution and laws, is conclusive.”¹¹⁷ The first principle clearly derives from sovereign immunity — the idea that a sovereign government cannot be sued without its consent.¹¹⁸ But the Court also needed the second principle to resolve *Murray’s Lessee* because Den was suing Hoboken Land, *not* the federal government. If such actions were permitted, the exception would swallow the rule. So the Court recognized a collateral immunity as well.

Most importantly for our discussion, the Court sat its sovereign immunity justification atop the political question case law. It described the cession cases — *Foster* and its progeny — as “striking instance[s]” of this rule in action.¹¹⁹ Specifically, the Court referenced *Burgess v. Gray*,¹²⁰ in which it had refused to adjudicate a title dispute under the belief that it lacked authority to overturn an executive determination establishing the status quo.¹²¹ Lest the plaintiff Burgess think he had no recourse, the Court had assured him that “the power to repair [his injury] rests with the political department.”¹²²

The *Murray’s Lessee* Court also cited *Luther* and *Doe v. Braden*.¹²³ In *Braden*, which involved familiar facts regarding the cession of Florida, the Attorney General prevailed by arguing that *Foster* and *Garcia* required total judicial deference to elected leaders acting within their constitutional roles.¹²⁴ Those same precedents underpinned the

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 284.

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 284–85.

¹¹⁸ See, e.g., *Price v. United States*, 174 U.S. 373, 375–76 (1899) (“It is an axiom of our jurisprudence. The Government is not liable to suit unless it consents thereto . . .”).

¹¹⁹ *Murray’s Lessee*, 59 U.S. (18 How.) at 284.

¹²⁰ 57 U.S. (16 How.) 48 (1854); see also *Murray’s Lessee*, 59 U.S. (18 How.) at 284 (citing *Burgess* to support the public rights doctrine).

¹²¹ *Burgess*, 57 U.S. (16 How.) at 64.

¹²² *Id.* at 65.

¹²³ 57 U.S. (16 How.) 635 (1854); see *Murray’s Lessee*, 59 U.S. (18 How.) at 285.

¹²⁴ See *Braden*, 57 U.S. (16 How.) at 649–50 (describing the argument of Mr. Cushing, Attorney General).

Court's *Williams* opinion, based as they were on "the rule that the action of the political branches of the government in a matter that belongs to them, is conclusive."¹²⁵

The Court's decision in *Murray's Lessee* is remembered not for its reliance on the political question doctrine, but rather for its creation of the *public rights* doctrine.¹²⁶ Yet, as shown above, the public rights doctrine does no more than apply the political question doctrine to the administrative state. The upshot is that the rationale supporting public rights doctrine should also inform the political question doctrine. And despite confusion reminiscent of the political question debate,¹²⁷ the Justices have generally recognized that rationale as a combination of "the traditional principle of sovereign immunity, . . . the principle of separation of powers, and a historical understanding that certain prerogatives were reserved to the political Branches of Government."¹²⁸

The second and third factors show through clearly in the political question case law. As a bar to judicial review, the political question doctrine relies on the theory that the judicial power has limits vis-à-vis the other branches. And indeed, the idea that those branches retain certain "prerogatives" essentially defines the political question doctrine. But sovereign immunity's role in all of this requires some explanation.

B. Above the Law and Passed Ther Lernyng

The principle of sovereign immunity digs deep into the history of the common law. Scholars have described it as a vestige of English feudalism according to which each Lord could be summoned only into the court of a higher noble.¹²⁹ The English King was thus beyond suit by virtue of his seat atop the feudal pyramid.¹³⁰ A dispute between King Henry VI and Richard the Duke of York in 1460 paints the picture.¹³¹ In October of that year, Richard presented Parliament with a

¹²⁵ *Williams v. Suffolk Ins. Co.*, 38 U.S. (13 Pet.) 415, 420 (1839) (internal punctuation omitted).

¹²⁶ See *Stern v. Marshall*, 131 S. Ct. 2594, 2609–10 (2011) (quoting *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 90–91 (1982) (Rehnquist, J., concurring in the judgment)); *N. Pipeline*, 458 U.S. at 67 (plurality opinion) ("The 'public rights' doctrine was first set forth in *Murray's Lessee* . . ."); *id.* at 91 (Rehnquist, J., concurring in the judgment) (referring to the "public rights' doctrine of *Murray's Lessee*").

¹²⁷ See, e.g., *N. Pipeline*, 458 U.S. 50.

¹²⁸ *Id.* at 67.

¹²⁹ *Developments in the Law — Remedies Against the United States and Its Officials*, 70 HARV. L. REV. 827, 829 (1957) [hereinafter *Remedies*]; see also Katherine Florey, *Sovereign Immunity's Penumbra: Common Law, "Accident," and Policy in the Development of Sovereign Immunity Doctrine*, 43 WAKE FOREST L. REV. 765, 771 n.28 (2008) (discussing the same phenomenon).

¹³⁰ *Remedies*, *supra* note 129, at 829.

¹³¹ Melville Fuller Weston, *Political Questions*, 38 HARV. L. REV. 296, 302 (1925). Weston touches on the place of sovereign immunity in the political question canon, but his analysis does not recognize the full interplay between the two concepts. See *id.* at 304–05.

written claim that the English Crown was rightfully his.¹³² The Lords consulted King Henry, who told them to prepare a brief against Richard's claim.¹³³ The Lords then turned to the King's judges for help with the brief, but the judges refused on the ground that they could not serve as counsel to a case that might come before them.¹³⁴ They went on, however, to speculate that the case would fall outside their jurisdiction, being that it was a matter "above the lawe and passed ther lernyng."¹³⁵ Indeed, the judges faced a double bind: they could not rule for Richard without ousting the source of their own authority, but if they could rule only one way, they were not a real tribunal at all.¹³⁶ The nuance of that original dilemma was lost amidst the breakdown of the feudal structure until eventually the King became "one with the sovereign power of the state."¹³⁷ This "unity of crown and state persisted" as the monarchy declined, until eventually the whole English government claimed immunity from suit.¹³⁸

The Founders grew up in this tradition, where "not to be amenable to the suit of an individual without its consent" was an "inherent" privilege of sovereignty.¹³⁹ Importantly, they viewed sovereign immunity as creating a defect of what we now call "personal" jurisdiction. Though they did not use that term, the early American courts recognized several "basic prerequisites for the exercise of judicial power," one of which dictated that a court must bring a defendant under its control before it could render judgment against him.¹⁴⁰ If the defendant did not appear voluntarily in response to a court order, the court would assume — or construct — his appearance.¹⁴¹ But the court could not order a sovereign government to appear.¹⁴² No order meant no constructive appearance, and therefore no valid judgment.¹⁴³ Indeed, without both parties actually or constructively before the bench, there was no "case" or "controversy" at all.¹⁴⁴

¹³² *Id.* at 302.

¹³³ *Id.* at 302–03.

¹³⁴ *Id.* at 303.

¹³⁵ *Id.* (quoting EUGENE WAMBAUGH, A SELECTION OF CASES ON CONSTITUTIONAL LAW 2–3 (1915)).

¹³⁶ *Id.* at 304.

¹³⁷ *Remedies*, *supra* note 129, at 829; *see also id.* at 829–30.

¹³⁸ *Id.* at 830.

¹³⁹ Caleb Nelson, *Sovereign Immunity as a Doctrine of Personal Jurisdiction*, 115 HARV. L. REV. 1559, 1575 (2002) (quoting THE FEDERALIST NO. 81, *supra* note 66, at 487 (Alexander Hamilton)).

¹⁴⁰ *Id.* at 1573.

¹⁴¹ *Id.*

¹⁴² *Id.* at 1575–76.

¹⁴³ *Id.* at 1574–75.

¹⁴⁴ *Id.* at 1587.

Both Federalists and Antifederalists agreed on the principle of sovereign immunity in the preconstitutional United States.¹⁴⁵ Merging this principle with the Constitution, however, took some doing. No longer did the courts have a clear nucleus of sovereignty in the form of a royal. Instead, as the first Chief Justice and *Federalist Papers* author John Jay put it, the people of the United States were “joint tenants in the sovereignty”¹⁴⁶ who had entrusted “many [sovereign] prerogatives . . . to the national Government” through the Constitution.¹⁴⁷ He described the Constitution, then, as similar to a federal agency’s organic statute: it is the people’s means of delegating sovereign power to public agents.¹⁴⁸ And when further lawful delegation is made under the Constitution to other public officers, they assume sovereign auspices. This helps to explain why William Marbury would not have been permitted to sue James Madison regarding the exercise of his *discretionary* power as Secretary of State.¹⁴⁹

More broadly, however, it explains why the political branches acting within their *constitutional powers* would not be susceptible to suit in the Article III courts. To say that the President or Congress has authority under the Constitution to exercise discretion subject to judicial second-guessing is to destroy the separation of powers.¹⁵⁰ To be clear, this makes political question doctrine the *limiting principle* of judicial review. Whereas the courts might decide whether the political branches have exceeded their constitutional roles, they cannot mistake a lack of *wisdom* for a lack of *power*.¹⁵¹ And though Congress might waive

¹⁴⁵ *Id.* at 1577–78. The Framers and their successors famously disagreed over the extent to which *states* retained this aspect of sovereignty after joining the Union, but that is a matter for a different Note. See generally Note, *Reconciling State Sovereign Immunity with the Fourteenth Amendment*, 129 HARV. L. REV. 1068 (2016) (discussing the debate over state sovereign immunity and the impact of the Fourteenth Amendment on that debate). But see generally Susan Randall, *Sovereign Immunity and the Uses of History*, 81 NEB. L. REV. 1 (2002) (arguing that the Founding generation “viewed the ratification of the Constitution as consent to Article III suits by the states individually and collectively for the United States,” *id.* at 3).

¹⁴⁶ *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 472 (1793).

¹⁴⁷ *Id.* at 471.

¹⁴⁸ See *Glass v. The Sloop Betsey*, 3 U.S. (3 Dall.) 6, 13 (1794) (“Sovereignty was, and is, in the people. It was entrusted by them, as far as was necessary for the purpose of forming a good government, to the Federal Convention; and the Convention executed their trust, by effectually separating the Legislative, Judicial, and Executive powers; which, in the contemplation of our Constitution, are each a branch of the sovereignty.”).

¹⁴⁹ See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 166 (1803).

¹⁵⁰ See *Glass*, 3 U.S. (3 Dall.) at 13 (“When, in short, either branch of the government usurps that part of the sovereignty, which the Constitution assigns to another branch, liberty ends, and tyranny commences.”).

¹⁵¹ See, e.g., *NFIB v. Sebelius*, 132 S. Ct. 2566, 2608 (2012) (opinion of Roberts, C.J.) (“[T]he Court does not express any opinion on the wisdom of the Affordable Care Act. Under the Constitution, that judgment is reserved to the people.”); *Lawrence v. Texas*, 539 U.S. 558, 605 (2003) (Thomas, J., dissenting) (“I write separately to note that the law before the Court today

sovereign immunity with respect to government operations created by statute,¹⁵² waiving immunity for *constitutionally* defined government action is a different matter. Indeed, it is tantamount to amending the Constitution to expand Article III, and is thus beyond the powers of any branch.

Yet the above describes only a direct immunity. To explain why Williams could not sue Suffolk Insurance or why Den could not sue Hoboken Land, one has to dig a little deeper. Extending sovereign immunity to these collateral actions makes practical sense for the reason mentioned briefly above — namely, that allowing a suit between private parties to undo sovereign determinations would erode the powers of government.¹⁵³ And indeed, closing such loopholes seems natural and appropriate within a totally judge-made doctrine.¹⁵⁴ Perhaps for this reason, courts have increasingly recognized sovereigns as “indispensable part[ies]” to certain litigation between private persons.¹⁵⁵ The Roberts Court has endorsed this viewpoint at least to a limited extent in other contexts,¹⁵⁶ aligning it with Justice Curtis’s opinion in *Murray’s Lessee*.¹⁵⁷

To the extent that sovereign immunity seems prudential, it shares that quality with all jurisdictional constraints. Indeed, no doctrinal limit to judicial process persists without judges who look beyond the bar and out the courtroom window. Even Blackstone can be read to describe sovereign immunity as recognizing a practical end to the amount of direction a sovereign power will tolerate.¹⁵⁸ So too, when Supreme Court Justices raise the political question doctrine to avoid telling Congress or the President what to do, they can have procedural reasons for taking an ultimately prudent action. Getting prudence out of the political question doctrine does not invite judges to behave imprudently. It merely ensures that the courtroom doors not close unless the Constitution says so.¹⁵⁹

With the sovereign immunity barrier to personal jurisdiction established, the next question is what salient contemporary issues still fall under the classical political question doctrine. Executive functions in

‘is . . . uncommonly silly.’” (alteration in original) (quoting *Griswold v. Connecticut*, 381 U.S. 479, 527 (1965) (Stewart, J., dissenting))).

¹⁵² See, e.g., Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671–2680 (2012).

¹⁵³ Florey, *supra* note 129, at 813.

¹⁵⁴ *Cf. id.* at 768–69.

¹⁵⁵ *Id.* at 806 (quoting FED. R. CIV. P. 19, 28 U.S.C. app. at 132 (2006) (amended in 2007)).

¹⁵⁶ *Id.* at 815.

¹⁵⁷ *Murray’s Lessee*, 59 U.S. (18 How.) 272, 284–85 (1856) (“It is true, also, that even in a suit between private persons to try a question of private right, the action of the executive power, upon a matter committed to its determination by the constitution and laws, is conclusive.”).

¹⁵⁸ See Florey, *supra* note 129, at 784–85.

¹⁵⁹ *Cf. Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1388 (2014).

foreign affairs come to mind.¹⁶⁰ But the next Part identifies several congressional charges that the courts must respect on account of sovereign immunity.

IV. MODERN APPLICATIONS

The articulation of the political question doctrine as presented above will not allow courts to dismiss cases on prudence alone, but that does not render it useless. On the contrary, judges can and should employ the political question doctrine to resolve at least two contemporary claims: those asking for judicial application of the Natural Born Citizen Clause and the Origination Clause.

A. *Natural Born Citizen Clause*

In February of 2016, things were looking up for Republican presidential primary hopeful Ted Cruz. He had recently won the Iowa caucuses¹⁶¹ and taken the lead in a major national poll.¹⁶² But just as Cruz seemed poised to claim the nomination, commentators began to wonder whether he was even eligible for the presidency.¹⁶³ Cruz was born in Calgary, Canada,¹⁶⁴ to an American mother and Cuban father.¹⁶⁵ Though clearly an American citizen,¹⁶⁶ even respected scholars believed that Cruz might not be a “natural born Citizen” within the meaning of Article II.¹⁶⁷ Nor was this the first time application of that language seemed relevant to presidential politics. Indeed, the provision has been a periodic issue for decades.¹⁶⁸ Predictably, the Cruz

¹⁶⁰ Cf. Jack Goldsmith, *The Supreme Court, 2014 Term — Comment: Zivotofsky II as Precedent in the Executive Branch*, 129 HARV. L. REV. 112, 131–33 (2015) (arguing that *Zivotofsky ex rel. Zivotofsky v. Kerry* (*Zivotofsky II*), 135 S. Ct. 2076 (2015), provides little guidance on what limits the Supreme Court might impose on presidential power in the future).

¹⁶¹ Jonathan Martin, *Ted Cruz Wins Republican Caucuses in Iowa*, N.Y. TIMES (Feb. 1, 2016), <http://www.nytimes.com/2016/02/02/us/ted-cruz-wins-republican-caucus.html> [https://perma.cc/V8N7-HDQ8].

¹⁶² Nick Gass, *Cruz Overtakes Trump in National Poll*, POLITICO (Feb. 17, 2016, 5:00 PM), <http://www.politico.com/story/2016/02/ted-cruz-donald-trump-national-poll-219396> [https://perma.cc/8L67-H7PW].

¹⁶³ Liz Mineo, *A Question of Citizenship*, HARV. GAZETTE (Feb. 5, 2016), <http://news.harvard.edu/gazette/story/2016/02/a-question-of-citizenship> [https://perma.cc/ECT4-GR8Q].

¹⁶⁴ Deroy Murdock, *Will Ted Cruz's Canadian Birth Prove to Be a Liability in a General Election?*, NAT'L REV. (Feb. 19, 2016, 4:00 AM), <http://www.nationalreview.com/article/431552/ted-cruz-natural-born-citizen-canadian-birth-problem> [https://perma.cc/8Z2Y-5LRC].

¹⁶⁵ *Id.*

¹⁶⁶ See Mineo, *supra* note 163.

¹⁶⁷ Eric Posner, *Ted Cruz Is Not Eligible to Be President*, SLATE (Feb. 8, 2016, 12:26 PM), http://www.slate.com/articles/news_and_politics/view_from_chicago/2016/02/trump_is_right_ted_cruz_is_not_eligible_to_be_president.html [https://perma.cc/4RUP-WSD6]; see U.S. CONST. art. II, § 1, cl. 5.

¹⁶⁸ See VINCENT A. DOYLE, THE NATURAL BORN CITIZEN QUALIFICATION FOR THE OFFICE OF PRESIDENT: IS GEORGE W. ROMNEY ELIGIBLE?, at i (1968); see also Paul

controversy led to litigation. A host of pro se opponents sought declaratory and injunctive relief to keep the candidate from pursuing office.¹⁶⁹ The federal courts dismissed these cases for lack of standing.¹⁷⁰ Yet one Pennsylvania state court took a different approach worth addressing.

Forgoing any discussion of the interaction between Article II eligibility and state electoral law, the Pennsylvania court addressed the political question argument, rejected it, and allowed ballot access on the merits.¹⁷¹ The Constitution leaves the state legislatures to decide how they will designate the Electors that will later cast votes for the President.¹⁷² A substantial number of states — including Pennsylvania — do not even attempt to bind their Electors.¹⁷³ For whom those Electors cast their votes is thus a matter of state concern. Once the Electors' votes have been cast, however, the eligibility of candidates receiving votes comes easily within the political question doctrine.

The Constitution gives the task of counting presidential ballots to the President of the Senate “in the Presence of the Senate and House of Representatives.”¹⁷⁴ The Pennsylvania court saw this function as utterly clerical,¹⁷⁵ but that analysis misses the point. Of course the Framers expected the ballots to be dutifully counted and the winner honestly reported. The clause's significance does not come from the duty it describes, but from *whom* it entrusts that duty to. Presumably, anyone could count the ballots; the Framers could have easily picked the Secretary of State, the Clerk of the House, or the Pope. And why not the Supreme Court? But the Framers delegated this uniquely sensitive job to a joint session of Congress — a body described nowhere else in the Constitution's pages.

Indeed, no situation illustrates the logic of the political question doctrine better than this one. Applying the law of the Constitution to the facts at hand to rule on eligibility would be a classic judicial exer-

Clement & Neal Katyal, *On the Meaning of “Natural Born Citizen”*, 128 HARV. L. REV. F. 161, 163–64 (2015), <http://harvardlawreview.org/2015/03/on-the-meaning-of-natural-born-citizen> [<https://perma.cc/5A6G-X2QT>] (noting controversies surrounding the candidacies of Senator John McCain, Governor George Romney, and Senator Barry Goldwater).

¹⁶⁹ See, e.g., *Schwartz v. Cruz*, No. H-16-106, 2016 WL 1449251, at *1 (S.D. Tex. Apr. 13, 2016), *appeal dismissed*, No. 16-20231 (5th Cir. June 21, 2016) (per curiam); *Elliott v. Cruz*, 137 A.3d 646, 648 (Pa. Commw. Ct. 2016), *aff'd*, 134 A.3d 51 (Pa. 2016).

¹⁷⁰ See, e.g., *Schwartz*, 2016 WL 1449251, at *2–3.

¹⁷¹ See *Elliott*, 137 A.3d at 652–58.

¹⁷² See U.S. CONST. art. II, § 1, cl. 2.

¹⁷³ See *About the Electors*, U.S. NAT'L ARCHIVES & RECORDS ADMIN., <http://www.archives.gov/federal-register/electoral-college/electors.html#restrictions> [<https://perma.cc/QLQ7-4E9E>].

¹⁷⁴ U.S. CONST. art. II, § 1, cl. 3.

¹⁷⁵ See *Elliott*, 137 A.3d at 650–51.

cise.¹⁷⁶ Perhaps the Framers even considered the Supreme Court for it.¹⁷⁷ But when the question is who will govern, accountability in the tribunal matters.¹⁷⁸ And Congress has validated the Framers' choice by taking this role seriously, debating and ruling on contested electoral ballots even in the recent past.¹⁷⁹ Indeed, it is also telling that the backup plan to the Electoral College is throwing the election to the House of Representatives,¹⁸⁰ which in fact did decide several of the most consequential and controversial early contests.¹⁸¹ Conversely, far from playing the impartial arbiter, the Supreme Court never appeared more like a council of unaccountable politicians than during its involvement in the 2000 presidential election.¹⁸² It thus makes legal and practical sense that the Congress should enjoy the immunity of the sovereign in deciding who is eligible to be President.

B. Origination Clause

Somewhat related is the currently brewing controversy over the Origination Clause. Initiating the latest battle in a seemingly endless war over the Affordable Care Act,¹⁸³ that law's opponents now challenge it as a bill "for raising [r]evenue" that originated in the Senate rather than the House.¹⁸⁴ As with the Natural Born Citizen Clause, judges have used standing doctrine to throw this challenge out of court.¹⁸⁵ But the political question doctrine also bars Article III adjudication of the merits. Indeed, though judicial review undoubtedly allows scrutiny of statutory *substance* for constitutional violations, federal legislative *procedure* always raises political questions under the doctrine as described above.

¹⁷⁶ *But cf.* U.S. CONST. art I, § 3, cl. 6 (giving the Senate sole responsibility to try impeachments).

¹⁷⁷ See *Electoral College & Indecisive Elections*, U.S. HOUSE OF REPRESENTATIVES HIST., ART & ARCHIVES, <http://history.house.gov/Institution/Origins-Development/Electoral-College/> [<https://perma.cc/69HM-PLFU>].

¹⁷⁸ See ROBERT V. REMINI, *THE HOUSE* 24 (2006).

¹⁷⁹ See *U.S. Electoral College: Frequently Asked Questions*, NAT'L ARCHIVES & RECORDS ADMIN., <https://www.archives.gov/federal-register/electoral-college/faq.html#contestvotes> [<https://perma.cc/KHC5-ULUG>] (describing the resolution of a challenge to Ohio's Electoral votes in the 2004 election); see also *Electoral College & Indecisive Elections*, *supra* note 177 (describing the contested 1876 election).

¹⁸⁰ U.S. CONST. art. II, § 1, cl. 3.

¹⁸¹ *Electoral College & Indecisive Elections*, *supra* note 177.

¹⁸² See Barkow, *supra* note 27, at 273–300 (“The Court did not pause for even a sentence in *Bush I* to explain why the Article II question was [not reserved to] Congress.” *Id.* at 275.).

¹⁸³ See, e.g., *King v. Burwell*, 135 S. Ct. 2480 (2015); *NFIB v. Sebelius*, 132 S. Ct. 2566 (2012).

¹⁸⁴ U.S. CONST. art. I, § 7, cl. 1; *Hotze v. Burwell*, 784 F.3d 984, 986 (5th Cir. 2015); see also *NFIB*, 132 S. Ct. at 2584 (“[T]he only effect of the individual mandate is to raise taxes . . . and thus the law may be upheld as a tax.”).

¹⁸⁵ *Hotze*, 784 F.3d at 991.

The Constitution delimits Congress's procedural scaffolding in uncommon detail. It specifies the required vote margins for myriad critical actions¹⁸⁶ and otherwise specifically empowers "[e]ach House [to] determine the Rules of its proceedings."¹⁸⁷ Read in light of eighteenth-century meaning, this language permits the House and Senate to both make and apply legislative procedure.¹⁸⁸ Allowing the Supreme Court a say in such matters would thus render much of Article I nugatory.

Similar to the case of presidential ballots, accountability appears as a motivating force here. Putting the Vice President in charge of the Senate departed from common practices of the time¹⁸⁹ but ensured a national constituency to check that presumably aristocratic chamber. The House, by contrast, chooses its Speaker but has no obligation to pick from among its own.¹⁹⁰ Much like the President, then, both the Speaker and the Vice President indirectly represent the nation.¹⁹¹ Both chairs must be complicit in any deviation from prescribed legislative rules, including origination restrictions. The architecture thus makes Congress a popularly accountable *and* structurally independent legislature. Certification of proper process from Congress therefore can and should bar suit under the Origination Clause or any other procedural rule.¹⁹²

This Part gives only two examples of political questions falling within the Supreme Court's current rule. Others undoubtedly exist,¹⁹³ showing in combination that the doctrine is far from irrelevant. On the contrary, the Roberts Court's focus on constitutional text over pru-

¹⁸⁶ U.S. CONST. art. I, § 3, cl. 6; *id.* § 5, cl. 1–2; *id.* § 7, cl. 2–3.

¹⁸⁷ *Id.* § 5, cl. 2.

¹⁸⁸ SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (London, 7th ed. 1783) (unpaginated) (listing one definition of "determine" as "to resolve concerning any thing"); *see also* *Georgia v. Brailsford*, 3 U.S. (3 Dall.) 1, 4 (1794) ("[Y]ou have nevertheless a right to take upon yourselves to . . . determine the law as well as the fact in controversy."); *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 425 (1793) ("[B]oth the *Imperial* Chamber, and the *Aulic* Council hear and determine the complaints of individuals against the *Princes*.").

¹⁸⁹ RONALD M. PETERS, JR., *THE AMERICAN SPEAKERSHIP: THE OFFICE IN HISTORICAL PERSPECTIVE* 18 (2d ed. 1997).

¹⁹⁰ *See* U.S. CONST. art. I, § 6, cl. 2 (applying the Incompatibility Clause only to *members* of Congress); PETERS, *supra* note 189, at 6. Congressman Jim Cooper of Tennessee has voted for former Secretary of State Colin Powell in each of the past three Speaker elections. *See* Office of the Clerk, *Final Vote Results for Roll Call 581*, U.S. HOUSE OF REPRESENTATIVES (Oct. 29, 2015), <http://clerk.house.gov/evs/2015/roll581.xml> [<https://perma.cc/AK9N-ALBG>]; Office of the Clerk, *Final Vote Results for Roll Call 2*, U.S. HOUSE OF REPRESENTATIVES (Jan. 6, 2015), <http://clerk.house.gov/evs/2015/roll002.xml> [<https://perma.cc/D8BF-TKGE>]; Office of the Clerk, *Final Vote Results for Roll Call 2*, U.S. HOUSE OF REPRESENTATIVES (Jan. 3, 2013), <http://clerk.house.gov/evs/2013/roll002.xml> [<https://perma.cc/5252-BSF4>].

¹⁹¹ *Cf.* PETERS, *supra* note 189, at 20.

¹⁹² *See* *United States v. Munoz-Flores*, 495 U.S. 385, 408–09 (1990) (Scalia, J., concurring in the judgment) (citing *Marshall Field & Co. v. Clark*, 143 U.S. 649 (1892)).

¹⁹³ *See, e.g.,* *Nixon v. United States*, 506 U.S. 224 (1993).

dence only brightens the line between political and judicial questions while confirming the sovereign immunity rationale detailed above.

V. CONCLUSION

After Menachem Zivotofsky's action received a second writ of certiorari, the Supreme Court dismissed the case because the underlying statute exceeded Congress's legislative power.¹⁹⁴ In this way, the Court retraced Chief Justice Marshall's steps from over 200 years ago. In both *Marbury* and *Zivotofsky II*,¹⁹⁵ judicial review defeated the action's premise, making merits review of executive decisionmaking premature. But also common to both cases was the notion that Congress cannot bring an issue of executive discretion within the cognizance of the courts any more than the courts can assume authority to overrule that discretion. Indeed, had Zivotofsky sued in equity to force the President to recognize Israeli sovereignty over Jerusalem, the Supreme Court would have had to encroach on executive power directly to entertain the claim. It thus would have encountered a political question beyond the limit of its rightful jurisdiction.

That limit, as explained here, results from the sovereign people's grants of agency to the political branches through the Constitution. Just as with public rights doctrine, agents of the sovereign enjoy the immunity of the sovereign. To hold otherwise would permit private litigants to subvert popular government one case at a time. Indeed, a core feature of popular government is its power to grant remedies through political processes above and beyond the reach of the courts.¹⁹⁶ In that tradition political question doctrine was forged, and in that tradition it remains.

¹⁹⁴ See *Zivotofsky II*, 135 S. Ct. 2076 (2015).

¹⁹⁵ 135 S. Ct. 2076.

¹⁹⁶ *Burgess v. Gray*, 57 U.S. (16 How.) 48, 65 (1854).