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Constitutional Law: Article III and the Political-Question Doctrine

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Constitutional Law

Article III and the Political-Question Doctrine

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Federal courts may not adjudicate a "nonjusticiable political question."[2] Though this doctrine has ancient roots, the modern incarnation of the political-question doctrine was cast by *Baker v. Carr*, which famously articulated a six-factor test for identifying a political question.[3] The first two factors remain prominent: (1) "a textually demonstrable constitutional commitment of the issue to a coordinate political department" and (2) "a lack of judicially discoverable and manageable standards."[4]

Baker called the political-question doctrine "primarily a function of the separation of powers"[5] but did not purport to source the doctrine in any particular provision of the Constitution. What is the constitutional source of the political-question doctrine? And does that source tell us anything about its nature? This chapter answers those questions.

The Source Isn't Article III

Article III, a repository of other separation-of-powers applicable to the federal judiciary, makes intuitive sense as the political-question doctrine's source, and, in a few cases, the Court has connected the political-question doctrine to Article III and its principles. In *Pacific States Telephone & Telegraph Co. v. Oregon*,[6] Oregon sued a business in state court after the business refused to pay a tax levied under authority of a state constitutional amendment adopted by ballot initiative; the business defended on the ground that the initiative process violated the Guarantee Clause.[7] The state courts held that the defense was justiciable but

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[1] Excerpted and adapted from Scott Dodson, *Article III and the Political Question Doctrine*, 116 NW. U. L. REV. 681 (2021).
[2] Rucho v. Common Cause, 139 S. Ct. 2484, 2494 (2019).
[3] 369 U.S. 186, 217 (1962).
[4] *Id.*
[5] *Id.* at 210.
[6] 223 US 118 (1912).
[7] *Id.* at 136.

meritless. On writ of error to the U.S. Supreme Court, the Court held the question "within the scope of the powers conferred upon Congress, and not, therefore, within the reach of judicial power."[8] *Pacific States* dismissed the writ for lack of jurisdiction, presumably under Article III, a result that, paradoxically, allowed the state-court decision on the merits to stand.

In *Rucho v. Common Cause*,[9] the Court held partisan-gerrymandering claims to be nonjusticiable directly under Article III.[10] Because testing the constitutionality of those claims would lack judicially discoverable and manageable standards under *Baker* Factor 2, those claims are "outside the Court's competence and therefore beyond the courts' jurisdiction" under Article III.[11] The Court therefore vacated the lower-court decisions and ordered the cases dismissed for lack of jurisdiction.[12]

But *Pacific States* and *Rucho* represent a minority view about the political-question doctrine's connection to Article III. Far more cases disavow or distance Article III from the political-question doctrine.

In *Luther v. Borden*,[13] for example, a case presenting the question of which government of Rhode Island was lawful, the Court held the Guarantee Clause to give Congress the power to decide that question (and to delegate that power to the President).[14] But the presence of a political question did not deprive the Court of power to decide the case, and the Court never mentioned Article III. To the contrary, when the President answered the question by authorizing the National Guard to put down the insurrectionist government, the Court considered the question authoritatively answered, applied that answer to the case at hand, and affirmed the lower court's holding on the merits.[15]

In *Baker v. Carr*,[16] the Court held justiciable the question of whether a state's districting plan that gave some voters more vote

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[8] *Id.* at 150–51.
[9] 139 S. Ct. 2484 (2019).
[10] *Id.* at 2493–96.
[11] *Id.* at 2494.
[12] *Id.* at 2508.
[13] 48 U.S. (7 How.) 1 (1849).
[14] *Id.* at 42.
[15] *Id.* at 46–47.
[16] 369 U.S. 186 (1962).

power than others was consistent with the Equal Protection Clause (and the Court held, on the merits, that the plan was not consistent with the Clause).[17] In discussing the political-question doctrine, the Court did not cite to Article III or reference its language; instead, the Court expressly contrasted justiciability with Article III jurisdiction.[18] Later, the Court again treated the political-question doctrine as distinct from Article III jurisdiction in *Powell v. McCormack*.[19]

In *Nixon v. United States*,[20] the Court considered nonjusticiable the question of whether the Senate court, consistent with the Impeachments Clause, take impeachment evidence by Senate committee rather than the full Senate.[21] No opinion cited to Article III as a basis for determining the existence of a political question, and the Court appears to have resolved the case on nonjurisdictional grounds.[22] Precedent, then, offers no clear answer about the political-question doctrine's source.

Further, an Article III source would create some odd results. For one, an Article III source cannot explain why the Court in *Luther* and *Nixon* claimed to retain some authority to decide political questions in extreme cases, such as in obvious Guarantee Clause violations and in hypothetical impeachments based on a coin flip. Article III limits on judicial power admit of no such exceptions for extreme cases.

Additionally, an Article III source would leave an unsettling role for state courts. Because Article III's limitations do not apply to state courts,[23] a political-question doctrine derived from Article III would allow state courts to adjudicate important constitutional issues that federal courts could not. Indeed, *Pacific States*'s

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[17] *Id.* at 237.
[18] *Id.* at 198.
[19] 395 U.S. 486, 512 (1969).
[20] 506 U.S. 224 (1993).
[21] *Id.* at 227.
[22] The district court held that it did have subject matter jurisdiction but nonetheless dismissed for lack of justiciability. Nixon v. United States, 744 F. Supp. 9, 11–12, 14 (D.D.C. 1990). The Supreme Court affirmed that result, and two justices who would have held the claim justiciable but meritless concurred in the judgment. *Nixon*, 506 U.S. at 239 (White, J., concurring). Those circumstances indicate that the Supreme Court agreed that political questions warrant nonjurisdictional dismissals.
[23] ASARCO Inc. v. Kadish, 490 U.S. 605, 617 (1989).

dismissal of the writ of error allowed the state-court judgment on the merits of the Guarantee Clause question to stand. And because states are entitled to give their state courts judicial power beyond the strictures of Article III, state courts might be able to decide partisan-gerrymandering claims under the federal Constitution even though the federal courts could not. More extreme possibilities exist. How odd would it be to learn that while the doctrine prevents the U.S. Supreme Court from reviewing the propriety of an impeachment trial of the President of the United States, the doctrine does not bar a state judge—perhaps from a state whose population and government officials strongly support the President—from doing so?[24]

The Source is the Substantive Law Underlying Each Political Question

If Article III isn't the source of the political-question doctrine, what is? The answer is that the political question doctrine is sourced in the substantive law at issue. It is the Guarantee Clause itself (or the Impeachments Clause itself, or even the Equal Protection Clause itself) that makes something nonjusticiable. Application of the doctrine can have (but need not always have) Article III *effects* by, say, calling for nonjudicial standards that a federal court couldn't apply without violating Article III. But the doctrine begins with the substantive law.

In Factor 1 cases, a "textual commitment" refers to whether the underlying substantive law—the Impeachments Clause, the Militia Clause, the Qualifications Clause, or the like—allocates interpretative or decisionmaking authority over the question to an entity other than the federal courts. If so, then Article III has nothing more to add. Nonjusticiability under Factor 1 thus arises solely from the substantive law, not from Article III.

Article III is itself allocative by committing judicial powers to the courts and, by implication, excluding the courts from legislative and executive powers. But the Article III allocative standards do not drive the Factor 1 determination and, indeed, are irrelevant to it. A question could meet all the requirements of

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[24] *But see* Goldwater v. Carter, 444 U.S. 996, 1005 n.2 (1979) (Rehnquist, J., concurring) ("This Court, of course, may not prohibit state courts from deciding political questions . . . .").

Article III, in that it is brought in the form of a constitutional "case" and with "judicial" standards available for adjudication, but if the substantive law commits the question instead to a coordinate branch, then the question is nonjusticiable in the federal courts *despite* Article III.

Pure Factor 2 cases are somewhat different. To date, partisan-gerrymandering claims represent the only pure Factor 2 political questions. These claims are political questions because the substantive-rights provisions of the Constitution provide standards for distinguishing constitutional from unconstitutional partisan gerrymandering that aren't judicially manageable or discoverable. Thus, Factor 2 cases are based on the standards supplied by the substantive law. If the standards supplied by the substantive law aren't judicially discoverable or manageable, then that determination will have an Article III *effect* of rendering an adjudicative decision based on those standards outside the federal judicial power. So Factor 2 does implicate Article III. But the determination that the law supplies only nonjudicial standards is sourced, just like in Factor 1 cases, in the substantive law.

What a Substantive-Law Source Says About the Doctrine

Reorientating the political-question doctrine around the substantive law has several important ramifications.

First, because Article III is not the source, federal courts retain Article III jurisdiction over cases presenting political questions. Indeed, if the political question can be avoided or has already been answered by the appropriate decisionmaker, then a federal court can decide a case presenting a political question on the merits, just as in *Luther*. If the answer to an unanswered political question is a necessary condition to maintaining a claim or defense, then the federal court should stay the case until receiving an answer, dismiss the claim for failure to state a claim upon which relief can be granted, or strike the defense.

Second, because substantive federal law binds state courts under the Supremacy Clause, a substantive-law delegation of adjudicatory authority under *Baker* Factor 1 must be binding on state courts as well. For example, because the Impeachments Clause grants the Senate "sole" power to "try" federal impeachments, state courts have no more authority to "try" a federal impeachment than federal courts.

However, if the political question arises only because of Factor 2—because the substantive law requires application of standards inappropriate for a federal court—a state court potentially could decide a political question even though a federal court could not. Although such asymmetry between state and federal courts poses problems generally, those problems are decidedly less forceful in the context of partisan gerrymandering, the only pure Factor 2 political question presently recognized, because partisan-gerrymandering claims involve questions of *state* politics, an area of familiarity to some state courts. True, state courts might generate a patchwork of different interpretations of how the Constitution applies to various districting plans, but the Constitution contemplates redistricting nonuniformity by granting the states significant control over districting standards—control that already creates a patchwork of redistricting standards across the country.

Third, because political questions do not deprive courts of jurisdiction, courts retain authority to decide matters peripheral to the political question even if they cannot answer the political question. Peripheral matters include determining *which* decisionmaker has constitutional authority under the substantive law to answer a political question and issuing orders protecting that decisionmaker's authority when a different putative decisionmaker attempts to usurp that authority. If, for example, the President attempted unilaterally to declare war, the political-question doctrine would not stop the judiciary from holding that presidential declaration unlawful—not because the declaration of war was incorrect but because the Declare War Clause gives that power to Congress, not to the President. Federal courts thus can enforce the delegation of a political question, even if they cannot answer the political question itself.

Fourth, even if a substantive law makes an issue a political question, other substantive laws could grant judicial authority over the same subject. For example, although the Impeachments Clause prevents a federal court from trying an impeachment, the Fifth Amendment might permit a federal court (or a state court) to exercise interpretive and adjudicatory authority over whether the Senate's trial comported with due process. A substantive-law focus on political questions, rather than an Article III focus, thus gives federal courts a limited role in some political question cases and helps explain why racial-gerrymandering claims can be

nonjusticiable under the Guarantee Clause but justiciable under the Equal Protection Clause.

Fifth, if the substantive law allocates adjudicatory authority under *Baker* Factor 1, the allocated decisionmaker could, if consistent with the nondelegation doctrine, delegate that adjudicatory authority to a different decisionmaker, including, potentially, to a federal court. Thus, the federal courts—and state courts—could exercise adjudicatory authority over a Factor 1 political question under a lawful delegation from the original decisionmaker. Orienting the doctrine around the substantive law helps explain why the Court has suggested that federal courts can hear cases under legislation to enforce the Guarantee Clause.[25] Even Factor 2 cases could be delegated to the federal courts if Congress supplied judicially manageable standards, such as under Congress's power under Section 5 of the Fourteenth Amendment, which allows Congress to supply statutory standards that are more protective of the constitutional right.[26]

Sixth, a substantive-law focus harmonizes the federal political-question doctrine with state political-question doctrines. A state constitution that commits interpretative or adjudicatory authority of a provision to, say, the state governor might give rise to a political question in state court under state law. But if the federal political-question doctrine is based on Article III, then a federal court hearing such a state-law claim would be bound by the federal version—but not the state version—which could lead to vertical differences in justiciability. A state constitutional question committed by the state constitution to the governor, for example, would be justiciable in federal court if posed within a case otherwise meeting the requirements of Article III, even if the state constitution would make the question nonjusticiable in state court. But reliance on the substantive law for sourcing the political-question doctrine—including state substantive law—would instead require the federal court to defer to the state

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[25] *Luther*, 48 U.S. (7 How.) at 43 ("It rested with Congress, too, to determine upon the means proper to be adopted to fulfil this guarantee. They might, if they had deemed it most advisable to do so, have placed it in the power of a court to decide when the contingency had happened which required the federal government to interfere.").

[26] City of Boerne v. Flores, 521 U.S. 507, 530, 532 (1997).

political-question doctrine under *Erie* and vertical choice-of-law principles, thus producing the same result in federal or state court.

Conclusion

In the end, reorienting the political question doctrine away from Article III and toward the substantive law creates a more sensible and workable doctrine.

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