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Mark Tushnet

Georgetown University Law Center

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ESSAYS

PRINCIPLES, POLITICS, AND CONSTITUTIONAL LAW†

Mark Tushnet*

During the hearings on the nomination of Judge Robert Bork to the Supreme Court, Senator Strom Thurmond confined his questions of witnesses to elicit only their views on Judge Bork's ability, integrity, and experience.¹ During an earlier set of nomination hearings, Senator Thurmond's questions were somewhat more far-ranging. Consider this exchange with the nominee: "What purpose did the framers have, in your estimation, in referring to the incident involving former Representative Samuel Hoar in Charleston, S.C., in December 1844, as showing the need for the enactment of the original version of the 14th Amendment's first section?" — to which the nominee replied, "I don't know, sir."² One might take this as an attempt to probe the nominee's qualifications, but an earlier incident in the questioning makes one hesitate. In that earlier exchange the nominee asked Senator Thurmond to repeat the question, which he did, word for word, at which point Senator Edward Kennedy asked Senator Thurmond to paraphrase the question. Senator Thurmond, relying heavily on questions prepared for him by Professor Alfred Avins, was unable to do so, and was somewhat irritated at Senator Kennedy's intervention.³ That nominee was Thurgood Marshall, who had served for four years as a judge on the United States Court of Appeals for the Second Circuit,

† © 1989 by Mark Tushnet. I take this title from Herbert Wechsler's book *Principles, Politics, and Fundamental Law*, published in 1961. There is a sense in which this essay consists simply of variations on themes set out by Wechsler. If it does, I believe that these themes are worth rehearing, for, as I will suggest, many scholars appear to have forgotten them.

* Professor of Law, Georgetown University Law Center. B.A. 1967, Harvard; J.D. 1971, M.A. (History) 1971, Yale. — Ed. I would like to thank L. Michael Seidman and Gerry Spann for their comments on this essay, with which they mostly disagree.

1. Although the transcript of the hearings is not publicly available at this writing, I note that the "Minority Views," published with the Senate judiciary committee report and signed by Senator Thurmond, states at an early point, "As for qualifications, no one seriously questions that Judge Bork is eminently qualified by virtue of his ability, integrity and experience." SENATE COMM. ON THE JUDICIARY, NOMINATION OF ROBERT H. BORK TO BE ASSOCIATE JUSTICE OF THE UNITED STATES SUPREME COURT, S. EXEC. REP. NO. 7, 100th Cong., 1st Sess. 215 (1987).

2. *Hearings on the Nomination of Thurgood Marshall Before the Senate Comm. on the Judiciary*, 90th Cong., 1st Sess. 164 (1967).

3. *Id.* at 163. For Avins's role, I rely on an interview with Dean Francis X. Beytagh, Ohio State University College of Law, Columbus, Ohio, May 9, 1988.

and for two years as Solicitor General of the United States — a record rather similar in those respects to Judge Bork's.

The contrast in Senator Thurmond's performance in hearings concerning Judge Bork, whose nomination he supported, and Justice Marshall, whose nomination he opposed, suggests the apparently cynical view that one's position on the proper scope of senatorial inquiry during a nomination depends upon one's position on the merits of the nomination. Much has been written, usually provoked by controversial nominations, about the proper scope of senatorial inquiry.⁴ The press of immediate controversy, however, diverts attention from more fundamental issues about the nature of constitutional government, to which I devote this essay.

The idea that views on the scope of senatorial inquiry are governed by views on the merits of the nomination appears cynical because it insists that narrowly partisan concerns determine positions that ought to be guided by basic constitutional principle. I will argue, in contrast, that there is nothing at all cynical in the view that, across a wide range of constitutional issues, the constitutional scheme authorizes a member of Congress to act solely with reference to his or her concerns for reelection — that is, to be partisan in the narrowest possible sense in taking positions on matters of constitutional import. I will argue that politics in this sense is built into the constitutional scheme, and that it is acceptable that principle play a role only insofar as partisan concerns make principle relevant to the member's prospects for reelection.

In constitutional law, the position for which I argue is most developed in the political questions doctrine, understood in the proper way. After examining that doctrine and its implications for the manner in which the Constitution authorizes a member of Congress to behave, I turn to the role of politics and principle in the confirmation process.

I. THE POLITICAL QUESTIONS DOCTRINE

The largest part of public policy is made through the operation of ordinary politics, and the reasons why the constitutional scheme allows that to happen illuminate the political questions doctrine. In the area of ordinary legislation — bills, for example, designed to provide for the common defense or to promote the general welfare — the constitutional scheme places no direct constraints on what legislators may do to serve those ends.⁵ Yet, one of the fundamental assumptions of

4. See, e.g., Fein, *A Circumscribed Senate Confirmation Role*, 102 HARV. L. REV. 672 (1989); Rees, *Questions for Supreme Court Nominees at Confirmation Hearings: Excluding the Constitution*, 17 GA. L. REV. 913 (1983). Rees provides a guide to the literature. *Id.* at 923 n.38.

5. Of course, there are constitutional constraints external to the concepts of "the general

the constitutional scheme seems to be that we should be quite suspicious of arrangements that allow the exercise of power without constraint.⁶ How then can the vast discretion lodged in representatives with respect to ordinary policy decisions be reconciled with that assumption?

First, perhaps there are no criteria external to the political process against which the behavior of representatives can be measured. That is, perhaps there is nothing like an identifiable "public interest" against which legislation can be assessed. In this view, the process of ordinary politics exemplifies pure procedural justice: whatever results from the proper operation of this process is, solely for that reason, justified.⁷

Second, perhaps there *are* external criteria for determining "the public interest," but they are sufficiently vague that we are confident that the operation of ordinary politics will never lead legislators to adopt laws that fall outside the constitutionally permitted range.⁸ In this view, the Constitution authorizes legislators to act with an eye to principle, or with an eye to their chances for reelection, or with any other orientation they choose. The outcome of a political process staffed by representatives with varying orientations and varying views on what is appropriate as a matter of principle or expediency is assumed unlikely to violate whatever external evaluative criteria we might develop.⁹ Note, in this connection, that an orientation toward principle can be built into the orientation toward reelection: If a rep-

welfare" or "the common defense," such as those imposed by the first amendment or by the concepts of equal protection implicit in the due process clause of the fifth amendment. These constraints, however, do not operate in the contexts which this essay concerns. On indirect constraints on legislators, see *infra* text accompanying notes 50-51.

6. See, e.g., THE FEDERALIST No. 51, at 322 (J. Madison) (C. Rossiter ed. 1961) ("If men were angels, no government would be necessary. . . . In framing a government which is to be administered by men over men . . . you must first enable the government to control the governed; and in the next place oblige it to control itself.").

7. This view can be associated with pluralists and social choice theorists who consider their work not only descriptive but normative. In the legal literature, perhaps the most prominent example of a purely procedural approach to ordinary politics, and indeed to most aspects of constitutional politics, is Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971).

8. Or, at least, we are confident that they will do so quite infrequently, and we lack confidence that any mechanism of policing their behavior, such as judicial review, will be more accurate than ordinary electoral politics in determining the occasions when they do.

9. In situations where ordinary politics do not prevent legislators from violating the "clear" commands of the Constitution, political circumstances will likely be such that the commands of the Constitution, insofar as they come into play at all, will no longer seem clear. For example, should substantial political forces ever propel the presidential candidacy of a person who was 33 years old, arguments in favor of flexible interpretation of the presidential age requirement would probably become credible. For one version of this point, see M. TUSHNET, RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW 61-62 (1988).

representative's constituents care about principle and the representative cares only about reelection, the representative will act according to the constituency's views on matters of principle.¹⁰

The unavailability of external evaluative criteria and the general trustworthiness of the ordinary political process combine to allay concern that ordinary politics will operate in a normatively troubling way.¹¹ The political questions doctrine, properly understood, applies these same elements to matters of constitutional import.

In saying that the political questions doctrine must be properly understood, I suggest that the doctrine is not simply concerned with questions regarding the proper judicial role in a system of separated powers, but rather deals with fundamentals of the overall constitutional scheme concerning legislative as well as judicial responsibilities.¹² In one sense, this broader understanding of the political questions doctrine should be readily apparent, for when a court decides that it cannot determine a constitutional question because of the doctrine, it necessarily remits that question to the political branches. The consequence of the doctrine, therefore, is that the political branches will decide what the Constitution means with respect to political questions.¹³

Current formulations of the political questions doctrine make it difficult to identify many constitutional provisions whose interpretation is left to the political branches.¹⁴ The following analysis begins with one provision that the Supreme Court has suggested involves a political question, but where external evaluative criteria are plainly available. Thus, the only apparent justification for allowing the political branches to decide what that constitutional provision means is that they are sufficiently responsible in the appropriate sense. The exam-

10. This point plays an important part in the subsequent analysis. See *infra* text accompanying notes 50-51.

11. If one believed both that external evaluative criteria were available and that the political process was not trustworthy, one would have a quite different view of the output of that process. For an extended example, see R. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985).

12. They concern executive responsibilities as well, but that is only a tangential theme in this essay.

13. The view that the doctrine deals solely with the proper judicial role looks at only one side of the doctrine's functions, ignoring its necessary consequences. An alternative view, that the doctrine is a judicial device to avoid deciding the merits of politically difficult constitutional questions, was given its classic articulation in A. BICKEL, *THE LEAST DANGEROUS BRANCH* 183-98 (1962). Whatever the validity of that view at that time, *Baker v. Carr*, 369 U.S. 186 (1962), gave the political questions doctrine a sufficiently crisp formulation to make it extremely difficult to use for Bickelian avoidance purposes. Those purposes appear now to be served by the standing doctrine. See, e.g., *Allen v. Wright*, 468 U.S. 737 (1984).

14. For additional discussion of this point, see *infra* text accompanying note 17.

ples that follow involve situations in which external evaluative criteria are increasingly difficult to identify, and in which the possibility of political irresponsibility is increasingly large. The theme overall, however, is that only when we are confident both that external evaluative criteria exist and that the ordinary processes of politics are insufficient to constrain political irresponsibility, should we be concerned that members of Congress may respond to constitutional questions solely by considering their political interests.

A. *Examples of the Political Questions Doctrine*

1. *The Qualifications of Members of Congress*

In *Powell v. McCormack*,¹⁵ the Supreme Court held that the House of Representatives could not exclude an elected member except for failure to satisfy the so-called "standing" requirements of age, citizenship, and residency. The Court noted that the constitutional provision that each house of Congress shall be the "sole judge" of the qualifications of its members might be the required "textually demonstrable commitment" of the question to the political branches, thus making the House's decision to exclude a member for failing to satisfy the standing requirements a political question; however, the Court found it unnecessary to resolve that issue in *Powell*.¹⁶

If we put the simple doctrinal point aside,¹⁷ why might we want to treat a decision by the House of Representatives interpreting the standing requirements for membership as a political question? After all, there is no serious question about the existence of external evaluative criteria for determining whether a member satisfies the age requirement; in this regard, the age requirement is no different from the requirement that the President be thirty-five years old, a provision routinely invoked to demonstrate how easily some constitutional provisions can be interpreted.¹⁸ As it happens, however, some interesting interpretive questions concerning the age requirement have arisen in the course of congressional history. For example, a member claiming

15. 395 U.S. 486 (1969).

16. 395 U.S. at 521 n.42.

17. A "textually demonstrable commitment" might be both necessary and sufficient under intentionalist approaches to constitutional interpretation. Under the approach developed in this essay, one would identify when a provision constituted a textually demonstrable commitment by considering whether the political branches were sufficiently likely to be constrained by the operation of ordinary politics so that their interpretation of the constitutional provision was unlikely to threaten constitutional values. See *infra* text accompanying notes 19-32.

18. See, e.g., R. NAGEL, CONSTITUTIONAL CULTURES: THE MENTALITY AND CONSEQUENCES OF JUDICIAL REVIEW 14 (1989); Schauer, *Easy Cases*, 58 S. CAL. L. REV. 399, 402 (1985).

to satisfy the age requirement may not have been twenty-five when elected, but either reached that age between the election and the time for swearing in new members, or will reach it at some point during his or her term.¹⁹ Suppose that the House's decision on whether these people satisfy the age requirement presents a political question. Surely the ordinary methods of constitutional interpretation — examining evidence of text, intention, purpose of the provision, and the like — are rich enough to *allow* us to decide what the age requirement means in these circumstances, in that they define an easily described range of possible interpretations, each of which is reasonable. At the same time, however, it is exceedingly difficult to identify any threat to fundamental constitutional values, including the value of allowing the people to choose whom they wish to govern them,²⁰ in *any* resolution of the question by the House. Members of Congress acting completely politically will serve constitutional values in an acceptable manner in agreeing upon an interpretation.

When might this sort of resolution be troubling? There appear to be three problematic situations. In the first, members of Congress have base political motives in attempting to exclude a member and therefore adopt a completely unreasonable interpretation of the age requirement, one that falls outside the range of interpretive possibilities allowed by the external evaluative criteria. However, it is extremely difficult to design a politically plausible scenario in which this possibility would occur, because the situation is essentially one in which members of Congress are willing to demonstrate their flat disregard for reasonable interpretations of the age requirement. Notice also that members of Congress incur political costs by that sort of flat disregard of the Constitution's reasonable interpretations. The excluded member will probably belong to one of the major political parties, whose other members will be alert to the threat posed by an exclusion based upon a completely unreasonable interpretation of the age requirement. Even if few people will defend the excluded person's political principles, some will likely point out that the people in the district elected the member to represent them, and should not be deprived of their choice on the basis of an unreasonable interpretation of the Constitution. The more unreasonable the interpretation adopted

19. For examples, see L. DESCHLER, DESCHLER'S PRECEDENTS OF THE UNITED STATES HOUSE OF REPRESENTATIVES ch. 7, § 10, at 110 n.1 (one member took oath during second session of 36th Congress but may not have participated in the first session because of age; another took oath at age twenty-two and again at twenty-four, in 5th and 6th Congresses respectively); *id.* § 10.2, at 112-13 (senator satisfied age requirement at time of taking oath but not on date of election).

20. This point was stressed in *Powell*, 395 U.S. at 547.

by the political majority, the higher the political costs are likely to be, and if the chosen interpretation falls outside the range of reasonable possibilities, the political costs may well exceed the base political gains. If so, the operation of ordinary politics would be sufficient to keep Congress from acting in a constitutionally unacceptable manner.

The second problematic situation occurs when Congress adopts an unreasonable interpretation of a constitutional provision that has become exceedingly unpopular or that is widely regarded as too silly to be complied with. As to the former, we must note that the provision must be unpopular, although not so unpopular as to have led to the adoption of a constitutional amendment. Under these circumstances, more than a few people will probably mobilize opposition to what Congress proposes to do on the ground, not that the proposal is unsound as a matter of policy, but rather that it should be adopted through the constitutionally prescribed means of amendment. If such opposition fails, we are likely to be confronting something on the order of a constitutional crisis, about which constitutional theory probably has nothing to say.

A similar response is available in connection with the constitutional provision currently believed to be silly. On one level, if a current majority is strong enough to override objections to tampering with the Constitution by enacting an unreasonable interpretation, one doubts the possibility of constraining that majority. To the extent that the provision, for what people believe to be silly reasons, bars them from adopting what they believe to be sound legislation, it is unclear why they should be bound by a decision made generations ago.

The most important response to the difficulties posed by unpopular or silly provisions, however, is that, once again, it is quite difficult to envision politically realistic scenarios in which unpopular or silly provisions constrain Congress on significant matters. The examples that come to mind involve provisions like the first amendment, which may not be sufficiently unpopular and which is, in any event, broad enough to license reasonable interpretations that would permit a majority to do what it wanted.²¹

The final problematic situation is more difficult to accommodate in the scheme developed here. In this situation, the elected person indeed does not satisfy the age requirement under one arguable interpretation — for example, she was elected on November 4 and turned

21. The present controversy over the constitutionality of efforts to enact a new statute to make it a criminal offense to burn a flag is an example of a politically significant matter involving, however, a constitutional provision that is not in the abstract unpopular and that can be read to allow Congress to enact at least some statute prohibiting flag burning.

twenty-five on December 12 of the same year — and members of Congress seek to exclude her for some invidious reason — for example, because she is a woman-identified woman — using the arguable constitutional interpretation as their nominal ground of opposition. Unlike the previous scenario, here the stated interpretation is not unreasonable, but the member's failure to satisfy the requirement as interpreted is a fig leaf concealing the real reason for exclusion.²² It is reasonably clear that a member of Congress should not behave in this essentially dishonest way. The doctrinal analogue occurs in cases where the Court has declined to examine the motives of members of Congress in enacting legislation even though certain motivations are constitutionally impermissible.²³ In such situations, the member of Congress acts in a constitutionally impermissible way if he or she is motivated by the improper ground for decision.

Yet, if the impropriety of this behavior is clear, the possibility of constraining it is not nearly as apparent. By hypothesis, the proffered interpretation of the age requirement is a reasonable one. The member may then use the following rhetoric to defend against charges of base motivation: "It's not me who acted incorrectly, but my opponents, who adopted an incorrect interpretation of the Constitution." Again, what seems to matter is that there will ordinarily be opponents of those who would act on impermissible grounds, who disagree with the position taken for reasons of their own political advantage (as when the person to be excluded is a member of the same political party) or as a matter of principle (as when they accept the constitutional principle that a person's sexual orientation is not a proper ground for exclusion). As in the prior scenario, there is no guarantee that the opponents of those who would act in a constitutionally impermissible manner will prevail. Yet, the modern experience of the country rather strongly suggests that principled arguments have an important political constituency,²⁴ one strong enough to allay most concerns about the practical implications of treating the age requirement as one that

22. Senator Thurmond's scrutiny of Judge Marshall's qualifications provides a possible real-life example. A nominee's qualifications are indeed a permissible topic of inquiry and basis for opposition, but it is hard to escape the inference that Senator Thurmond was really more concerned with the nominee's race than with his qualifications, especially in light of the Senator's inability to pursue the inquiry other than by reading an aide's questions. For additional discussion of the "fig leaf" problem, see *infra* text accompanying note 72.

23. For a discussion, see Brest, *The Conscientious Legislator's Guide to Constitutional Interpretation*, 27 STAN. L. REV. 585 (1975).

24. Again, the controversy over the proper response to *Texas v. Johnson*, 109 S. Ct. 2533 (1989), shows that there is a constituency that opposes efforts to amend the Constitution or evade the Court's decision because (as that constituency would put it) of a principled commitment to first amendment values.

presents a political question, at least when that constituency is joined, as it usually will be, by a more narrowly political one.

2. *Impeaching the President*

The preceding points about the practical political costs of constitutional irresponsibility may be further illustrated by considering the proposition that the Senate's action in impeaching a President presents a political question. As with the standing requirements for membership in the House of Representatives, here too the possibility that external evaluative criteria are available seems rather strong. Consider the following situation: A President is impeached over the objection that the grounds charged do not constitute "high crimes and misdemeanors" within the meaning of the Constitution. Note first that, as the Supreme Court has constructed the political questions doctrine in *Powell v. McCormack*,²⁵ this objection would not present a political question. The President's objection is that the Senate has adopted a definition of "high crimes and misdemeanors" different from the one adopted by the Framers, just as Representative Powell objected that the House of Representatives adopted a definition of "qualifications of its members" different from the one in the Constitution. Both Powell's claim and the President's call only for a simple interpretation of the Constitution, and that, according to *Marbury v. Madison*²⁶ and *Powell v. McCormack*, is just what the courts are supposed to do.²⁷

Despite the parallelism between the impeachment question and the question presented in *Powell*, almost all commentators believe that the courts should not review a presidential impeachment.²⁸ At the core of the consensus is the view that such a case would present a political question. Yet why should that be so in light of *Powell v. McCormack*? In this context, the view that the political questions doctrine is a device by which the courts avoid decision on certain difficult questions²⁹ has a great deal of force, for judicial review of an impeachment would obviously be extremely disruptive of the ongoing operations of the government.³⁰ Still, whatever the descriptive accuracy of this pruden-

25. 395 U.S. 486 (1969).

26. 5 U.S. (1 Cranch) 137 (1803).

27. This is not to say, of course, that determining what the Constitution means is a simple task, but only that the enterprise here is indistinguishable in principle from the ordinary run of constitutional interpretation that the courts engage in when they deal with cases that no one believes present political questions.

28. See, e.g., C. BLACK, *IMPEACHMENT: A HANDBOOK* (1974); P. KURLAND, *WATERGATE AND THE CONSTITUTION* (1978).

29. See *supra* note 13.

30. Whose orders would be obeyed in a crisis, for example, the impeached "former" Presi-

tial or political-science account of the political questions doctrine, it does not treat the doctrine as one embodying a legal principle.³¹

In the view developed here, however, allowing the Senate to adopt whatever definition of "high crimes and misdemeanors" it chooses is acceptable because the operation of ordinary politics is likely to constrain irresponsible action as effectively as any other mechanism, including judicial review. The most obvious political dimension in the problem of impeachment is the party system. Members of the President's party in the Senate would defend against the impeachment, and one powerful line of defense would be that the impeachment is merely political — shown, the argument would go, by the fact that the proponents of impeachment are acting upon a constitutionally questionable definition of impeachable offenses. I have little doubt that this line of defense would rather severely limit the range of possible definitions of impeachable offenses upon which the Senate could act.³²

It is worth remembering, too, that the ultimate question is comparative: Are the disciplining effects of ordinary politics on constitutional interpretation by the political branches or judicial review more likely to improve the operation of the overall constitutional system? Where ordinary politics fail to constrain the Senate from adopting an unacceptably broad definition of impeachable offenses, we could fairly wonder whether the courts could pull off a decision chastising the Senate for its unconstitutional action.³³ In short, where ordinary politics fail, we may face situations in which all bets are off on the continuing viability of the constitutional system.

3. Federalism

*Garcia v. San Antonio Metropolitan Transit Authority*³⁴ can be understood as adopting the view that objections to federal legislation on the ground that it intrudes on constitutionally protected domains of

dent's — whose impeachment could be invalidated by the Supreme Court — or the putative incumbent President's?

31. For a classic statement of this criticism of the view described in the text, see Gunther, *The Subtle Vices of the Passive Virtues*, 64 COLUM. L. REV. 1 (1964).

32. Relatedly, the co-membership of the President and members of the Senate in a political party may make the President sufficiently sensitive to the political costs of fighting impeachment so that he or she would resign or work out some sort of compromise, thus effectively foreclosing the occasion for judicial interpretation of the Constitution.

33. Perhaps a phenomenon like regression to the mean might operate. That is, the more institutions that must agree on an interpretation of the Constitution, the less likely it is that the ultimate outcome will be unreasonable in the relevant sense. Still, the point is that in circumstances where the political branches adopt unreasonable interpretations, the courts are unlikely to succeed in constraining them.

34. 469 U.S. 528 (1985).

the states raise political questions.³⁵ The Court's two-part analysis paralleled the two parts of the suggestion made here about the structure of the political questions doctrine.

The first part of the *Garcia* opinion recited the Court's previous difficulties in applying the test, articulated in *National League of Cities v. Usery*,³⁶ that federal legislation was invalid if it infringed on domains integral to the interests of states "as states." In effect, the Court argued, its experience had shown that, contrary to the Court's belief in *National League of Cities*, there were no external evaluative standards against which a states' rights claim could be measured. In more traditional terms, the Court concluded that there were no judicially manageable standards for deciding federalism-based claims. Notably, neither Justice Rehnquist nor Justice O'Connor, each of whom dissented, disagreed with the proposition that the *National League of Cities* test had failed; the former simply asserted that some other, unspecified standard could be developed to reach the *National League of Cities* result, and the latter proposed a balancing test in which intrusion on state interests would be relevant to the disposition of the constitutional claim.³⁷

There is a sense, however, in which the claim that there are no external evaluative standards is necessarily unpersuasive. Consider *Baker v. Carr*,³⁸ which first suggested the "no judicially manageable standards" test. Justice Frankfurter's dissent claimed that there were no such standards for deciding equal protection challenges to apportionment,³⁹ to which the Court replied that standards under the equal protection clause were well-developed.⁴⁰ Yet, while the Court proclaimed that such standards existed,⁴¹ it did not hold that the Constitution required a rule of "one person, one vote." The Court's relatively rapid embrace subsequently of the "one person, one vote" standard⁴² clarifies the nature of Justice Frankfurter's objection. The difficulty, as he saw it, was not really that courts could not develop standards to evaluate legislative apportionments, but rather that such court-developed standards would inevitably be insensitive to consider-

35. See also *South Carolina v. Baker*, 485 U.S. 505 (1988).

36. 426 U.S. 833 (1976).

37. 469 U.S. at 579-80 (Rehnquist, J., dissenting); 469 U.S. at 588 (O'Connor, J., dissenting).

38. 369 U.S. 186 (1962).

39. 369 U.S. at 322 (Frankfurter, J., dissenting).

40. 369 U.S. at 226; see also *Kirkpatrick v. Preisler*, 394 U.S. 526 (1969) (good faith effort to achieve precise mathematical equality required in congressional apportionments); *Reynolds v. Sims*, 377 U.S. 533 (1964).

41. 369 U.S. at 226.

42. *Reynolds*, 377 U.S. 533 (1964).

ations that a more political system of apportionment would be allowed to take into account.⁴³ "One person, one vote" is judicially manageable but, in Justice Frankfurter's view, bad policy.

This episode is instructive because it demonstrates that it will rarely be true that external evaluative standards are completely unavailable. Some standards, albeit often rather arbitrary ones, could be developed with respect to almost any significant constitutional claim. Given this fact, however, we need to know why there is something disquieting about judicial administration of arbitrary standards for interpreting the Constitution, in a system that takes *Marbury* as its predicate. The second element in this essay's approach to the political questions doctrine provides that explanation: Judicial arbitrariness is particularly troubling when another mechanism — the operation of ordinary politics — is likely to do just as good a job of constraining the exercise of arbitrary legislative power.

The Court invoked this latter element in the second part of its *Garcia* analysis. Relying on Herbert Wechsler's classic argument, as elaborated more recently by Jesse Choper,⁴⁴ the Court asserted that there were adequate safeguards within the operation of ordinary politics to assure that the states' constitutional interests would be respected by Congress.⁴⁵ Dissenting, Justice Powell argued that the Court's position was fundamentally in tension with *Marbury* in its holding that certain questions of constitutional interpretation were to be left to Congress.⁴⁶ Justice Powell's argument is correct, but only restates with disapproval the proposition that issues of federalism are political questions.⁴⁷ Justice Powell also denied the empirical premise that the interests of states were in fact adequately represented in the

43. For example, despite Chief Justice Warren's assertion that "legislators represent people, not trees or acres," *Reynolds*, 377 U.S. at 562, apportionment should sometimes be sensitive to interests like family farming or concentrations of racial or religious minorities because legislation often has a socially undesirable impact on those interests which is disproportionate to the number of people affected.

44. Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954); J. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 175-84 (1980).

45. *Garcia*, 469 U.S. at 551.

46. 469 U.S. at 567 (Powell, J., dissenting).

47. It perhaps should be noted that Justice Powell was willing in other contexts to use political-question language without bothering to explain why he could do so under *Marbury*. See, e.g., *United States v. Richardson*, 418 U.S. 166, 188-92 (1974) (Powell, J., concurring). For a particularly egregious example of Justice Powell joining an opinion barring judicial interpretation of a constitutional provision (the establishment clause of the first amendment, as to which it would be difficult to claim openly that a political question was presented), see *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982).

ordinary operation of congressional politics.⁴⁸

The empirical objection to the Court's argument in *Garcia* has two branches. First, if one examines how Congress actually works, one discovers that congressional sensitivity to the interests of states as states is relatively sporadic. Sometimes members of Congress openly advert to the impact their proposals will have on those interests, and sometimes they do not.⁴⁹ It is important to stress, however, that the argument underlying *Garcia* does not depend in any significant way on explicit congressional consideration of the interests of the states, but instead relies on structural features of the government that give members of Congress incentives to respond to those interests. Regardless of whether the members expressly address the interests of states, the argument goes, their political careers will turn on the way in which voters generally, or politically important segments of their constituencies, evaluate what they have done. Incentive structures operate in complex ways, and those who feel their effects are not always able to articulate the reasons for their actions in terms of incentives.⁵⁰ We may have more confidence that the incentive structures have operated as they are postulated to operate, of course, if members of Congress advert to the interests of states as states in the course of their deliberations, but it would seem to impose an unnecessary stringency on the political process to insist that such direct consideration appear on the face of the congressional record. In short, while it may be desirable for members of Congress to address directly questions about the impact of their actions on the states as states, it hardly seems necessary that they do so.

The second branch of the empirical objection to the *Garcia* analysis is that in fact the structures presently operating on members of Congress do not give them adequate incentives to respect the constitutional interests of states. I do not wish to enter into a discussion of that empirical claim here, because evaluating it would lead us too far into the details of federalism and away from the more general points about the political questions doctrine that are my primary concern. I simply note that, if the empirical objection is confined, as it should be, to this second branch, it is entirely consistent with the structure of the

48. 469 U.S. at 564-67 (Powell, J., dissenting).

49. Instructive case studies of congressional sensitivity are provided in Lee, *The Political Safeguards of Federalism?: Congressional Responses to Supreme Court Decisions on State and Local Liability*, 20 URB. LAW. 301 (1988). See also Mulhern, *In Defense of the Political Question Doctrine*, 137 U. PA. L. REV. 97, 159-61 (1988).

50. Thus, in *South Carolina v. Baker*, 485 U.S. 505 (1988), the Court was correctly indifferent to arguments that no one in Congress actually *said* anything about the impact of a change in the tax laws on state treasuries.

argument of this Essay about the proper scope of the political questions doctrine.

Before we take up the separation-of-powers issues implicated in the question of the proper scope of senatorial inquiry into the qualifications of Supreme Court nominees, a brief summary of the argument so far may be useful. When we consider whether we should be troubled by remitting certain questions of constitutional interpretation to the political branches, we should first determine how successful the ordinary operations of politics are in constraining arbitrary governmental action. This concern is particularly compelling when it is difficult to develop nonarbitrary standards by which we could evaluate the constitutional interpretations proffered by the political branches, but it has force even when external evaluative standards are available. In making this determination, we should be fully aware of the complexity of the ordinary operations of politics. Those operations include mere partisanship as well as incentive structures affecting people who wish to be reelected. They also include, however, whether as an element of partisanship, as part of the incentive structure, or as an independent factor, members' concern that they act in accordance with the constitutional scheme. That is, sometimes the ordinary operations of politics produce citizens and representatives who believe that there are certain topics that should be placed outside the domain of ordinary politics. For representatives, this concern can be part of the reelection incentive structure, as when important segments of constituencies are themselves concerned with the underlying questions of principle, or it can simply be an independent motivation of the member of Congress.

Finally, at least in situations in which the courts will refuse to review the decisions of the political branches, we must remember the two serious normative problems that might arise when the political branches interpret the Constitution: the problem of the fig leaf, in which appeals to principle conceal normatively unacceptable grounds for decision, and the problem of the constitutional crisis, in which all bets are off as to the interpretation of the Constitution. The comparison with the political questions doctrine is designed to demonstrate that the adequacy of the political process is necessarily a comparative question: in that context, the question is whether the courts will do a better job than the political branches in interpreting the Constitution. In the case of the problems of the fig leaf and the constitutional crisis, the comparative perspective shows that no improvements may be possible over the ordinary operations of politics — except, of course, to the extent that a more informed citizenry would give members of Congress more focused incentives to act according to principle.

4. *Executive-Congressional Conflicts: The Scope of Senatorial Inquiry as an Example*

The preceding analysis sheds light on questions of the separation of powers that have recently been controverted. For example, much of the literature has recently been concerned with the contrast between formalistic and instrumental ways of understanding the separation of powers.⁵¹ In the terms developed here, the defenders of formalism claim that there are external evaluative criteria against which the statutes enacted by Congress and signed by the President can be measured, whereas the critics of formalism point out that those evaluative criteria are quite arbitrary. The defenders of instrumentalism argue that the courts should be quite deferential to compromises worked out in the political process, because there is no reason to believe that the operation of ordinary politics provides a less effective constraint on the exercise of arbitrary power than does judicial review.⁵² The general analysis now can be used to examine this Essay's opening question: What is the proper scope of senatorial inquiry into the qualifications of a Supreme Court nominee?⁵³

Plainly, there are external evaluative criteria that can be used to measure the actions of a senator. As Senator Thurmond indicated in his questions during the Bork nomination hearings, it is possible that senators should examine only the ability, integrity, and experience of judicial nominees. Or it could be that a senator should be concerned with the nominee's predicted behavior should he or she be confirmed, and therefore could inquire into the nominee's relatively fixed positions on questions of legal theory as a basis for predicting whether the nominee would probably vote for or against certain positions about which the senator is particularly concerned. The necessity to choose between these two positions, or among other possible positions, might direct us to the usual sources for interpreting the Constitution. What is at stake, ultimately, is a question of separation of powers, in the sense that different answers to the question of the proper scope of senatorial inquiry will lead to different allocations of power between the President and the Senate. So, to answer the question, we would examine the text of the Constitution, the history of its framing, and all

51. See, e.g., Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions — A Foolish Inconsistency?*, 72 CORNELL L. REV. 488 (1987).

52. For a review of these positions, see Sargentich, *The Delegation Debate and Competing Ideals of the Administrative Process*, 36 AM. U. L. REV. 419 (1987).

53. In a later section we will consider the consequences of the conclusion that determining the scope of that inquiry is a political question as political questions are here defined. See *infra* section I.B.

the other standard sources of constitutional interpretation. Because this Essay is concerned not with that particular question but with the analytically prior question of whether a senator is obliged by the constitutional scheme to engage in that sort of examination, I will not review the standard sources, but note only that, as with almost all interesting constitutional questions, the sources appear to license a reasonable senator to conclude either that only a relatively narrow scope of inquiry is allowed, or that a relatively broad scope of inquiry is permitted.⁵⁴

Supporters of Judge Bork's nomination have criticized the nomination process on the ground that it demonstrated the failure of the ordinary operations of politics to constrain the Senate from improper interpretations of its role in the nomination process.⁵⁵ In particular, they have emphasized the influence of narrow interest groups in mobilizing opposition to the nomination, and point as an example to the uniform opposition to the nomination among recently elected Southern Democratic senators. According to this view, these senators, most of whom had faced substantial opposition from quite conservative Republicans, had been elected by assembling a coalition of black and blue-collar white voters, along with a smattering of white liberals. The blue-collar white voters were among the strongest supporters of President Reagan's election and reelection, and Bork's adherents argued that senators should presume that these constituents favored Judge Bork's nomination. Further, the new Democratic Senators had campaigned on platforms that, in their emphasis on problems of law and order and similar "Republican" social issues, suggested that they ought to support the nomination. Nonetheless, the argument goes, they were induced to oppose the nomination, contrary to their inclinations and to the inferences that could be drawn from their campaigns, solely because Washington-centered interest groups had mobilized their black constituencies and threatened to retaliate against these senators when they sought reelection.⁵⁶ In addition, and not confined to pressure on the Southern senators, Judge Bork's opponents are said to have seriously distorted his record, particularly by translating his criticisms of the constitutional arguments used in certain Supreme Court

54. Compare Rees, *supra* note 4, at 923 ("Almost everyone . . . agree[s] that probable opinions were proper criteria.") with Fein, *supra* note 4, at 672-73 (describing a limited "Hamiltonian model" for scope of inquiry).

55. The best statement of this position that I have found is Garment, *The War Against Robert Bork*, COMMENTARY, Jan. 1988, at 17.

56. *Id.* Of course, this story must be accompanied by criticism of the Reagan administration for failing to mobilize its own constituency to be persuasive in its depiction of the nomination fight as simply a political struggle.

opinions into criticisms of the results reached by the Court. For example, the fact that Judge Bork had offered rather standard academic criticisms of the scope of the state action doctrine as articulated by the Court in *Shelley v. Kraemer*⁵⁷ was, Judge Bork's supporters said, unfairly represented as evidence that Judge Bork approved of racially restrictive covenants.

This account of the nomination process can be questioned in a number of ways. For example, some of the Southern senators may have opposed the nomination because they disagreed with the way they thought Judge Bork would act as a Justice of the Supreme Court; much of the political analysis offered by Judge Bork's supporters depends upon inferences from campaign positions not expressly directed at the issue of Supreme Court confirmations, and imputations of motives to senators who articulated their positions rather differently. The political analysis cannot account for the fact that a highly conservative Southern senator, John Stennis of Mississippi, voted against the nomination, for well before the vote was taken he had announced his intention to retire from the Senate, and therefore could not have been concerned about alienating potential voters. In addition, the advertisements with the greatest number of alleged distortions of Judge Bork's record were not very widely distributed,⁵⁸ although they were disseminated "inside the Beltway," where, presumably, most Senators saw them and perhaps gained an inaccurate impression not only of Judge Bork's record but also of the extent of opposition to that presumed record. Finally, sometimes the distinction between criticism of opinions or theories and criticism of results rang hollow, as when Judge Bork, who claimed to criticize only the Court's opinion in *Griswold v. Connecticut*,⁵⁹ was unable to provide Senators with a constitutional analysis that he deemed acceptable to reach the *Griswold* result.⁶⁰

For present purposes, however, I do not want to engage these critics of the nomination process on whether their political analysis is persuasive. Rather, we should note the exact nature of their objection: that the nomination process was vitally affected by the ordinary operations of politics. Surely no one would think it strange or constitu-

57. 334 U.S. 1 (1948).

58. See Totenberg, *The Confirmation Process and the Public: To Know or Not to Know*, 101 HARV. L. REV. 1213, 1221-22 (1988).

59. 381 U.S. 479 (1965) (invalidating as an unconstitutional invasion of privacy a Connecticut law prohibiting the use of contraceptives).

60. For a brief mention of this exchange (which does not, however, cite the precise matter described in the text), see E. BONNER, *BATTLE FOR JUSTICE: HOW THE BORK NOMINATION SHOOK AMERICA* 269 (1989).

tionally improper for a senator to vote for or against a tax measure because important segments of his or her constituency would consider that vote in deciding whether to support the senator's bid for reelection. What the critics of the nomination process imply, therefore, is that it is in some sense constitutionally improper for ordinary politics to play a role in the confirmation process.⁶¹

The confirmation process is, of course, one aspect of the constitutional system of the separation of powers. Therefore, it is important to consider the extent to which the operation of ordinary politics is a feature of the constitutional allocation of powers between the President and the Senate. We know from the language of the Constitution *what* the Senate is to do with a nomination: it is to advise and consent. Yet, the language of the Constitution does not say *how* the Senate should do that — by examining only the nominee's ability, integrity, and experience, or by inquiring more broadly into the nominee's political and social views.

When we look beyond the text of the Constitution, we will discover a tension in the other sources of constitutional interpretation. I focus on *The Federalist Papers*, in part because the tension is easily described by reference to different numbers in the *Papers*.⁶² As Bruce Fein has shown, when Hamilton addressed directly the question of the Senate's role in the nomination process, he characterized it as relatively limited.⁶³ In my terms, Hamilton offered external evaluative criteria to guide the Senate's action, and those criteria were concerned primarily with the nominee's ability, integrity, and experience.⁶⁴ Elsewhere, however, *The Federalist Papers* generally seem to make the operation of ordinary politics the linchpin of the system of separation of powers. The most celebrated general discussion of the separation of powers occurs in *The Federalist Number 51*, in which Madison writes that "[A]mbition must be made to counteract ambition" and that the "interest of the man must be connected to the . . . interests of the

61. Two qualifications come immediately to mind. First, perhaps the objection is that it is constitutionally improper for ordinary politics to have played as large a role as it did in the Bork confirmation process. I find it difficult to determine how to measure the extent of the influence of ordinary politics, and I doubt that much turns on whether the issue is stated as an absolute or as one of degree. Second, it is important to stress that the objection is to the operation of ordinary politics in the *confirmation* process. It would be difficult to defend the proposition that the President acts in a constitutionally questionable manner in considering political favors when deciding whom to nominate. This merely demonstrates, once again, that the issue is basically one of the allocation of power between the President and the Senate; that is, that we are dealing with a question of the separation of powers.

62. Perhaps this is because the different numbers were written by different authors.

63. Fein, *supra* note 4, at 672.

64. See THE FEDERALIST No. 66, at 405 (A. Hamilton), & No. 78, at 471 (A. Hamilton) (C. Rossiter ed. 1961).

place.”⁶⁵ The latter statement, in particular, appears positively to reveal in the claim that the separation of powers operates by mobilizing ordinary politics: The interests of a senator are in, among other things, reelection, and they connect with the interests of the place by giving the senator an incentive to stand against the President, letting the senator’s ambition for reelection counteract the President’s ambition for, among other things, making a mark on the Supreme Court.

The tension in *The Federalist Papers* can be reduced in several ways. First, we must understand that the *Papers* were documents designed to persuade people in the midst of a highly contested struggle for adoption of the Constitution. They had to operate on two levels, describing both the way the new national government would function in general and the way the authors believed things would actually work once the new government was in place. Thus, given what they knew about their society, Madison and Hamilton might well have believed that, if the confirmation process were left to the operation of ordinary politics, senators would confine their inquiries to integrity, ability, and experience. But, they were also experienced enough to understand that their predictions about the specific operations of government might prove wrong even though they well understood the broader mechanisms of that government. Second, Hamilton was a notorious defender of expansive presidential power, and there is little reason to take his claims about the scope of that power in particular instances as overriding the more general propositions about the structure of the government offered elsewhere in the *Papers*. Finally, and perhaps most important, Madison’s and Hamilton’s arguments operate on different levels of generality, and since Madison is concerned with the overall operation of the system while Hamilton is concerned with details, there may be good reason to pay more attention to Madison’s theoretical propositions than to Hamilton’s specific ones.

If we take “ambition counteracting ambition” as the fundamental principle of the separation of powers, it follows rather straightforwardly that questions like that of the proper scope of senatorial inquiry are political questions in the sense offered here. They are to be left to the operation of ordinary politics, and there is nothing constitutionally troubling about a senator whose position on that question is determined solely with reference to crass political concerns, for those concerns are part of “the interests of the man.” It should be emphasized once again, however, that to say that there is nothing constitutionally troubling about such a senator is not to say that he or she acts

65. THE FEDERALIST NO. 51, at 322 (J. Madison) (C. Rossiter ed. 1961).

in an admirable manner. It might be better if senators were less concerned about reelection and more concerned about principle — even if taking a principled stand reduced their chances of reelection — but, I have argued, the Constitution authorizes a senator to act solely with reference to political concerns. Indeed, it might be worse if senators were less concerned about reelection and more concerned about principle, for that might reduce the efficacy of the principle that ambition should counteract ambition.

If this conclusion is accepted, an additional question arises: Even if a senator may decide what scope of inquiry into a nominee's qualifications is appropriate solely with reference to ordinary political considerations, may that senator *vote* on a particular nomination solely with reference to the same considerations? Before addressing that question, it will be helpful to discuss some objections to the analysis as it has been developed so far.

B. *Objections*

Many people will doubtless be troubled by the suggestion that members of Congress can decide constitutional questions by referring solely to political considerations. It is one thing to argue that constitutional interpretation should not be left only to the courts. In a system with multiple possible interpreters of the Constitution, though, one might argue that everyone who does interpret the Constitution should apply the same tools of principle that the courts purport to use. In that view, one might agree that members of Congress should interpret the Constitution in at least some situations and contend that, if their interpretations are to have weight, they should be made through a deliberative process in which all the relevant constitutional concerns are openly addressed in an informed and even-handed manner.⁶⁶ The view offered here is different. Such a deliberative process is certainly not objectionable, but neither is it required by the Constitution. In this approach, ordinary politics is good enough. What is wrong with that view?

1. *Normatively Troubling Outcomes*

The first and probably most obvious objection to this view is that it almost guarantees that sometimes there will be normatively troubling outcomes in constitutional interpretation. Consider the member of Congress who has a racist constituency and therefore votes to exclude

66. See Brest, *Congress as Constitutional Decisionmaker and Its Power to Counter Judicial Doctrine*, 21 GA. L. REV. 57, 101-02 (1986).

Representative Powell from the House solely to appease the racists in his district — voters who could, he believes, provide the margin for his defeat in the next election. Or consider the Senator who votes against Judge Bork's confirmation because his constituents erroneously believe that Bork is Jewish.

There is no doubt that this objection has force, and that all that can be done is to show that its scope in practice is perhaps more limited than might initially be thought. Consider three aspects of the previous analysis. First, we must note that the political branches are multi-member bodies.⁶⁷ As a consequence, other members will almost certainly point out the normatively troubling grounds upon which the senator is relying. In the context of a nomination, the President and at least some members of the President's party will undoubtedly mobilize their supporters against those who oppose the nomination on openly racist grounds. Other senators, perhaps less concerned about the underlying principle, will nonetheless support the nomination on its merits. Still others, including members of the racist senator's party, will take a principled stand against that sort of opposition, in part because the party as a whole must appeal to a national constituency in which racist opposition may play less well. Considering all these possible sources of constraint on normatively troubling outcomes, we may be less concerned by the fact that embedded somewhere in the Senate some senators cast their votes for the wrong reasons.

In the context of a nomination, or indeed of proposed legislation where there is no guarantee of judicial review either because the courts apply an extremely loose standard of reasonableness, or because the proposal will not be enacted, there is an additional difficulty. In these contexts the comparative question — ordinary politics as compared to what? — must be framed to compare ordinary politics to a different form of politics in which members of the political branches expressly advert to constitutional concerns in their deliberations. When that comparison is made, the problems of the constitutional crisis and the fig leaf are quite serious.

The former problem arises when a representative's constituency is indifferent to or affirmatively rewards the representative's expressions of normatively improper positions. For example, during the long and unsuccessful effort in the 1920s and 1930s to enact a federal anti-lynching law, several Southern senators and representatives openly

67. I focus on the House and Senate in what follows, but the points are the same if we consider the executive branch.

stated their opposition to such laws in racist terms.⁶⁸ If representatives were placed under a moral injunction to avoid stating such grounds of opposition, there might ultimately be a beneficial educative effect: people forced to suppress expressions of their undesirable views may come to believe that those views are indeed undesirable.⁶⁹ There are two reasons, though, to think that imposing a norm against such expressions is unnecessary or undesirable. First, the other mechanisms of discipline — opposition from other members of the same party, which has its national constituency, opposition from members of the other party, and the like — have in the recent past proven rather effective in constraining the expression of normatively undesirable views.⁷⁰ The incremental beneficial effect of an additional normative constraint may be quite small. Second, imposing such a constraint is likely simply to transfer the difficulty from the domain of the constitutional crisis to the domain of the fig leaf.

The anti-lynching campaign again provides an example, because some of its “more respectable” opponents stated their opposition in terms of states’ rights rather than in racist terms. As has been suggested, Senator Thurmond’s opposition to Thurgood Marshall’s nomination to the Supreme Court may be another example of the problem of the fig leaf. The Supreme Court recognized the problem in *United States v. O’Brien*,⁷¹ refusing to invalidate a statute on the ground that statements on the Senate floor showed that it was adopted for normatively troubling reasons — to punish people who opposed the war in Vietnam — saying that relying on that ground would encourage senators to conceal the real reasons for their action in re-enacting the statute.⁷² If, as is almost always the case, there are constitutionally permissible grounds for a representative’s position, the problem of the fig leaf will be pervasive. Indeed, the Court’s position in *O’Brien* makes sense beyond the context of judicial review. As citizens exam-

68. For examples, see R. ZANGRANDO, *THE NAACP CRUSADE AGAINST LYNCHING, 1909-1950*, at 64, 143, 149-50 (1980).

69. The examples should make clear that there is a difference between a normatively troubling reason, such as racism, and a constitutionally erroneous one. It is a premise of this branch of the argument that there may be external evaluative standards to determine what the Constitution really means, but that does not mean that a representative who adopts a different interpretation of the Constitution acts in a normatively troubling way. This is to say only that the Constitution as a system of organizing a government does not occupy a fully normative terrain (although it may fully occupy the normative terrain).

70. Cohler, *Republican Racist*, *THE NEW REPUBLIC*, Sept. 18 & 25, 1989, at 11, discusses this proposition in the context of the problems of the Louisiana and national Republican parties in dealing with the election of David Duke, a prominent white supremacist, as a Republican Louisiana state senator.

71. 391 U.S. 367 (1968).

72. 391 U.S. at 382-86.

ining the behavior of our representatives, we ought to regard the problem of the fig leaf as a serious one, because when fig leaf reasons are given on the floor of the Senate or the House it becomes more difficult for us to engage in an open discussion of the propriety of our representatives' behavior. Better, it would seem, that they say openly what they really care about, so that we can engage them on the terrain that truly matters.

Treating certain questions as political questions in the sense developed here makes sense in some circumstances, then, even if we are convinced that at times normatively troubling results may be obtained. The circumstances are those where there is no mechanism other than citizen outrage to constrain the representatives, as with nominations or legislation that fails to be enacted, and where there are both constitutionally permissible arguments and normatively troubling ones in support of one or another position.

2. *The Slippery Slope*

A second difficulty with treating certain constitutional questions as political, in the sense that we will allow the operation of ordinary politics to determine what the Constitution means, is that Congress and the President may find themselves sliding down a slippery slope. Having relied on ordinary politics to resolve a particular problem in a reasonable way, they may become accustomed to adopting such resolutions. The constraining effect of ordinary politics may gradually be weakened, to the point that the constitutional interpretations that result from the operation of ordinary politics should be unacceptable. As Frederick Schauer has shown, though, the conditions under which slippery slope problems are likely to arise are fairly restricted.⁷³

Justice Scalia's dissent in *Mistretta v. United States*⁷⁴ explained the slippery slope objection. The Court in *Mistretta* upheld the constitutionality of the Federal Sentencing Commission, on which several federal judges sit, to prescribe and, as experience accumulates, revise guidelines for sentencing criminal offenders. Justice Scalia objected that the Commission's functions amounted to lawmaking and could not be delegated by Congress. Some delegations, he thought, were permissible because they were subject to the constraints of ordinary politics; these delegations involved the transfer of legislative authority from Congress to either the President or the courts, and, according to Justice Scalia, Congress's ambition would lead it to be cautious in aug-

73. Schauer, *Slippery Slopes*, 99 HARV. L. REV. 361 (1985).

74. 109 S. Ct. 647 (1989).

menting the authority of another governmental branch, which of course has its own ambitions.⁷⁵ In contrast, the Sentencing Commission, as Justice Scalia saw it, was a free-standing lawmaking body, which drew power away from Congress without transferring it to another branch:

If rulemaking can be entirely unrelated to the exercise of judicial or executive powers, I foresee all manner of "expert" bodies, insulated from the political process, to which Congress will delegate various portions of its lawmaking responsibility. How tempting to create an expert Medical Commission . . . to dispose of such thorny, "no-win" political issues as the withholding of life support systems in federally funded hospitals, or the use of fetal tissue for research.⁷⁶

There are a number of responses to this objection. Perhaps least important, the Court in *Mistretta* appeared to hold in reserve the possibility of invalidating a statute on separation of powers grounds where the resolution it embodied was simply unreasonable.⁷⁷ In the terms of the present essay, we might say that political questions are ones in which the interpretation of the Constitution is left to the political branches subject to the constraints of ordinary politics and judicial review for reasonableness. Yet, this response may be less significant than it seems because we would have to identify or at least speculate about the circumstances under which the political branches would act unreasonably. As Paul Gewirtz has argued, it is unavailing to respond to claims about the operation of ordinary politics by devising hypothetical cases in which the political branches might act unreasonably, unless one can identify the political forces that would lead the political branches to act in that way.⁷⁸

Justice Scalia's reference to "no-win" issues is an attempt to identify such forces, but it is not terribly persuasive. He fails to appreciate that, once we understand how we ought to define such issues, there are exceedingly few of them. Justice Scalia's enumeration suggests that by a "no-win" issue he means one in which the operation of ordinary politics is paralyzed because no votes can be gained by taking a position on the issue, some resolution is necessary, and responding to paralysis by delegating authority is therefore likely to produce bad public policy.⁷⁹ But, there are likely to be few such issues because representa-

75. 109 S. Ct. at 680 (Scalia, J., dissenting).

76. 109 S. Ct. at 680 (Scalia, J., dissenting).

77. 109 S. Ct. at 659-60.

78. Gewirtz, *The Jurisprudence of Hypotheticals*, 32 J. LEGAL EDUC. 120 (1982).

79. It should be noted that "no policy" constitutes a policy of nonregulation, and that Justice Scalia must therefore have in mind issues as to which the resolution arrived at by people doing what they believe best yields unsound policy.

tives can gain votes by being principled per se, that is, by presenting themselves to their constituents as concerned with the proper resolution of controversial issues even if there is apparently little electoral advantage in the position they take.⁸⁰ In addition, of course, there are representatives who are truly principled, that is, who are indeed completely indifferent to the electoral consequences of their actions.⁸¹

Recent experience indicates why there are so few “no-win” issues as defined in a way relevant to the discussion in this essay. In several recent situations electoral pressures have led Congress to act in ways that produce what almost all members believe to be bad public policy. There has been general agreement, for example, that there are too many military bases in the United States, and yet Congress was reluctant to enact legislation authorizing base closings.⁸² Too many members had bases in their districts and were concerned that once a base in another district was closed, the one in their own would be next. Members could believe that every base but one — the one in their district — was unnecessary, and yet base closings would be defeated unanimously. Congress solved this problem by creating an automatic mechanism for base closings: a commission was established to identify bases to be closed, and the list it produced had to be accepted or rejected in its entirety.⁸³ The sense in which it had to be accepted or rejected in its entirety is important, though. As a matter of formal law, nothing prevents a later Congress from repudiating the commitment a prior Congress made to act on the list as a whole.⁸⁴ If Congress adheres to that commitment, it is because members of Congress believe at present that, given the operation of ordinary politics, they will benefit by acting on the list as a whole. Yet, adhering to a precommitment of that sort can itself become a political issue. Congress’ rejection in early 1989 of a pay increase for high federal employees resulted in part from the injection of precommitments into

80. Perhaps a legislator can lose votes by acting in a principled way, when constituents criticize him or her for failing to be oriented toward some result, whether or not they have a strong preference for a particular result. In the present context, it seems likely that this group will be small, because the hypothesized paralysis occurs when there is a deep division in the constituency over what the proper result is.

81. Such indifference might occur, for example, when the issue is one about which the representative’s constituency is uninformed and largely, although not entirely, indifferent, and which is much less important to the constituency than many other issues. Under these circumstances, the member is in a position to cast a “free” vote, that is, one resting entirely on grounds independent of concerns for reelection.

82. See Lamar, *Taps for Old Bases*, TIME, Jan. 9, 1989, at 28.

83. *Id.*

84. For a comprehensive discussion, see Eule, *Temporal Limits on the Legislative Mandate: Entrenchment and Retroactivity*, 1987 AM. B. FOUND. RES. J. 379.

ordinary politics.⁸⁵

There are additional reasons to be skeptical of the slippery slope objection. As this essay has stressed, some constituents care about principled action by their representatives, and their views will have to be considered when a representative confronts a proposal that might be a step along the slippery slope. Further, the slippery slope argument can be made by a representative's opponents, both within the district in the course of an election campaign and across districts in the chambers of Congress itself. It seems, therefore, that "no-win" issues in the relevant sense will be few and far between, as will, therefore, skids down the slippery slope. Congress may adopt statutes that embody unsound public policy, of course, or it may fail to adopt any policy when some policy is needed, but, under the constraints imposed by ordinary politics, it is extremely unlikely to adopt unreasonable interpretations of the Constitution, at least in the contexts being considered here. The specification of those contexts, however, leads to a third objection to the political questions approach developed in this essay.

3. *The Scope of the Analysis*

The arguments in this essay have been confined to problems of federalism and the separation of powers. Yet, the third objection goes, if we are willing to rely upon the operation of ordinary politics to constrain Congress with respect to those problems, why should we not rely on it with respect to other problems, that is, those usually designated problems of individual rights? After all, many of the same arguments, such as those deriving from the existence of principled voters and representatives, are available in the context of individual rights as well. Even more, to the extent that the analysis makes the unavailability of external evaluative standards important, it cannot distinguish between individual rights and other aspects of the constitutional scheme. And, in light of that unavailability, the problems of the fig leaf and the constitutional crisis are no more severe in the context of individual rights than in those of federalism and the separation of powers.

This objection has been noted, in different ways, by Stephen Carter and John Hart Ely. According to Carter, the past decade's investigations of constitutional theory primarily in the context of individual rights have demonstrated that there are no nonarbitrary external

85. Gorey, *The Games Congress Plays*, TIME, Feb. 13, 1989, at 38; Gorey, *Vote, You Guys*, NATL. REV., Jan. 27, 1989, at 13.

evaluative standards against which the performance of legislatures can be measured.⁸⁶ If our society's commitment to the institution of judicial review is to be preserved, we must let the courts act in the only areas that have external evaluative standards, no matter how arbitrary and foolish those standards may be.⁸⁷ It is not clear, though, why we should want to preserve the institution of judicial review under these circumstances, or indeed why we should be less troubled by arbitrariness in these areas than in the area of individual rights. Perhaps we must preserve judicial review so that it will exist when we gain confidence once more that there are external evaluative standards in the area of individual rights, but this seems an extraordinarily weak position.

John Hart Ely's approach can be taken to distinguish between the area of individual rights and the ones of primary concern in this essay on the ground that ordinary politics bring with them structural impediments to the full and fair consideration of individual rights. As the prior discussion of *Garcia* indicates, to the extent that there are structural impediments in the areas of federalism or the separation of powers, Ely's approach would authorize judicial review as a constraint on legislators.⁸⁸ I have avoided discussing structural impediments in my defense of the political questions approach developed in this Essay, because sustained examination of Ely's approach in its primary domain, that of individual rights, has demonstrated that it is infected by serious problems of arbitrariness in the identification of what will count as a structural impediment.⁸⁹

It seems, then, that this third objection, that the approach developed here threatens judicial review across the board, is well taken. When Chief Justice John Marshall first articulated the possibility that there would be a doctrinal category of political questions, he believed

86. See Carter, *Constitutional Adjudication and the Indeterminate Text: A Preliminary Defense of an Imperfect Muddle*, 94 YALE L.J. 821 (1985).

87. Carter claims that the formalism in the area of separation of powers is at least less arbitrary than most commentators believe it to be. *Id.* at 853-55. See, e.g., Elliott, *INS v. Chadha: The Administrative Constitution, the Constitution, and the Legislative Veto*, 1983 SUP. CT. REV. 125. Justice Scalia's dissents in *Morrison v. Olson*, 108 S. Ct. 2597 (1988), and *Mistretta v. United States*, 109 S. Ct. 647 (1989), do not provide strong support for that claim. For Carter's views on *Mistretta*, see Carter, *Framers Lost in Sentencing Case*, *Legal Times*, Jan. 30, 1989, at 21.

88. See *supra* text accompanying notes 49-50.

89. The earliest version of this criticism is Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063 (1980). Later versions are M. TUSHNET, *supra* note 9, at 72-107; Miller, *The True Story of Carolene Products*, 1987 SUP. CT. REV. 397; Tushnet, *Public Choice Constitutionalism and Economic Rights*, in *THE CONSTITUTION AND ECONOMIC RIGHTS* (E. Paul ed. (forthcoming)).

that such a category could readily be distinguished from the separate category of individual rights:

The province of the court is, solely, to decide on the rights of individuals, not to inquire how the executive, or executive officers, perform duties in which they have a discretion. Questions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court.⁹⁰

If we accept the analysis offered here, that distinction may well be untenable. All that can be said at this point, I suspect, is that over the course of 200 years of constitutional history, and within the past decade, there is not a great deal to be said in favor of the institution of judicial review.⁹¹

II. THE REPRESENTATIVE'S PERSPECTIVE ON POLITICAL QUESTIONS

We now turn to a brief consideration of the implications of the preceding analysis for the behavior of representatives who are asked to consider some question that the analysis leads us to conclude is a political question. Suppose that the question of the proper scope of a senator's inquiry into the qualifications of a nominee to the Supreme Court is treated as a political question. A senator then is free to take a position on that question solely with reference to electoral considerations, although, as has been emphasized repeatedly, he or she is also free to choose a position with reference to an independent analysis of constitutional principle. Having determined his or her position, what may a senator then do in voting on the nomination itself? In one sense, of course, the answer to that question is self-evident. At least to the extent that we have treated the question as political because of the fig leaf problem, it follows that the senator may take a position on the nomination solely with reference to electoral considerations. Consider the senator who, as a result of electoral considerations, believes that it is proper to engage in a wide-ranging inquiry into the nominee's views on controversial questions. If we were to say that that senator must then vote for the nominee if those views fell within the range of re-

90. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803).

91. For an examination of the Court's recent exercises of the power of judicial review, and a comparison with Congress, see Tushnet, Schneider & Kovner, *Judicial Review and Congressional Tenure: An Observation*, 66 TEXAS L. REV. 967 (1988). The standard counter-example to claims about the inutility of judicial review is *Brown v. Board of Educ.*, 347 U.S. 483 (1954). Yet, as opponents of judicial review have pointed out, it is not obvious that *Brown* would have been needed had the Court not exercised the power of judicial review to invalidate federal civil rights statutes enacted immediately after the Civil War. See, e.g., *The Civil Rights Cases*, 109 U.S. 3 (1883). Had the civil rights acts remained on the books, perhaps states would have been less likely to adopt segregation statutes in the succeeding decades.

spectable professional opinion, we would once again generate a fig leaf problem for the senator whose constituents oppose the nominee's views on the merits of the controversial questions. More generally, it seems unlikely that we should allow electoral considerations to dictate the answer to one question — the proper scope of inquiry — and then require that they be put aside when the senator considers the inevitable follow-up question, whether to vote to confirm. For the senator who concludes that a wide-ranging inquiry is appropriate, we would then come close to saying that, although you can engage in such an inquiry, you cannot take the answers you get into account when deciding how to vote.⁹² The previous analysis allows a somewhat more extended defense of the view that electoral considerations may dictate a senator's position on the confirmation question as well as on the proper scope of inquiry.

Most of the political considerations that justify treating the scope of inquiry as a political question apply as well to the confirmation issue. They include competing interest groups, the existence of some principled constituents to whom the senator must respond, the possibility that the senator may have a principled position on the nominee's qualifications, and the possibility of party solidarity and presidential retaliation. When these considerations are aggregated across the entire Senate, there is in general little reason to believe that a nominee would be rejected for unconstitutional reasons.⁹³ On the broader level of "ambition counteracting ambition," selection of members of the Supreme Court, as much as determining the proper scope of inquiry into a nominee's qualifications, is a point of political struggle between the President and the Senate. It is therefore one of the "interests of the place" that both the President and the Senate may be sensitive to the political implications of what they do. A senator who wishes to emphasize that the President has failed to take adequate account of the political or policy dimensions of a proposed appointment is exercising one of the prerogatives of office — a prerogative that, among other things, serves to counteract the equally permissible ambition of the President to determine the composition of the Supreme Court.

We have already considered the problems associated with the political questions doctrine as applied to the question of the scope of senatorial inquiry. Somewhat different problems might arise when the

92. At least as long as the senator is persuaded that the answers fall within the range of acceptable professional opinion.

93. It will not do to say that these considerations make it possible for a nominee to be rejected for purely political reasons, for it is precisely the point of the political questions analysis to demonstrate that there is nothing constitutionally troubling about rejecting a nominee for such reasons.

question of confirmation is considered. The difference lies in the fact that the confirmation question deals with the substance of the senator's decision while the scope of inquiry deals with preparatory stages.

There are several areas of constitutional law where it is clear that substantive norms ought to govern the action of representatives even though there is no external mechanism, other than an informed electorate, to police their action. We have already noticed one: the proposition that statutes adopted with the motivation of suppressing free speech are constitutionally improper even though the courts will not invalidate them.⁹⁴ Lawrence Sager has discussed another area, which he calls the domain of the underenforced constitutional norm.⁹⁵ In this domain, there are constitutional norms which the courts fail to enforce, in large part because they find themselves under institutional limitations that preclude them from effectively enforcing the norms.

The application of these ideas to the confirmation process must proceed by stages. Assume, first, that there is a constitutional norm that governs a senator's decision on whether to confirm a nominee to the Supreme Court — for example, that a senator should vote to confirm any nominee who satisfies the requirements of ability and integrity.⁹⁶ Is that norm underenforceable, in the sense that institutional limitations preclude courts from examining decisions that violate it? There are at the outset obvious difficulties in constructing a lawsuit that could properly bring a failure to confirm a nominee into court.⁹⁷ Creative lawyering, though, could probably overcome these difficulties.⁹⁸ It seems that the only real institutional difficulty is the fig leaf problem, in the sense that only that problem cannot be overcome by a carefully constructed set of judicially enforceable rules. If constitutional norms regulate the confirmation decision, then they are underenforceable in the requisite sense, and a senator could properly be criticized for relying on politics rather than on those norms in deciding whether to vote to confirm.

The real question therefore appears to be whether we can identify constitutional norms to regulate the confirmation decision. This

94. See *supra* text accompanying note 71.

95. Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978).

96. We should note once again the anomaly of supposing that there is such a standard after we have concluded that a senator may properly inquire into a wider range of factors.

97. And, of course, there ought to be potential lawsuits claiming that a nominee was improperly confirmed, in that senators relied on political considerations in voting to confirm a nominee who was not sufficiently able or honest.

98. For example, one can imagine a lawsuit by the disappointed nominee for wrongfully withheld salary (at least if the jurisdictional statutes covered such a claim).

brings us back to the earlier discussion of the existence of external evaluative standards. Here, as there, it is undoubtedly the case that we can devise such norms; the "ability and integrity" example sufficiently makes the point. But, here as there, the question recurs whether the norms we can devise are sufficiently sensitive to the considerations that a sound constitutional order should take into account. Most obviously, given the central proposition about ambition counteracting ambition, the case for allowing senators to consider their predictions about the nominee's likely behavior on the Court seems powerful. This is so for two reasons. First, it is generally conceded that a President may, though once again he or she need not, take such predictions into account in selecting a nominee. Given that concession, a system that made it normatively impermissible for a senator to consider such predictions would tilt the balance of authority rather strongly in favor of the President, undermining the principle of ambition counteracting ambition. Second, the Supreme Court is one of the institutions whose ambition must be countered. We can think of ambition countering ambition as a game of strategy, and surely a sensible player of that game would attempt to select opponents whose ambition can be readily countered. Thus, preventing senators from considering a nominee's likely action on the Supreme Court would distort the system of checks and balances by reducing the Senate's power vis-à-vis both the President and the Supreme Court.

All of this does not yet establish, however, that a senator acts properly in voting on a confirmation solely with reference to electoral considerations, though the fig leaf problem goes a long way toward supporting that conclusion. However, perhaps we need only flip the question around. In light of the preceding analysis, is there any good reason to think that undesirable consequences will flow from allowing senators to rely solely on electoral considerations when they vote on confirmations? I am hard-pressed to identify such a reason, particularly when we remember that we are considering the behavior of a multi-member body, some of whose members will act with reference to other considerations. At least, it seems to me, although a senator who relies solely on electoral considerations may not behave in the most admirable way, he or she does not act in a manner made questionable by constitutional norms.

One final point should be stressed here. When I speak of mere political considerations, the natural inference is that we are dealing with crass politics, interest group deals, satisfying people who donated large amounts of money to a senator's campaign, and the like. Yet, that is not all there is, or needs to be, to ordinary politics. Loyalty to

one's party or one's President serves valuable political ends too, putting in place institutions that might be able to adopt relatively coherent overall programs of national policy. And, in the end, there is the possibility that senators will respond to voters who actually care about issues of constitutional principle. That possibility leads to the final section of this Essay, which considers the scholar's perspective on these problems.

III. CONCLUSION: THE SCHOLAR'S PERSPECTIVE

This essay has defended the proposition that in cases involving the separation of powers, the Constitution adopts a scheme of pure procedural justice: whatever results from the operation of the political process is constitutionally acceptable, and there are no external evaluative criteria against which that outcome can be measured. The position taken in this essay is strongly democratic, for it relies on the operation of democratic processes to produce results and denies that such processes are likely to produce normatively troubling outcomes.

However, this proposition raises two kinds of problems that deserve attention. The first is narrowly political. In recent discussions, particularly of the Bork nomination, it was Judge Bork's supporters who claimed that the political process was insufficiently respectful of constitutional norms. Yet, when they come to deal with many questions of substantive constitutional law — at least outside the context of the separation of powers — they appeal to canons of judicial restraint whose primary justification is that the political process sufficiently protects against intrusions on constitutional values. One can, of course, distinguish between judicial restraint in the contexts of individual rights and the separation of powers, yet, given the obvious imbalances between individuals and government compared to the more balanced power between President and Congress, the distinction is, one can safely say, strongly counterintuitive. Further, the defense of separation of powers is that it is a structure designed to promote democratic liberties. There is something anomalous about invoking judicial review in the area of separation of powers on the ground that an antidemocratic institution is necessary to enhance the working of a structure whose purpose is precisely the promotion of democracy.⁹⁹ One can capture this narrow political point by saying that Judge Bork's supporters have objected to the sort of political behavior that they expected Judge Bork to approve if confirmed.

The second problem with the democratic defense of the political

99. I owe this point to L. Michael Seidman.

questions doctrine is that it is on its face inconsistent with the notion that there should be limitations on the operation of democracy and is, in that sense, anticonstitutional. This, however, misconceives the nature of the democratic defense. As I have stressed, nothing in the position developed here rules out the possibility of an informed and principled electorate. Such an electorate would subject its representatives to principled constraints because it was committed to restraints on itself. The objection to the concept of political questions developed here as anticonstitutional conceives of constitutional restraints as, in some sense, coming from the outside. The democratic position, in contrast, believes that the most effective constraints are those that come from within.

The democratic position would then seem to prescribe a particular role for scholars, which would be to contribute to the development of an informed and principled electorate. Yet, here too there is a certain anomaly. Consider the scholar who believes that, all things considered, the constitutional system would work best if senators confined their inquiries to a nominee's character and ability. Such a scholar is of course free to write articles urging that position as a matter of sound policy. Yet, if the scholar is a lawyer, there may be no particular reason to take his or her views on sound policy more seriously than those of political scientists or indeed politicians. The legal scholar's comparative advantage may lie in demonstrating that this policy is in some important sense dictated by the Constitution — that is, that once one examines the ordinary sources for constitutional law, one will find that the Constitution requires a restricted scope of senatorial inquiry.

The analysis developed here suggests that this legal scholar may then be caught in a rhetorical trap. For his or her prescriptions to be taken seriously, they must be cast in terms of constitutional requirements. Yet, I have argued, all the Constitution really requires is that politics be given its ordinary range of operation, that ambition be set to counteract ambition. In the end, then, there may indeed be no distinctive contribution that legal scholars can make to the creation of an informed and principled electorate, which is the primary guarantor of the constitutional system — except, of course, that academic lawyers have peculiar rhetorical resources and have come to occupy positions of influence in discussions of constitutional structure. To that extent, an academic lawyer who adopts the model of the Sophist can continue to offer policy prescriptions that will be taken seriously. Whether that is an admirable model has been controverted since Socrates.