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ABSTRACT

This Article describes and analyzes a hitherto unrecognized doctrine—the political remedies doctrine. That doctrine maintains that courts ought not adjudicate separation of powers claims until both political branches of government have asserted their rights. The doctrine has escaped analysis (and even explicit notice) because judges camouflage it, employing it while invoking the more familiar rubrics of ripeness, standing, political question, and equitable discretion. Justice Powell provided the leading articulation of the doctrine, but the Supreme Court as a whole has never squarely endorsed it. The political remedies doctrine, however, has played a surprisingly important role in the lower courts, helping justify refusal to adjudicate war powers claims and cases arising from President Trump's challenges to the constitutional order.

While invoked as a neutral rule, the courts always apply the doctrine to shield presidential acts from judicial scrutiny and never to protect acts of Congress from judicial interference. Accordingly, it aids aggrandizement of presidential power. Partly for that reason, this doctrine has great potential to unravel the rule of law and even, during times of partisan stress, to hasten the collapse of the separation of powers undergirding our democracy.

This Article claims that the courts should not apply this doctrine, except perhaps to avoid adjudication of challenges to bipartisan legislation signed by the President. It employs a Coasean property rights analysis to provide new insights germane not just to this doctrine, but also to debates about the proper role of bargaining in resolving separation of powers questions, the relationship between law and politics, and how the courts should approach justiciability doctrine more generally. That Coasean analysis shows that judicial resolution of a separation of powers claim on the merits does not preclude political bargaining, but simply determines a baseline for future negotiations. Conversely, dismissing a claim because of the potential for political bargaining functions much like a ruling on the merits, also creating a constitutional baseline for future political negotiations. Hence, the justiciability issues involved when political remedies are invoked do not present a choice between political and judicial resolution of disputes, but rather a choice about baseline power

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allocations form which to conduct future bargaining. Thus, analysis of this hitherto unrecognized doctrine yields valuable insights.

INTRODUCTION

The federal courts sometimes decline to review constitutional questions on the grounds that they should not adjudicate separations of powers cases until both of the political branches of the government have asserted their rights. One might call this the "political remedies doctrine" because the doctrine maintains that courts should refuse judicial review when a political remedy is available.

Justice Powell articulated the political remedies doctrine in *Goldwater v. Carter* to justify not deciding whether a President may unilaterally terminate a treaty enacted with the advice and consent of the Senate.[1] The *Goldwater* Court agreed that the case was not justiciable by a 5-4 margin in a summary ruling without a single majority opinion.[2] The doctrine has aided the transfer of the war power from Congress, the body possessing the power according to the constitutional text, to the President.[3] It has also played a major role in catalyzing a cutback in the scope of congressional standing to sue.[4] More recently, it figured in a series of lower court decisions dismissing challenges to President Trump's invocation of emergency powers to build a wall on the U.S. southern border without a congressional appropriation, defiance of congressional subpoenas, and alleged violations of the Constitution's Emoluments Clauses.[5]

In spite of the political remedies doctrine's influence, the literature has not noticed this doctrine's existence, let alone analyzed its implications in a sustained way. The doctrine has escaped notice because judges camouflage it, blending it in with the justiciability doctrines that surround it—the doctrines of ripeness, standing, political questions, and equitable discretion. Furthermore, while it has played a prominent role in justifying some opinions in the lower courts, the Supreme Court has never endorsed it. Only Justice Powell's

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[1] Goldwater v. Carter, 444 U.S. 996, 996 (1979) (Powell, J., concurring) (stating that the courts should not adjudicate "a dispute between Congress and the President . . . unless and until each branch has taken action asserting its constitutional authority").

[2] *See id.* at 996, 1002–05 (plurality opinion).

[3] *See* Eric A. Posner & Adrian Vermeule, *Constitutional Showdowns*, 156 U. PA. L. REV. 991, 1020 (2008) (noting that the judiciary's ducking of War Powers Resolution cases has "allow[ed] the President to ignore it"); *see also* Greenham Women Against Cruise Missiles v. Reagan, 755 F.2d 34, 37 (2d Cir. 1985) (per curiam) (invoking the political remedies doctrine briefly to justify rejecting a complaint about the legality of presidential deployment of cruise missiles).

[4] *See* David J. Wiener, *The New Law of Legislative Standing*, 54 STAN. L. REV. 205, 218 (2001) (citing Raines v. Byrd, 521 U.S. 811 (1997)) (commenting that notwithstanding Justice Rehnquist's disclaiming reliance on the political remedies doctrine in *Raines v. Byrd*, some lower courts have read *Raines* as demanding its application in cases of congressional standing); *see, e.g.*, Campbell v. Clinton, 203 F.3d 19, 24 (D.C. Cir. 2000) (denying congressmen standing to enforce the War Powers Resolution because they have not used political remedies).

[5] *See infra* notes 135–98 and accompanying text.

concurring opinion in *Goldwater* squarely relies on the political remedies doctrine. Justice Rehnquist's opinion for the other four Justices in *Goldwater* invokes the political remedies doctrine, but the doctrine did not play as central a role in his reasoning as it does in Powell's.[6]

The political remedies doctrine, however, merits sustained attention on its own, not only because of its influence on the lower federal courts in extremely important cases, but also for its potential future influence. While framed as a neutral rule of restraint applying equally to review of both political branches' decisions, in practice, it consistently augments presidential power at the expense of Congress. Moreover, it has the potential to broadly liberate the President from obligations to comply with applicable law. Indeed, Justice Scalia in a dissent advocated an interpretation of the doctrine that would allow a President to nullify numerous statutes by simply declaring them unconstitutional.[7] Justices still on the Court signed on to the Scalia dissent[8] and a lower court has followed it in declining to protect congressional spending power from presidential usurpation.[9]

The political remedies doctrine also merits attention for theoretical reasons. The political remedies doctrine provides an opportunity to engage in broader questions about separation of powers. Since this doctrine, as applied, liberates presidential actions, but not acts of Congress, from judicial review, it invites questions about this asymmetry's effects and desirability.

The analysis of the doctrine offered here contributes to the theory of negotiated separation of powers arrangements, as scholars have debated whether the Supreme Court should defer to power allocations negotiated between the legislative and executive branches.[10] It shows, contrary to the assumptions undergirding that literature, that neither political remedies dismissals nor adjudication of separation of powers claims on the merits precludes subsequent political bargaining. Both adjudication and dismissal establish baselines for future negotiations.

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[6] *See Goldwater*, 444 U.S. at 1004 (Rehnquist, J., concurring) (finding a political question when asked to decide a separation of powers claim when each branch "has resources available to protect and assert its interests").

[7] *See* United States v. Windsor, 570 U.S. 744, 786–87 (2013) (Scalia, J., dissenting) (suggesting that the President should decline to enforce statutes that he finds unconstitutional and that a judge should enter a consent decree forbidding statutory enforcement when the President enforces it but says it is unconstitutional).

[8] *Id.* at 778.

[9] *See* House of Representatives v. Mnuchin, 379 F. Supp. 3d 8, 16 (2019) (citing *Windsor*, 570 U.S. at 790) (declining to adjudicate the House of Representative's claim that the President usurped the House's appropriations power by building a wall unauthorized by statute).

[10] *E.g.*, Erin Ryan, *Negotiating Federalism and the Structural Constitution: Navigating the Separation of Powers Both Horizontally and Vertically*, 115 COLUM. L. REV. SIDEBAR 4, 20–23 (2015) (reviewing the debate).

The doctrine also raises questions about the relationship between law and politics. The political remedies doctrine and some commentators suggest that law and politics exist as separate spheres.[11] But this Article questions the notion that judicial rulings end politics and that politics substitute for judicial decisions when courts dismiss cases.

The analysis developed here on all of these questions has implications for justiciability doctrines more broadly. Both the Supreme Court and commentators have noted that the justiciability doctrines overlap.[12] A consideration motivating the political remedies doctrine—that judicial review might improperly displace political decision-making—plays a role in shaping all the justiciability doctrines.[13]

While I write on a blank slate about this particular doctrine, several literatures do address the role of political remedies in adjudication, at least in passing. I therefore draw upon articles addressing the idea as part of the doctrine of congressional standing,[14] discussions of the role of politically negotiated resolution of separation of powers disputes,[15] and general theoretical works on the role of law and politics in restraining presidents.[16]

Michael Sant'Ambrogio's article, *Legislative Exhaustion*, comes closest to this Article's topic by focusing on the idea of using the availability of political

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[11] *See, e.g.*, Posner & Vermeule, *supra* note 3, at 992–93.

[12] *See, e.g.*, Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc., 528 U.S. 167, 189 (2000) (noting the Court's "repeated" characterization of mootness as "standing set in a timeframe"); Matthew I. Hall, *Making Sense of Legislative Standing*, 90 S. CAL. L. REV. 1, 5 (2016) (describing the legislative standing doctrine as overlapping with "related" doctrines, especially the political question doctrine); Note, *Standing to Sue for Members of Congress*, 83 YALE L.J. 1665, 1666–69 (1974) (describing a discrete standing doctrine as a recent development with antecedents in cases relying on a mixture of "other jurisdictional inquiries").

[13] *See, e.g.*, Gladstone v. Vill. of Bellwood, 441 U.S. 91, 99 (1979) (stating the standing doctrine confines the judiciary to its "properly limited . . . role . . . in a democratic society" (quoting Warth v. Seldin, 422 U.S. 490, 498 (1975))); Abbott Lab'ys v. Gardner, 387 U.S. 136, 148 (1967) (identifying "avoidance of premature adjudication" and "judicial interference" with agency decision-making as part of the "basic rationale" for the ripeness doctrine); Marbury v. Madison, 5 U.S. (1 Cranch) 137, 165–66 (1803) (stating that the courts should not resolve political questions because the President must have the freedom to exercise his "discretion" on some matters).

[14] *See, e.g.*, Theodore Y. Blumoff, *Judicial Review, Foreign Affairs, and Legislative Standing*, 25 GA. L. REV. 227 (1991); Tara Leigh Grove, *Government Standing and the Fallacy of Constitutional Injury*, 167 U. PA. L. REV. 611 (2019); Hall, *supra* note 12 (developing a model to clarify uncertainty in congressional standing jurisprudence); Jonathan Remy Nash, *A Functional Theory of Congressional Standing*, 114 MICH. L. REV. 339 (2015).

[15] *See, e.g.*, Aziz Z. Huq, *The Negotiated Structural Constitution*, 114 COLUM. L. REV. 1595 (2014); Posner & Vermeulle, *supra* note 3; Note, *supra* note 12; Jonathan Wagner, *The Justiciability of Congressional-Plaintiff Suits*, 82 COLUM. L. REV. 526 (1982).

[16] *See, e.g.*, ERIC A. POSNER & ADRIAN VERMEULE, THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC (2010).

remedies to decide questions of congressional standing in suits seeking to compel the executive branch to properly execute federal statutes.[17] By contrast, the political remedies doctrine goes beyond congressional standing doctrine and properly focuses on separation of powers cases, not on cases seeking proper enforcement of statutes. My analysis, however, does illuminate congressional standing to enforce statutes and casts doubt on Sant'Ambrogio's claim that a legislative exhaustion requirement forces deliberation over policy.[18]

This Article's first Part tells the story of the political remedies doctrine's articulation in the Supreme Court and use in the lower courts. It begins with an account of the doctrine's articulation in *Goldwater* and its subsequent reception in the Supreme Court. This account reveals that the doctrine has influenced subsequent decisions, but that the Supreme Court has not squarely endorsed it. This Part continues with an account of the doctrine's influence in the lower courts, looking at its effect on war power cases and recent decisions adjudicating President Trump's challenges to the constitutional order. The analysis reveals that the doctrine, while originally arising in the realm of foreign affairs, now influences the domestic constitutional order in important ways.

The second Part analyzes the doctrine's potential to unravel the rule of law. It shows that the political remedies doctrine, while articulated as a protection for both political branches, shields only *ultra vires* presidential action from judicial check. The doctrine, in practice, *never* protects acts of Congress from judicial interference. This Part explores the breadth of its potential to unravel the rule of law by analyzing Justice Scalia's dissent in *United States v. Windsor*, which used the doctrine to justify empowering presidents to abrogate statutes.[19]

The third Part critiques the doctrine. It argues that the strongest case for avoiding judicial review in favor of political resolution of disputes arises not from the possibility of a political remedy to an open dispute between the political branches of government but from completed bipartisan agreements between the President and Congress about how to share powers. It uses a Coasean property rights framework to demonstrate two propositions. First, a dismissal under the political remedies doctrine establishes a power allocation, just like an explicit ruling on the merits. Second, an explicit ruling on the merits does not preclude

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[17] Michael Sant'Ambrogio, *Legislative Exhaustion*, 58 WM. & MARY L. REV. 1253, 1259 (2017) (advocating denying Congress "access to federal courts" when "Congress does not like the Executive's use of enforcement discretion or its interpretation of the law" to encourage "legislative . . . refine[ment of] statutory regimes").

[18] *See id.* at 1258 (finding that the goal of forcing deliberation suggests denying Congress access to courts to enforce statutes).

[19] United States v. Windsor, 570 U.S. 744, 778–91 (2013) (Scalia, J., dissenting).

political bargaining.[20] Accordingly, the political remedies doctrine does not protect opportunities for political settlement of controversies. Instead, both the political remedies doctrine and explicit merits rulings establish *baseline* power allocations, which influence the results of bargaining.

This Part shows, moreover, that the political remedies doctrine is inconsistent with existing Supreme Court precedent. The political remedies doctrine's welcoming of politically negotiated reallocation of power conflicts with the formalist notion that the Constitution provides reliable answers to separation of powers questions, which courts must recognize, and that particular arrangements are necessary to preserve liberty.

The best defense of the political remedies doctrine stems, this Part claims, from the need to avoid judicial articulation of unwise legal doctrine. Many scholars have suggested that this danger proves acute in separation of powers cases.[21] The Court could better effectuate that goal by giving more weight to the presumption of constitutionality in separation of powers cases and through the use of less problematic justiciability doctrines. The political remedies doctrine, this Part argues, relies on an outmoded Madisonian political economy model that tends to disable judicial intervention precisely when it is most needed, when partisan polarization provides opportunities to dismantle checks and balances.[22]

This Article closes with some tentative observations about the links between this analysis of the political remedies doctrine and other justiciability doctrines, which also rely, to some degree, on a preference for political resolution of disputes. It suggests that the courts probably should apply justiciability restraints more strictly to challenges to interbranch bipartisan consensus than to efforts to resolve interbranch disputes.

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[20] *Accord* David Landau, *Political Support and Structural Constitutional Law*, 67 ALA. L. REV. 1069, 1075–79 (2016) (discussing how the political branches may "work[] around" structural constitutional rulings).

[21] *See infra* notes 311–14.

[22] *See* STEVEN LEVITSKY & DANIEL ZIBLATT, HOW DEMOCRACIES DIE 115–17 (2018); *cf.* Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2312, 2368 (2006) (claiming judicial review is most needed during "eras of strongly unified government"). *See generally* Neal Devins, *Congress, the Courts, and Party Polarization: Why Congress Rarely Checks the President and Why the Courts Should Not Take Congress' Place*, 21 CHAP. L. REV. 55, 55 (2018) (describing the point that "Congress is generally uninterested in . . . asserting its institutional prerogatives" under the Constitution as "clearly right"); Lucas Issacharoff & Samuel Issacharoff, *Constitutional Implications of the Cost of War*, 83 U. CHI. L. REV. 169, 176 (2016) (characterizing the rise of political polarization as "perhaps the most significant, and almost certainly the most examined, institutional shift in American constitutional life"); Levinson & Pildes, *supra*, at 2313 (stating that competition between political parties has displaced competition between branches of government).

I. THE STORY OF THE POLITICAL REMEDIES DOCTRINE

Our story begins with an account of the political remedies doctrine's articulation in *Goldwater v. Carter*[23] and its treatment in subsequent Supreme Court decisions, which reveals that the doctrine lacks a clear endorsement in majority decisions. The story continues with a discussion of its more frequent use in the lower courts, first in war powers cases and more recently in cases challenging the domestic constitutional order.

A. The Political Remedies Doctrine in the Supreme Court

1. Justice Powell's Goldwater Opinion

Goldwater v. Carter arose out of President Carter's effort to normalize relations with Communist China.[24] To facilitate that normalization, President Carter decided to terminate a longstanding mutual defense treaty with Taiwan.[25] Senator Barry Goldwater and several other congressmen challenged the treaty termination, claiming that the President may not abrogate a treaty without the Senate's consent.[26] The District of Columbia Circuit, sitting *en banc*, concluded that the justiciability doctrines did not bar the court from reaching the merits and unanimously found that the case posed a legal question, rather than a political one.[27]

The Supreme Court disagreed, finding the case nonjusticiable in a 5-4 summary disposition.[28] Following this decision, the President has almost always terminated treaties unilaterally.[29]

Justice Powell most clearly articulated the political remedies doctrine. His concurring opinion declares that "a dispute between Congress and the President is not ready for judicial review unless and until each branch has taken action asserting its constitutional authority."[30] While Powell did not specify what sort of action he had in mind, presumably legislation repudiating the withdrawal from the treaty or a funding cutoff designed to change the withdrawal decision

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[23] 444 U.S. 996 (1979).

[24] *See* Goldwater v. Carter, 617 F.2d 697, 700–01 (D.C. Cir. 1979), *rev'd*, 444 U.S. 996 (1979).

[25] *See id.*

[26] *See Goldwater,* 444 U.S. at 997–98 (Powell, J., concurring).

[27] *Goldwater*, 617 F.2d at 698 n.1.

[28] *See Goldwater*, 444 U.S. at 996, 1002–06 (Powell, J. & Rehnquist, J., concurring).

[29] Harold Hongju Koh, *Presidential Power to Terminate International Agreements*, 128 YALE L.J. F. 432, 437 (2018).

[30] *See Goldwater*, 444 U.S. at 997 (Powell, J. concurring).

would count. Powell's opinion suggests that the political remedies doctrine is prudential, not a hard and fast rule limiting the courts' jurisdiction under Article III.[31]

Powell's articulation of the political remedies doctrine also establishes a limit on its application. It does not preclude judicial review when the political branches reach a "constitutional impasse."[32]

Powell said little to justify the doctrine. He did state, however, that differences between Congress and the President usually "turn on political rather than legal considerations" and should do so.[33] This Article will refer to the idea that politics rather than law should resolve separation of powers issues as the "politics preference." Powell also articulated a concern that adjudicating "issues affecting the allocation of power between the President and Congress" before they reach a "constitutional impasse" encourages "small groups or even individual Members of Congress to seek judicial resolution of issues before the normal political process has the opportunity to resolve the conflict."[34] Thus, Powell apparently assumed that judicial resolution of the merits of separation of powers claims would interfere with political resolution of conflicts.

Constitutional law courses usually treat *Goldwater*, including its political remedies doctrine, as an exemplar of judicial reluctance to adjudicate foreign affairs cases.[35] But the doctrine, as articulated by Powell, seems to reach all conflicts between the President and Congress, whether foreign or domestic.

2. Justice Rehnquist's Goldwater Opinion

Justice Rehnquist's opinion for the remaining four justices denying justiciability also made use of Powell's logic. Justice Rehnquist dubbed the treaty termination question a nonjusticiable "political question" because it involved the President's foreign affairs power and the extent to which Congress may negate the President's action.[36] The notion that questions about the scope

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[31] *See id.* (stating that "[*p*]*rudential considerations* persuade me" that judicial review should only occur after both branches assert their authority) (emphasis added).

[32] *See id.* ("The Judicial Branch should not decide issues affecting the allocation of power between the President and Congress until the political branches reach a constitutional impasse.").

[33] *Id.*

[34] *Id.*

[35] *See, e.g.*, ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 111–14, 339 (6th ed. 2020) (treating *Goldwater* as an exemplar of the tendency to treat foreign affairs issues as political questions but including the Powell concurrence).

[36] *Goldwater*, 444 U.S. 996, 1002 (1979) (Rehnquist, J., concurring).

of the President's foreign affairs power necessarily constitute political questions, however, seems inconsistent with *Youngstown Sheet & Tube Co. v. Sawyer*, which resolved a legal challenge to President Truman's seizure of steel mills in support of the war effort in Korea on the merits.[37] Justice Rehnquist distinguished *Youngstown* by stating that Senator Goldwater's challenge required the Court to "settle a dispute between co-equal branches of government, each of which has resources available to protect and assert its own interests"—a clear reference to political remedies.[38] Since the Court settles disputes between co-equal branches of government every time it resolves a separation of powers case and did so in *Youngstown*, the existence of a separation of powers dispute alone cannot possibly serve as a justification for dismissal. Accordingly, Rehnquist's statement is best read as indicating that the availability of potential political remedies helped justify Rehnquist's denial of justiciability as well.[39]

Thus, the political remedies doctrine played a role in the Court's decision to refuse review of treaty termination in *Goldwater*. Justice Powell clearly endorsed it and the rest of the majority favoring dismissal also suggested that it aids justification of *Goldwater*'s result.

3. Relationship to Other Justiciability Doctrines

Justice Powell camouflaged his creation of the political remedies doctrine by identifying it with the ripeness doctrine.[40] He characterized the treaty termination issue as unripe until Congress votes against treaty termination.[41]

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[37] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

[38] *Goldwater*, 444 U.S. at 1004 (Rehnquist, J., concurring).

[39] Justice Rehnquist's statement might be read to suggest that Senator Goldwater's presence as a plaintiff made the treaty termination question into a political question. But that idea is plainly at odds with *Flast v. Cohen*, which explains that the question of whether the issue posed in a case is political or legal is wholly distinct from the question of what party may bring the case (the question of standing). *See* Flast v. Cohen 392 U.S. 83, 100 (1968); *see also* Baker v. Carr, 369 U.S. 186, 204–18 (1962) (characterizing standing as focusing on the party bringing suit while defining the political question doctrine as focusing on the issue to be adjudicated); Comm. on the Judiciary v. McGahn, 968 F.3d 755, 769 (D.C. Cir. 2020) (en banc) (distinguishing the standing doctrine's focus on proper parties from the political remedies doctrine's focus on the existence of a separation of powers dispute).

[40] *Goldwater*, 444 U.S. at 997 (Powell, J., concurring). *See generally* Gene R. Nichol, *Ripeness and the Constitution*, 54 U. CHI. L. REV. 153, 156 (1987) (examining the ripeness doctrine and concluding that it is more intertwined with the merits than with Article III). I identify Powell with the doctrine's creation because his articulation of it had a big influence on the lower courts, not because his opinion lacks antecedents.

[41] *Goldwater*, 444 U.S. at 997 (Powell, J., concurring) (mentioning that the Court should not decide "unripe" issues and then stating that "a dispute between Congress and the President is not ready for judicial review unless and until each branch has taken action asserting its constitutional authority").

This idea of making the congressional stance relevant to justiciability does not fit traditional ripeness doctrine.[42] Ripeness constitutes a prudential doctrine primarily designed to avoid premature adjudication of issues that might become more clearly defined later on.[43] In assessing whether the courts might benefit from waiting without impairing litigants' legitimate interests in prompt resolution of disputes, the courts assess the "hardship to the parties" from postponing review and the "fitness of the issue[]" for prompt judicial review.[44] Justice Powell's concurrence does not articulate a relationship between his rationale and the doctrine's fundamentals, but one might understand his opinion as suggesting that the lack of congressional action fighting the treaty termination defeats the issue's fitness for judicial review. The idea that a lack of congressional action makes a well-defined issue unfit for judicial review, however, proves tautological and disconnected from the ripeness doctrine's purpose.[45] The ripeness doctrine's fitness-for-judicial-review prong focuses on whether the court's resolution of the issue before it would benefit from information gleaned from awaiting application of the law or instead whether the plaintiff seeks to litigate a "purely legal issue" that does not gain clarity from further factual development.[46] Separation of powers cases raise purely legal issues, which usually gain little or no clarification from concrete context, as I have shown elsewhere.[47] Because of that, congressional action rarely clarifies issues and waiting for Congress to act rarely serves the goal of ensuring concrete adjudication.

None of the *Goldwater* opinions indicate that later adjudication would clarify the treaty termination issue. In particular, none of the Justices claimed

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[42] *See* Carlin Meyer, *Imbalance of Powers: Can Congressional Lawsuits Serve as Counterweight*, 54 U. PITT. L. REV. 63, 93 (1992) (referring to the political remedies doctrine as a "special branch of the ripeness doctrine"); Wagner, *supra* note 15, at 539 ("Justice Powell's reliance on ripeness doctrine . . . disregards prior law."). *But see* Blumoff, *supra* note 14, at 334–37 (suggesting that Powell's ripeness reasoning fits the doctrine's purposes as described by Gene Nichol).

[43] *See* Wagner, *supra* note 15, at 539 (noting that "[r]ipeness dictates dismissal when the lawsuit lacks a clearly defined dispute").

[44] *See* Ohio Forestry Ass'n v. Sierra Club, 523 U.S. 726, 733 (1998) (quoting Abbott Lab'ys v. Gardner, 387 U.S. 136, 148–49 (1967)).

[45] It proves tautological because the political remedies doctrine itself provides the only justification for considering an issue not joined by Congress unfit for judicial review.

[46] *See* Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 479 (2001) (recognizing that a purely legal issue "would not 'benefit from further factual development'" (quoting *Ohio Forestry Ass'n*, 523 U.S. at 733)); Thomas v. Union Carbide Agric. Prods. Co, 473 U.S. 568, 581 (1985) (noting that "further factual development" will not clarify a "purely legal" issue); Pac. Gas & Elec. v. Energy Res. Conservation & Dev. Comm'n, 461 U.S. 190, 201 (1983) (finding the preemption question fit for judicial resolution because it is "predominantly legal").

[47] David M. Driesen, *Standing for Nothing: The Paradox of Demanding Concrete Context for Formalist Adjudication*, 89 CORNELL L. REV. 808 (2004) (analyzing the abstract reasoning in the Line Item Veto case in detail and explaining how that style of reasoning applies to other separation of powers cases).

that a congressional vote against treaty termination would clarify that constitutional issue. The treaty termination claim relied on a straightforward textual inference—that the Senate's role in consenting to a treaty's creation implies a role in deciding whether to terminate it.[48] Justice Brennan indicated that he would imply a presidential right to terminate the treaty with Taiwan unilaterally based on presidential authority to recognize the government of Communist China.[49] So, the resolution of the merits issue required abstract reasoning about textual inference and the scope of presidential recognition authority based on past custom and precedent.

The Supreme Court has sometimes said that the ripeness doctrine avoids "unnecessary decision of constitutional issues."[50] But this avoidance rationale begs the question of when is a constitutional decision necessary. The Court does not invoke this principle to avoid ruling on constitutional issues having real world consequences.[51] Instead, it invokes this principle to justify not adjudicating a challenge to a statute that has never been enforced and therefore is extremely unlikely to injure anybody.[52] Hence, Powell's opinion is best understood as articulating a distinct political remedies doctrine that has little to do with traditional ripeness concerns.

Most of the lower courts treated *Goldwater* primarily as a case signaling an extreme hands-off approach to foreign affairs, at least at first.[53] Certainly, Justice Rehnquist's opinion seems to put foreign affairs cases in a special justiciability category. Even though he claimed that the question of treaty termination constitutes a political question, that conclusion required an extremely unusual approach to the doctrine.[54] Federal courts usually find a political question when a case involves a "lack of judicially discoverable and manageable standards" for resolving the question before the Court.[55] The Supreme Court relied on this

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[48] *See* Goldwater v. Carter, 617 F.2d 697, 703 (D.C. Cir. 1979), *vacated*, 444 U.S. 996 (1979).

[49] *See* Goldwater v. Carter, 444 U.S. 996, 1007 (1979) (Brennan, J., dissenting).

[50] *See* Blanchette v. Conn. Gen. Ins. Corps. (*Reg'l Rail Reorganization Act Cases*), 419 U.S. 102, 138 (1974) (dictum).

[51] *See* Nichol, *supra* note 40, at 171 (noting that the courts have used ripeness "to deny jurisdiction" when the plaintiffs have not suffered an injury).

[52] *See* Poe v. Ullman, 367 U.S. 497, 508 (1961) (declining to assess the constitutionality of a state ban on contraception that the state had never enforced).

[53] *See* Harlan Grant Cohen, *A Politics-Reinforcing Political Question Doctrine*, 49 ARIZ. ST. L.J. 1, 14 (2017) (suggesting that the breadth of Rehnquist's *Goldwater* opinion explains the lower courts' extensive reliance on the political question doctrine to refuse to adjudicate foreign affairs cases).

[54] *See id.* at 12–13 (noting Rehnquist's failure to cite the *Baker* factors); Blumoff, *supra* note 14, at 323–25, 336 (explaining why Rehnquist's opinion is "woefully underanalyzed" and "does not fit into standard political question evaluation").

[55] Baker v. Carr, 369 U.S. 186, 217 (1962).

factor in 2019 in holding that questions about the fairness of political gerrymandering constitute political questions, and it also helps explain the one case Justice Rehnquist relied upon, *Coleman v. Miller*.[56] Nobody claimed that the issue of treaty termination poses a manageable standards problem, which may explain why the entire D.C. Circuit unanimously rejected President Carter's political question defense.[57] The two other Supreme Court cases that somewhat recently found political questions found "a textually demonstrable constitutional commitment of the issue to a coordinate political department."[58] In one of these cases, the Court held that questions about the procedures Congress uses to handle impeachments constitute political questions because the Constitution commits impeachment to Congress.[59] In the other case, it held that the Constitution assigns regulation of the National Guard to Congress and the President.[60] Justice Rehnquist's opinion, however, does not claim that the Constitution assigns the decision about who has a right to terminate a treaty to another branch of government.[61]

Baker v. Carr, traditionally considered the leading case on the political question doctrine, lists other factors beyond constitutional commitment to other branches of government and a lack of judicially manageable standards that can justify finding a political question.[62] But Justice Rehnquist did not rely on any of those factors and none of them suggest that the possibility of a political remedy converts a legal question into a political one.

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[56] Rucho v. Common Cause, 139 S. Ct. 2484, 2505 (2019); Goldwater v. Carter, 444 U.S. 996, 1002–04 (1979) (Rehnquist, J., concurring) (citing Coleman v. Miller, 307 U.S. 433 (1939)); *Coleman*, 307 U.S. at 452–54 (finding no standards that the Court could use to determine the time necessary for a proposed constitutional amendment to have lapsed); Note, *Standing to Sue, supra* note 12, at 1679 (reading *Coleman* as implying "that legislators may be granted standing in a . . . wide variety of circumstances").

[57] *Accord* Koh, *supra* note 29, at 445 (finding no lack of judicially manageable standards on the treaty termination issue).

[58] *Baker*, 369 U.S. at 217.

[59] Nixon v. United States, 506 U.S. 224, 228–29 (1993).

[60] Gilligan v. Morgan, 413 U.S. 1, 5–12 (1973).

[61] *Cf.* Koh, *supra* note 29, at 445 (stating that the Constitution does not "textually commit" the treaty termination question to another branch of government).

[62] *Baker*, 369 U.S. at 217. The *Baker* Court mentioned the following additional factors:

> [T]he impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Id. But see Zivotofsky v. Clinton, 566 U.S. 189, 195–96 (2012) (describing the political question doctrine narrowly as only involving the textually demonstrable commitment of an issue to another branch of government or a problem of judicially manageable standards).

Almost two decades after *Goldwater*, the Supreme Court developed a variant of the political remedies doctrine in *Raines v. Byrd*.[63] In so doing, the Court gave the doctrine vitality outside the *Goldwater* realm of foreign affairs.[64]

Raines arose from a congressional decision to address budget deficits by giving the President a line item veto—the ability to veto particular spending authorizations without vetoing an entire budget (which would shut down the government).[65] Various congressmen challenged the statute's constitutionality.[66] The *Raines* Court suggested that only a House of Congress, not a collection of congressmen, would have standing to challenge actions enhancing presidential power at the expense of Congress, a stance in some tension with *Coleman v. Miller*.[67] This increasingly restrictive congressional standing doctrine has the same tendency as the *Goldwater* decision of demanding an institutional stance against the President before the Court will hear a case.[68]

We cannot be certain that the Court will follow *Raines*'s suggestion that a single House of Congress has standing to vindicate a statute. In 2019, the Court held that a single house of a state legislature lacks standing to challenge a court ruling invalidating the legislature's redistricting plan.[69] But the Court's increasingly restrictive congressional standing doctrine does not prevent private litigants from obtaining judicial review. Indeed, the Supreme Court did address the line item veto's constitutionality in a subsequent decision at the behest of private litigants.[70]

The Supreme Court recently declined to consider the political remedies doctrine even though the dissent raised it. In *Zivotofsky v. Clinton*,[71] the Court addressed a justiciability issue of how to resolve a clash between presidential

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[63] Raines v. Byrd, 521 U.S. 811 (1997).

[64] *See* Wiener, *supra* note 4, at 218 (notwithstanding Justice Rehnquist's disclaiming reliance on the political remedies doctrine in *Raines*, a "close reading of the opinion suggests otherwise"). *See generally* Hall, *supra* note 12, at 4 (internal quotation marks omitted) (claiming that "legislative standing is fundamentally about when . . . federal courts should" referee "disputes between Congress and the executive branch").

[65] *See* Driesen, *supra* note 47, at 809–10.

[66] *Raines*, 521 U.S. at 814.

[67] *See id.* at 831 (Souter, J., concurring).

[68] *Cf. id.* at 829–30 (explaining that the rejection of standing to contest the line item veto does not deprive the congressmen of a remedy since Congress "may repeal the Act or exempt appropriations bills from its reach" and suggesting the result might be different if this were not so). For a catalogue of the political remedies available to Congress, see Josh Chafetz, *Congress's Constitution*, 160 U. PA. L. REV. 715 (2012).

[69] Va. House of Delegates v. Bethune-Hill, 139 S. Ct. 1945, 1950 (2019).

[70] *See* Clinton v. City of New York, 524 U.S. 417, 425–27, 448–49 (1998) (identifying the private parties and striking down the line item veto).

[71] 566 U.S. 189 (2012).

and congressional control over foreign affairs like that posed in *Goldwater*.[72] Congress passed a statute authorizing American citizens born in Jerusalem to get a passport listing Israel as their birthplace.[73] Zivotofsky sought to avail himself of this statutory right but the State Department refused to list Israel on his passport, as doing so might undercut the longstanding executive branch policy of not recognizing Jerusalem as part of Israel.[74] *Zivotofsky* thus presented a conflict between the President's implied authority over recognition of foreign governments and congressional authority over foreign commerce and immigration.[75] Yet, the Court found the case justiciable.[76]

Justice Breyer invoked the political remedies doctrine in his dissent. He argued, relying on Justice Rehnquist's *Goldwater* opinion, that the existence of "nonjudicial methods for working out" political differences between the President and Congress made the passport issue a political question.[77] Breyer read the Rehnquist opinion as treating the political remedies doctrine as a "strong reason" for the result reached in *Goldwater*.[78]

While one might read *Zivotofsky* as silently repudiating the political remedies doctrine, it may instead signal a pro-presidential limit on the doctrine's use. The *Zivotofsky* Court justified its decision to treat this separation of powers question as a justiciable legal issue by stating that the courts have the responsibility to determine the constitutionality of *statutes*.[79] And indeed, in a subsequent opinion, the Court struck down the statute as an infringement of the President's recognition authority in a 5-4 decision.[80] Its first *Zivotofsky* opinion leaves open the possibility of continuing to use the political remedies doctrine to shield the President's actions from judicial scrutiny, while not applying the doctrine to shield statutes from judicial review.

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[72] *Id.* at 191–93.

[73] *Id.* at 191.

[74] *Id.*

[75] *Id.* at 197–202; *see* Zivotofsky v. Kerry, 576 U.S. 1, 9, 64 (2015) (describing the merits of the claims dismissed in *Zivitofsky v. Clinton*) (majority and dissenting opinions).

[76] *Zivotofsky v. Clinton*, 566 U.S. at 201.

[77] *Id.* at 219 (Breyer, J., dissenting) (citing Goldwater v. Carter, 444 U.S. 996, 1002 (1979) (Brennan, J., dissenting)).
Goldwater, 444 U.S. at 1002 (Rehnquist, J., concurring)) (supporting an argument that Zivotofsky's claims should be dismissed by noting that the "political branches of Government . . . have nonjudicial methods of working out their differences").

[78] *Id.* (characterizing Rehnquist's opinion as finding a fact similar to the existence of "nonjudicial methods of working out . . . differences" as a "strong reason for the Judiciary not to decide treaty power question[s]").

[79] *Id.* at 196–97.

[80] *See Zivotofsky v. Kerry*, 576 U.S. at 32.

Justice Roberts, who wrote the majority opinion in *Zivotofsky v. Clinton*, may not have responded to Breyer's invocation of the political remedies doctrine because it seemed like a very weak argument when the issue before the Court was fully joined. Both the President and Congress had taken actions to advance their rights. Congress used its legislative power to pass a statute authorizing citizens living in Jerusalem to list Israel as the place of birth and the President had used his executive power to deny a Jerusalem resident this statutory right.[81]

On the other hand, Breyer's invocation of the political remedies doctrine after both branches of government have asserted their rights and reached a constitutional impasse raises important questions. What more did Breyer expect the political branches to do? How much political action should courts applying the political remedies doctrine require before acting?[82]

B. The Political Remedies Doctrine in the Lower Courts

The political remedies doctrine has played a key role in shielding alleged presidential usurpation of congressional authority from judicial scrutiny in the lower courts. The lower courts first applied the doctrine primarily to war powers cases and then more recently to President Trump's challenges to the constitutional order.

1. War Powers Cases

The Constitution grants the power to declare war to Congress.[83] Since World War II, however, presidents have initiated combat operations around the world unilaterally on numerous occasions. Beginning with the Vietnam War, congressmen, soldiers, owners of property damaged in war, and others have asked the federal courts to recognize that the President exceeds his constitutional authority when he deploys the military without a congressional declaration of war.[84] The lower courts have consistently treated these claims as nonjusticiable, and the Supreme Court has refused to review the lower court decisions.[85]

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[81] *Zivotofsky v. Clinton*, 566 U.S. at 191–93.

[82] *Cf.* Meyer, *supra* note 42, at 69 (claiming that the political remedies doctrine can always justify foregoing judicial review and is incompatible with the Pocket Veto cases).

[83] U.S. CONST. art. I, § 8, cl. 11.

[84] *See, e.g.*, Doe v. Bush, 323 F.3d 133, 134 (1st Cir. 2003) (suit by soldiers, parents of soldiers, and members of the House seeking to prevent the war against Iraq); Mitchell v. Laird, 488 F.2d 611, 613 (D.C. Cir. 1973) (suit by members of the House of Representatives challenging the Vietnam War, waged without a declaration of war by Congress).

[85] *See, e.g.*, McKaye Neumeister, *Reviving the Power of the Purse: Appropriations Clause Litigation and National Security Law*, 127 YALE L.J. 2512, 2523–24 (2018) ("Members of Congress have . . . brought twelve . . . lawsuits" contesting presidential usurpation of the war power, but the courts have dismissed them all as

Collectively, these decisions have played a role in the *de facto* transfer of the war power to the President. While the Constitution clearly demands peace unless the President, the Senate, and the House agree to war, current practice allows the President to wage war unless and until both Houses of Congress agree to stop him (perhaps even by a supermajority, as a presidential veto remains possible).[86] The political remedies doctrine has played a role in a number of the cases authorizing presidential usurpation of the war power through judicial inaction.[87] While it played a role in at least one case arising before *Goldwater*,[88] its primary role has been to sustain the courts' refusal to adjudicate war powers cases after some of the other excuses for not hearing these cases have lost credibility.

Many of the Vietnam War cases rely upon the political question doctrine, not on the political remedies doctrine.[89] And the rulings in many of those cases were unanimous.[90] Nevertheless, the rationales for these rulings appear weak, and recent cases either tend to generate split decisions or do not rely on them at all.[91]

An early case arising from the Vietnam War, *Massachusetts v. Laird*, however, counts as a forerunner of the political remedies doctrine.[92] In that case, Massachusetts and soldiers from that state alleged that forcing young men to fight in Vietnam violated their liberty interests under the Due Process Clause

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nonjusticiable); Sarnoff v. Schultz, 409 U.S. 929 (1972); Massachusetts v. Laird, 400 U.S. 886 (1970); Mora v. McNamara, 389 U.S. 934 (1967) .

[86] *See* The Prize Cases, 67 U.S. (2 Black) 635, 668 (1863) (stating that "Congress alone has the power to declare . . . war" and the President "has no power to initiate or declare . . . war"); Talbot v. Seeman, 5 U.S. (1 Cranch) 1, 28 (1801) (Marshall, J.) (unanimous) (the Constitution vests "the whole powers of war" in Congress).

[87] *Cf.* Meyer, *supra* note 42, at 71–72 (explaining that the courts' invocation of the political remedies doctrine in the war powers area has upended the Framers' intent to use legislative deliberation to inhibit "solo and possibly precipitous . . . action").

[88] *See, e.g.*, Massachusetts v. Laird, 451 F.2d 26 (1st Cir. 1971).

[89] *See* Mitchell v. Laird, 488 F.2d 611, 615–16 (D.C. Cir. 1973) (finding the question of whether the Vietnam War is constitutional a political question because Congress can choose the form of approving the war and the court cannot second guess President Nixon's effort to end the war); Orlando v. Laird, 443 F.2d 1039, 1043 (2d Cir. 1971) (finding the question of whether congressional approval of the Vietnam War was in the proper form a political question); DaCosta v. Laird, 448 F.2d 1368, 1370 (2d Cir. 1971) (per curiam) (holding that the constitutionality of the method of "winding down" the Vietnam War is a political question); Luftig v. McNamara, 373 F.2d 664 (D.C. Cir. 1967) (per curiam) (holding that the legality of the Vietnam War constitutes a political question because it involves foreign policy and military power).

[90] *See Mitchell*, 488 F.2d 611; *Orlando*, 443 F.2d 1039; *DaCosta*, 448 F.2d 1368; *Luftig*, 373 F.2d 664.

[91] *See, e.g.*, El-Shifa Pharm. Indus. v. United States, 607 F.3d 836 (D.C. Cir. 2010) (en banc) (holding 5-4 that the political question doctrine barred consideration of a federal tort claim seeking damages for U.S. bombing of a pharmaceutical plant); Samuel R. Howe, Note, *Congress's War Powers and the Political Question Doctrine After* Smith v. Obama, 68 DUKE L.J. 1231, 1234 (2019) (referencing Smith v. Obama, 217 F. Supp. 3d 283 (D.D.C. 2016)) (questioning the *Smith v. Obama* court's use of the political question doctrine).

[92] *Laird*, 451 F.2d 26; *accord* Blumoff, *supra* note 14, at 303 (recognizing that Judge Coffin's *Laird* opinion anticipated Justice Powell's *Goldwater* opinion).

absent a declaration of war.[93] The First Circuit stated that, absent congressional opposition to the Vietnam War, "there is no necessity of determining boundaries."[94] It invoked the political remedies doctrine in this way after noting that Congress had steadily supported the Vietnam War, albeit not through a specific war authorization.[95]

Laird reveals an important aspect of the politics preference, which it endorses.[96] By allowing political agreement to defeat a due process claim, the court allowed political consensus to infringe liberty in a very serious way.

The Vietnam War also spurred suits by congressmen, who argued that several Presidents had usurped Congress' war power by waging war in Vietnam.[97] These cases and other cases occasioned by increased strife with the executive branch led to a confused D.C. Circuit doctrine on congressional standing.[98] In 1981, the D.C. Circuit tried to address the confusion by adopting the political remedies doctrine under the rubric of equitable discretion, after rejecting the applicability of the other justiciability doctrines.[99] Thus, judges employ the political remedies doctrine under the rubrics of ripeness, political questions, standing, and equitable discretion.[100]

By the time of the Reagan administration, dismissal of war powers cases based on unanimous appellate political question doctrine rulings seldom

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[93] *Laird*, 451 F.2d at 28.

[94] *Id.* at 34.

[95] *See id.*

[96] *See id.* (holding that the President's conduct of the War "with steady Congressional support" does not violate the Constitution).

[97] *See, e.g.*, Mitchell v. Laird, 488 F.2d 611, 613 (D.C. Cir. 1973) (thirteen members of the House brought suit to challenge the plaintiffs' waging of war in Vietnam without the required congressional declaration of war).

[98] *See* Nash, *supra* note 14, at 358–59 (discussing "confusion" in the D.C. Circuit's approach to standing).

[99] *See* Riegle v. Fed. Open Mkt. Comm., 656 F.2d 873, 881 (D.C. Cir. 1981) (holding that "[w]here a congressional plaintiff could obtain substantial relief from his fellow legislators through enactment, repeal, or amendment of a statute, this court should exercise its equitable discretion to dismiss the legislator's action" after declining to employ standing, ripeness, or the political question doctrine); Dornan v. U.S. Sec'y of Def., 851 F.2d 450 (D.C. Cir. 1980) (per curiam) (dismissing a challenge to aiding the Nicaraguan Contras based on the political remedies doctrine camouflaged as equitable discretion). The *Riegle* court read the *Goldwater* opinion as disapproving of congressional standing doctrine predicated on political remedies type reasoning. *See Riegle*, 656 F.2d at 880. The doctrine of equitable discretion is poorly defined, but basically gives a court flexibility to refuse to issue an equitable remedy based on a balancing of competing factors. *See* Wagner, *supra* note 15, at 540–41. The lower courts, however, employ equitable discretion mechanically in this context and do not "balance[] . . . competing factors." *Id.* at 541. *See generally* Carl McGowan, *Congressmen in Court: The New Plaintiffs*, 15 GA. L. REV. 241, 244 (1981) (offering the doctrine of equitable discretion as an alternative to the standing, political question, and ripeness doctrines in addressing separation of powers concerns in congressional lawsuits).

[100] *See, e.g.*, Smith v. Obama, 217 F. Supp. 3d 283, 302–03 (D.D.C. 2016) (employing the political remedies doctrine to help justify a dismissal ostensibly based on the political question doctrine).

occurred anymore, and the political remedies doctrine began to play a more prominent role.[101] Judge (later, Justice) Ginsburg declined to sign on to an opinion relying on the political question doctrine to reject a claim that President Reagan had unconstitutionally waged war against the government of Nicaragua by supporting the Contra forces.[102] Instead, she relied on the political remedies doctrine.[103] She identified some of the political remedies that Congress could invoke to contest President Reagan's role in the war in Nicaragua—the power of the purse and to investigate.[104] Noting a congressional appropriation to support the Contras, she did not find a constitutional impasse that would justify judicial review under the political remedies doctrine.[105]

In *Conyers v. Reagan*, the District Court for the District of Columbia invoked the political remedies doctrine in dismissing a challenge to President Reagan's invasion of Grenada.[106] A few years later, in *Dellums v. Bush*, the same court relied squarely on the political remedies doctrine to dismiss a war powers case, while rejecting defenses based on the political question and standing doctrines.[107] The political remedies doctrine justified refusing to order President Bush to refrain from waging war against Iraq, which had just invaded Kuwait, without congressional authorization.[108] Judge Greene's *Dellums* opinion reveals some of the consequences of accepting the politics preference underlying the doctrine. First of all, his reasoning maintains that Congress may amend the Constitution through its inaction.[109] He strongly suggested that if Congress thinks that the Constitution authorizes unilateral war and therefore does nothing, then the President should be allowed to proceed, even if Congress is wrong.[110]

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[101] *See, e.g.*, Crockett v. Reagan, 720 F.2d 1355, 1357 (D.C. Cir. 1983) (approving dismissal of an effort to enforce the War Powers Resolution under the doctrine of equitable discretion—i.e., the political remedies doctrine). *But see* Lowry v. Reagan, 676 F. Supp. 333, 339 (D.D.C. 1987) (holding that the question of whether President Reagan had introduced armed forces into hostilities in the Persian Gulf thereby triggering the War Powers Resolution constitutes a political question).

[102] *See* Sanchez-Espinoza v. Reagan, 770 F.2d 202, 210 (D.C. Cir. 1985) (majority opinion) (dismissing congressional challenges to the U.S. role in the war in Nicaragua on political question grounds).

[103] *See id.* at 210–11 (Ginsburg, J., concurring) (quoting Powell's statement in *Goldwater* that the courts should not adjudicate "issues affecting the allocation of power between the President and Congress until the political branches reach a constitutional impasse" (quoting Goldwater v. Carter, 444 U.S. 996, 997 (1979))). The majority did not address this issue, as it considered it abandoned. *See id.* at 208 n.9.

[104] *Id.* at 211.

[105] *Id.*

[106] Conyers v. Reagan, 578 F. Supp. 324, 326 (D.D.C. 1984), *appeal dismissed as moot*, 765 F.2d 1124 (D.C. Cir. 1985).

[107] Dellums v. Bush, 752 F. Supp. 1141, 1144–52 (D.D.C. 1990).

[108] *Id.* at 1143.

[109] *Cf.* Meyer, *supra* note 42, at 72 (claiming that the political remedies doctrine enables the political branches to alter the Constitution without going through the amendment process mandated by Article V).

[110] *See Dellums*, 725 F. Supp. at 1150–51. Judge Greene discussed what should happen if the court

Other district courts used the political remedies doctrine not to avoid the political question doctrine, but to bolster it. In *Obama v. Smith*, the District Court for the District of Columbia invoked the political remedies doctrine to help justify stating that the political question doctrine barred judicial review of a challenge to the war against Islamic State of Iraq and the Levant.[111]

The political remedies doctrine also played a role in *Doe v. Bush*, which rejected challenges to the constitutional sufficiency of a congressional resolution authorizing President George W. Bush to go to war in Iraq under certain conditions.[112] The First Circuit quoted Powell's endorsement of the political remedies doctrine in addressing some of the issues raised in that challenge but seemed aware of its insecure placement in the ripeness doctrine.[113] It prefaced the Powell quote by grounding its decision not only on the lack of an interbranch dispute, but also on "the consequent lack of a clearly defined issue."[114] It also found the case unripe because the war might not occur, a view aligned with ripeness doctrine's traditional concern about deciding hypothetical cases—cases that have no real world impact.[115] The political remedies doctrine acted to influence, but perhaps not wholly determine, a ripeness ruling with many elements on some of the claims before the court.[116] At the same time, the *Doe* court rejected invocation of the political remedies doctrine in addressing a claim that Congress may not delegate the war power to the President because Congress must take political responsibility for deciding whether to go to war or not.[117] It dismissed that claim on other grounds.[118]

Toward the end of the Vietnam War, Congress did use a political remedy to check the President's usurpation of its war power by passing the War Powers Resolution.[119] The War Powers Resolution requires the President to notify

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enjoined the War in Iraq, presumably on the ground that the President could not initiate a war without congressional authorization, but the majority in Congress thought the Constitution authorized unilateral war. *Id.* at 1150. That injunction would not be proper, wrote Judge Greene, because it would force Congress to make a choice about whether to authorize the war. *Id.* at 1150–51. But this means that the President could engage in unilateral war unauthorized by the Constitution only because Congress thought he could.

111 Smith v. Obama, 217 F. Supp. 3d 283, 302–03 (D.D.C. 2016). The *Smith* Court also relied on a lack of standing. *See id.* at 289–97.

112 Doe v. Bush, 323 F.3d 133, 134, 144 (1st Cir. 2003).

113 *Id.* at 137 (quoting Goldwater v. Carter, 444 U.S. 996, 997 (1979)).

114 *Id.*

115 *See id.* at 139 (identifying the question of "whether there will be a war" as "unanswered").

116 *See id.* at 137–41 (intermingling consideration of the political remedies doctrine with more traditional ripeness concerns).

117 *See id.* at 141.

118 *See id.* at 141–44.

119 50 U.S.C. §§ 1541–1548.

Congress within forty-eight hours of the introduction of troops abroad.[120] And it obligates the President to remove troops within two months of the reporting deadline, unless Congress authorizes the President to leave them in place.[121] Thus, one might have expected the courts to treat actions challenging presidential failure to comply with the War Powers Resolution as asking for judicial resolution of a constitutional impasse and therefore to at least eschew reliance on the political remedies doctrine as a basis for dismissing these challenges.[122]

In *Campbell v. Clinton*, however, the D.C. Circuit dismissed an action to enforce the War Powers Resolution based, in part, on the political remedies doctrine.[123] In *Campbell*, several congressmen sued President Clinton for bombing Kosovo without notifying Congress as required by the War Powers Resolution.[124] Furthermore, Congress employed additional political remedies to reign in this particular unilateral war. It voted against a declaration of war and an authorization of air strikes.[125] On the other hand, it voted against requiring the President to immediately end his unilateral participation and funded the involvement.[126]

The *Campbell* court held that the congressmen lacked standing to sue.[127] While the court might have distinguished the *Raines* congressional standing ruling on the grounds that Congressman Campbell and his allies sought to vindicate Congress' political decision rather than ask the court to invalidate one, it relied instead on the political remedies doctrine to bolster its standing ruling.[128] The court relied squarely on D.C. Circuit congressional standing precedent justifying, according to the majority, dismissal of disputes "fully susceptible to political resolution."[129] And in explaining why it read *Raines* restrictively instead of relying on earlier precedent granting standing to legislators, the court relied on the existence of a potential legislative remedy addressing the bombing

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120 50 U.S.C. § 1543(a).

121 Crockett v. Reagan, 558 F. Supp. 893, 895 (D.D.C. 1982), *aff'd*, 720 F.2d 1355 (D.C. Cir. 1983).

122 *Cf.* Meyer, *supra* note 42, at 124 (characterizing invocation of the political remedies doctrine to dismiss efforts to enforce the War Powers Resolution as "peculiar").

123 203 F.3d 19, 19–21 (D.C. Cir. 2000)

124 *See id.* at 20.

125 *Id.*

126 *Id.*

127 *Id.* at 19.

128 *Cf. id.* at 31–32 (Randolph, J., concurring) (summarizing the majority's position as relying on the political remedies doctrine to deny congressmen's standing to enforce the War Powers Resolution because Congress could take additional action).

129 *Id.* at 21 (quoting Chenoweth v. Clinton, 181 F.3d 112, 116 (D.C. Cir. 1999)).

of Kosovo—passing a law ordering the troops home.[130] Toward the end of its opinion, the court also mentions congressional authority to "cut off funds" and impeach the President.[131] In the context of the case's facts, *Campbell* held that even when Congress has employed legislative remedies denying a war power to the President, the political remedies doctrine still applies if Congress could do more. That proved a bit too much for Judge Randolph, who wrote a concurring opinion treating the possibility of voting "for other legislation in the future" on the same matter as an insufficient basis for triggering the political remedies doctrine once Congress has taken some action.[132] He pointed out that such an approach to congressional standing eliminates it.[133] The *Campbell* majority emphatically read *Raines* as making congressional standing doctrine a tool for implementing the political remedies doctrine.[134]

2. *President Trump's Challenges to the Constitution*

In a number of cases, President Trump has challenged the constitutional order by breaking long-standing constitutional norms.[135] Many of his broader challenges triggered efforts to enforce the constitutional norms in question and statutes implementing them.[136] But several lower courts invoked the political remedies doctrine to avoid enforcing the relevant constitutional norms. The cases seeking to reign in Trump's undermining of the constitutional order led to a revealing debate among the lower court judges about the proper scope of the political remedies doctrine. This subpart examines cases involving Trump's resistance to the Emoluments Clauses, congressional subpoenas, and restrictions on funding a wall on the U.S. southern border in turn.

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[130] *Id.* at 23 (the Senators in *Coleman v. Miller* obtained standing because "they had no legislative remedy," but Campbell and his allies "enjoy ample legislative power to" stop the war's "prosecution").

[131] *Id.*

[132] *See id.* at 32 (Randolph, J., concurring) (disapproving of ignoring nullification of previous votes just because of the possibility of additional votes in the future on the same matter).

[133] *See id.* (because "[m]embers will always be able to vote for [additional] legislation[,] . . . the majority's decision . . . abolish[es] legislative standing").

[134] *See id.* at 24 (reading *Raines* as focusing on "self-help available to congressmen"); *see also* Kucinich v. Obama, 821 F. Supp. 2d 110, 120 (D.D.C. 2011) (dismissing congressmen's war power claims and making the lack of a legislative remedy a prerequisite for congressional standing).

[135] *See, e.g.*, David M. Driesen, *President Trump's Executive Orders and the Rule of Law*, 87 UMKC L. REV. 489, 497–506 (2019) (reviewing Trump's executive orders challenging the constitutional order early in his administration); Daphna Renan, *Presidential Norms and Article II*, 131 HARV. L. REV. 2187, 2214, 2219–21 (2018) (discussing Trump's norm violations). Unlike Daphna Renan, I use the term "norms" to refer both to informal and formal legal constraints. *Cf.* Renan, *supra*, at 2189.

[136] *See, e.g.*, Citizens for Resp. and Ethics in Wash. v. Trump, 953 F.3d 178, 184 (2d Cir. 2019), *vacated as moot*, 141 S. Ct. 1262 (2021) (addressing claims that President Trump violated the Constitution's Emoluments Clauses); Blumenthal v. Trump, 335 F. Supp. 3d 45 (D.D.C. 2018).

a. Emoluments Clause Cases

One set of cases arose out of Trump's defiance of the Constitution's Emoluments Clauses, which forbid the President from accepting "emoluments" (anything of value) from a foreign government or from the government of the United States (excepting his salary).[137] The Foreign Emoluments Clause has an exception authorizing the President to accept an emolument from a foreign government if Congress consents.[138] These provisions aim to prevent corruption of the President.[139] President Trump allegedly violated the Emoluments Clauses primarily by owning a number of hotels frequented by government officials and representatives of foreign governments, including one leased from the federal government.[140]

A district court dismissing complaints about Trump's alleged violations relied, in part, on the political remedies doctrine.[141] Because, in the court's view, Congress can enforce the Foreign Emoluments Clause through legislation or by approving emoluments, the judge dismissed the Foreign Emoluments Clause claim.[142] In doing so, the court relied not only on *Goldwater* itself, but also on *Dellums*, the war powers case relying exclusively on the political remedies doctrine.[143] Thus, a doctrine justifying staying out of foreign affairs cases and used to avoid checking unilateral war-making generated a separation of powers logic favoring politics over the rule of law domestically by hindering enforcement of a constitutional restraint limiting presidential corruption.

But not for long. The Second Circuit reversed the district court's opinion, including its reliance on the political remedies doctrine.[144] It explained that the political remedies doctrine applies only to separation of powers cases.[145] Since the Foreign Emoluments Clause claim only concerned the question of whether

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137 *See* U.S. CONST. art. I, § 9, cl. 8; art. II, § 1, cl. 7; NORMAN L. EISEN, RICHARD PAINTER & LAURENCE TRIBE, THE EMOLUMENTS CLAUSE: ITS TEXT, MEANING, AND APPLICATION TO DONALD J. TRUMP 6 (2016) (characterizing the Emoluments Clause as aimed at preventing "gifts of any kind from a foreign government"). *Contra* Seth Barrett Tillman, *Business Transactions and President Trump's Emoluments Problem*, 40 HARV. J. L. & PUB. POL'Y 759, 760 (2017) (doubting this interpretation).

138 U.S. CONST. art. I, § 9, cl. 8.

139 *In re* Trump, 928 F.3d 360, 373 (4th Cir. 2019), *vacated as moot*, 141 S. Ct. 1262 (2021) (characterizing the Emoluments Clauses as "structural provisions concerned with public corruption").

140 *Id.* at 364–65.

141 Citizens for Resp. and Ethics in Wash. v. Trump, 276 F. Supp. 3d 174, 195 (S.D.N.Y. 2017).

142 *Id.*

143 *See id.* (citing Goldwater v. Carter, 444 U.S. 996, 998 (1979) and Dellums v. Bush, 752 F. Supp. 1141, 1149–50 (D.D.C. 1990)).

144 *See* Citizens for Resp. and Ethics in Wash. v. Trump, 953 F.3d 178, 202–03 (2d Cir. 2019).

145 *See id.*

President Trump transgressed an ethical limitation on his conduct, rather than a question of whether the President encroached on a power of Congress, it rejected the applicability of the political remedies doctrine.[146]

In *Blumenthal v. Trump*, a district court declined to use the political remedies doctrine to bar enforcement of the Foreign Emoluments Clause, partly on grounds similar to those relied on in the Second Circuit and partly because the court found the political remedies that President Trump relied upon inadequate and constitutionally inappropriate.[147] *Blumenthal* evaluates the realism of the political remedies suggested to justify invocation of the political remedies doctrine. The court noted that the President may veto legislation enforcing the Emoluments Clause.[148] Moreover, it declined to assume that the President would comply with the legislation, as he had not complied with the constitutional provision governing foreign emoluments.[149] The judge also cited the problem of legislating without information about the President's emoluments.[150] Finally, the court rejected reliance on "the extreme measure of impeachment" as an adequate political remedy within the meaning of the political remedies doctrine.[151]

Even more importantly for this Article, *Blumenthal* recognizes that a political remedies doctrine dismissal would itself allocate power in a manner inconsistent with the Foreign Emoluments Clause and that doing so would change the terms of political bargaining.[152] That Clause forbids taking an emolument without congressional consent.[153] A judicial decision recognizing that the President must receive congressional consent before taking an emolument would not cut off bargaining but instead would "place[] the burden on the President to convince . . . Congress to consent."[154] Dismissal based on the availability of a political remedy would reverse this allocation of power and therefore change the baseline for negotiations. It would allow the President to keep the corrupting emolument unless Congress acted to stop it.[155] This ruling exposes the problem of evaluating the adequacy of political remedies and, even

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146 *See id.*

147 *See* Blumenthal v. Trump, 335 F. Supp. 3d 45, 66–68 (D.D.C. 2018), *rev'd on other grounds*, 949 F.3d 14 (D.C. Cir. 2020).

148 *See id.* at 67 (assuming that the President would sign legislation enforcing the Emoluments Clause for purposes of argument).

149 *See id.*

150 *Id.* at 68.

151 *Id.*

152 *See id.* at 67.

153 *Id.*

154 *See id.*

155 *See id.*

more fundamentally, recognizes that a ruling on the political remedies doctrine allocates power in a way that changes constitutional balances.[156]

b. Subpoena Cases

The political remedies doctrine had a larger impact on cases addressing President Trump's resistance to congressional subpoenas. Congress has demanded documents and witnesses from the executive branch since the Founding, and while disputes have arisen from the beginning about specific requests, the executive branch typically complies with most congressional requests for information.[157] The Supreme Court has held repeatedly that Congress has broad authority to subpoena information from the executive branch.[158] Yet, President Trump claimed authority to resist all sorts of subpoenas, thereby triggering enforcement actions in the federal courts.[159]

These cases reveal much about the potential breadth of the political remedies doctrine. The executive branch sought to rely on the political remedies doctrine to resist a House Judiciary Committee subpoena demanding that White House Counsel Donald McGahn testify about Russian interference in the 2016 election and the Special Counsel's findings of fact about presidential obstruction of justice.[160] In spite of the political remedies doctrine's role in justifying shrinking

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[156] *See infra* pp. 46–51 (justifying the court's conclusion that the political remedies doctrine changes constitutional balances); *cf.* Wagner, *supra* note 15, at 536 (noting that broad abstention from lawsuits brought by congressmen can "alter the constitutional balance").

[157] *See* McGrain v. Daugherty, 273 U.S. 135, 161 (1927) (tracing the practice of securing information needed by Congress back to 1792 and noting the support of James Madison and four other Framers); *see, e.g.*, *In re* Chapman, 166 U.S. 661, 665–66 (1897) (discussing a statute passed in 1857 requiring witnesses summoned by a House of Congress or one of its committees to appear and answer questions posed).

[158] Watkins v. United States, 354 U.S. 178, 194–95, 200 n.33 (1956) (characterizing *McGrain* and *Sinclair* as recognizing congressional authority to encourage "honest and effective government" by investigating corruption and noting established authority to police maladministration); Sinclair v. United States, 279 U.S. 263, 294–95 (1929) (upholding imprisonment of an oil company executive who did not fully cooperate in congressional investigation of an oil leasing scandal because the investigation might produce legislation); *McGrain*, 273 U.S. at 150–51, 154, 177–80 (approving the arrest of the former Attorney General for failing to cooperate with a congressional investigation of a failure to enforce anti-trust laws and other statutes); Senate Select Comm. on Pres. Campaign Activities v. Nixon, 498 F.2d 725, 727, 731–32 (D.C. Cir. 1974) (en banc) (approving demand for tapes revealing presidential misconduct in an election by a committee that might recommend legislation, which became a basis for an impeachment investigation); *cf.* Trump v. Mazars, 140 S. Ct. 2019, 2035–36 (2020) (imposing various limitations on Congressional subpoenas seeking personal financial information from the President).

[159] *See Mazars*, 140 S. Ct. at 2028–29 (detailing presidential challenges to congressional subpoenas of his financial records); Trump v. Vance, 140 S. Ct. 2412, 2431 (2020) (upholding a state's right to subpoena the President's financial records).

[160] Comm. on the Judiciary v. McGahn, 415 F. Supp. 3d 148, 153 (D.D.C. 2019) (explaining that President Trump ordered McGahn not to testify).

standing for individual congressmen in *Raines*, a district court declined to treat the alleged existence of political remedies as a defense to an action brought by an entire House Committee to vindicate its subpoena power.[161] Having found that the Judiciary Committee had incurred an injury, it refused to read the political remedies requirement as a stand-alone addition to traditional standing requirements.[162] The judge also evaluated the realism of the political remedy McGahn relied on—use of the Spending Power to enforce subpoenas—and found it impracticable.[163]

A panel of the District of Columbia Circuit reversed, with the political remedies doctrine playing a significant role in its decision.[164] Like the district court, the panel named some specific remedies. But it did not confine itself to remedies available to the Judiciary Committee or even to the House. It cited congressional power to "hold officers in contempt, withhold appropriations, refuse to confirm the President's nominees, or impeach recalcitrant officers."[165] It offered no evaluation of the reasonableness or practical availability of these remedies. Even though this case presented a constitutional impasse of the sort that Justice Powell had suggested would be justiciable, the panel declined to adjudicate the merits lest it disrupt "the flexible system of negotiation, accommodation, and (sometimes) political retaliation" that usually resolves such disputes.[166]

The entire D.C. Circuit, however, reversed the panel decision in a 6-2 opinion.[167] Like the District Court, it declined to treat the political remedies doctrine as a defense.[168] Importantly, the en banc court viewed merits adjudication as supporting, rather than disrupting, the tradition of bargaining over information disclosure to Congress.[169] It rejected the argument that judicial

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[161] *See id.* at 196–97 (citation omitted) (the argument that the Judiciary Committee has "several political arrows in its quiver" does not defeat standing because Article III standing does not have a "last resort" requirement).

[162] *See id.* at 197.

[163] *See id.* (characterizing the remedy of withholding appropriations as a "practical nullity" because of the time required and the need for "the cooperation of the entire Congress").

[164] Comm. on the Judiciary v. McGahn, 951 F.3d 510, 518–19 (D.C. Cir. 2020), *rev'd*, 968 F.3d 755, 760, 778 (D.C. Cir. 2020) (en banc).

[165] *Id.* at 519.

[166] *Id.*

[167] *See* Comm. on the Judiciary v. McGahn, 968 F.3d 755, 760 (D.C. Cir. 2020) (en banc).

[168] *See id.* at 769–70 (rejecting the idea of incorporating a general reluctance to intervene in separation of powers cases into standing doctrine and distinguishing the leading case articulating the political remedies doctrine as a test of the exercise of equitable discretion (citing Riegle v. Fed. Open Mkt. Comm., 656 F.2d 873, 881 (D.C. Cir. 1981)).

[169] *Id.* at 770 (concluding that enforcing the subpoena "would preserve, rather than disrupt, [the] historical practice of accommodation").

enforcement of subpoenas would "dramatically alter" the respective "bargaining positions" of the two political branches.[170] Instead, it pointed out that "the threat of a subpoena enforcement lawsuit may be an essential tool in keeping the Executive Branch at the negotiating table."[171] The court also doubted that the ability to enforce a subpoena in court would lead Congress to eschew negotiation, since negotiation and compromise usually offer much quicker relief than adjudication.[172] The court noted that the Committee issued the McGahn subpoena "over 15 months" before its decision (which only produced a remand, not a final resolution) and that a session of Congress lasts only two years.[173]

The political remedies doctrine has also played a role in securing dismissal of claims brought by members of the House Oversight Committee to enforce a subpoena of records regarding President Trump's lease of the Old Post Office building in Washington, D.C., which houses the Trump International Hotel.[174] Because the members seeking enforcement derived their authority from a federal statute authorizing any seven members of the Oversight Committee to subpoena records from the executive branch, the members relied on the statute in arguing for standing to enforce their demand.[175] The District Court, relying in part on the political remedies doctrine, held that the members lacked standing to enforce their subpoena.[176] It pointed out that even though they had authority to issue a subpoena under federal law and had done so, they could have tried to convince the Oversight Committee as a whole to endorse their demands and sought endorsement of their litigation from the Bipartisan Legal Advisory Group.[177]

The court explicitly rejected a political realism constraint on the political remedies doctrine. It admitted that these remedies were not readily available to the congressmen, who were then part of the minority on the Oversight Committee.[178] It stated that the difficulty of employing a political remedy "does not automatically swing open the doors to the federal courts."[179] To buttress this conclusion it cited the *Campbell* Court's mention of the impeachment option,

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170 *Id.* at 771.

171 *Id.*

172 *See id.* at 772 (acknowledging that litigation is not politicians' preferred option because of the time required to resolve cases).

173 *Id.*

174 *See* Cummings v. Murphy, 321 F. Supp. 3d 92, 95–96 (D.D.C. 2018).

175 *See id.* at 95, 106.

176 *See id.* at 117–18.

177 *See id.* at 117.

178 *See id.* (admitting that "had these paths been readily available, plaintiffs would not have filed this action").

179 *Id.*

thereby suggesting that the courthouse doors would remain firmly shut.[180] After all, if a litigant can only challenge a president's allegedly unconstitutional conduct after his removal from office, that removal might well moot the case.[181] This citation to *Campbell* further illustrates how the political remedies doctrine in war powers cases has created impediments to enforcing the rule of law domestically and how those impediments might in practice become a categorical prohibition on enforcement of statutes. The D.C. Circuit reversed this decision just weeks before President Trump left office, treating the minorities' statutorily created right to information as a sufficient basis to establish standing.[182]

The Supreme Court did not mention the political remedies doctrine when it considered congressional subpoenas seeking disclosure of President Trump's tax returns and other financial information in *Trump v. Mazars*.[183] It proceeded straight to the merits and crafted fresh limitations on the congressional subpoena power as applied to presidential information.[184]

c. The Power of the Purse: Trump's Wall

Another case invoking the political remedies doctrine stemmed from a battle over congressional control of the purse. During the 2016 presidential campaign, Trump promised to build a wall on the U.S. southern border in order to keep out illegal immigrants.[185] After criticism from right wing media for failure to fulfill his campaign promise, President Trump demanded $5.7 billion to build his wall and threatened to veto an appropriations bill if Congress did not provide full funding.[186] Congress refused and the "longest partial government shutdown" in

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[180] *Id.*

[181] *Cf.* Campbell v. Clinton, 203 F.3d 19, 32 (D.C. Cir. 2000) (Randolph, J., concurring) (arguing that dismissal based on the mere availability of an option to impeach, legislate, or cut-off funding will justify dismissal even if Congress has acted); Nash, *supra* note 14, at 363 (noting that "[s]ince impeachment is technically always available," invoking its availability to deny standing would "render standing virtually unavailable for any claims of federal legislators").

[182] Maloney v. Murphy, 984 F.3d 50, 54 (D.C. Cir. 2020).

[183] 140 S. Ct. 2019, 2026 (2020).

[184] *See id.* at 2035–36 (authorizing lower courts to second guess congressional determinations about what information it needs to inform its legislative processes).

[185] *See* Sierra Club v. Trump, 379 F. Supp. 3d 883, 891 (N.D. Cal. 2019) (citing Donald Trump, U.S. President, Presidential Announcement Speech (June 26, 2016)) (stating that the President has "long voiced support for" a border wall).

[186] *See id.* at 892 (stating that President Trump announced that he would not sign any federal legislation that failed to provide "substantial funds" for the wall); U.S. House of Representatives v. Mnuchin, 379 F. Supp. 3d 8, 11 (D.D.C. 2019), *rev'd*, 969 F.3d 353, 354 (D.C. Cir. 2020) (en banc) (citations omitted) (explaining that Trump had sought $5.7 billion for a border wall and that a "protracted public fight" over funding the wall led to a government shutdown).

history ensued.[187] In the wake of the public furor over the shutdown, Congress and the President resolved this impasse by agreement to a $1.375 billion appropriation for fencing along the Rio Grande Valley.[188]

Trump then invoked emergency powers to circumvent the funding limitation.[189] In order to retain its power of the purse, Congress passed a joint resolution to void the President's emergency declaration, which President Trump vetoed.[190] The House of Representatives sued to stop the alleged misappropriation of funds, claiming that the statutory authority relied on in the emergency proclamation does not authorize expenditures to build a wall and that therefore the President violated the Constitution's Appropriations Clause.[191]

The District Court dismissed the suit, relying on a narrow reading of congressional standing doctrine.[192] Incredibly, the Court relied on the political remedies doctrine to bolster its congressional standing ruling, apparently not considering a government shutdown and presidential defiance of a subsequent congressional resolution sufficient to indicate a constitutional impasse. It noted that Congress could, with a two-thirds majority, overcome the President's veto of the joint resolution seeking to void Trump's order creating a national emergency.[193] Congress could amend the sections that allegedly fail to justify Trump's redeployment of funds to expressly prohibit the use of funds to build the wall.[194] And, the court added, Congress can investigate the administration's conduct or expand private remedies for damages for private parties harmed by building the wall.[195] The court applied a variant of the political remedies doctrine that requires that the House prove "complete nullification" of its power before it would have standing to sue to vindicate its rights.[196] Although the Court did not find complete nullification, it did recognize the appropriateness of private lawsuits to vindicate the same interests.[197] The entire D.C. Circuit, however, reversed this ruling.[198]

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187 *Sierra Club*, 379 F. Supp. 3d at 892.

188 *Mnuchin*, 379 F. Supp. 3d at 11.

189 *Id.*

190 *See id.*

191 *Id.* at 11–12.

192 *See id.* at 13–19.

193 *See id.* at 20.

194 *See id.* at 12, 20.

195 *Id.* at 20.

196 *See id.* at 21.

197 *See id.* at 22; *cf.* California v. Trump, 963 F.3d 926, 950 (9th Cir. 2020) (invalidating transfer of funds to build a section of the wall at the behest of a number of states).

198 *See* U.S. House of Representatives v. Mnuchin, 969 F.3d 353, 354 (D.C. Cir. 2020) (en banc).

We can see that the political remedies doctrine has enjoyed more influence in the lower courts than in the Supreme Court. It has helped supply rationales for allowing allegedly unconstitutional presidential exercise of the congressional war power to continue without judicial scrutiny. More recently, it has played a role in rejecting several challenges to President Trump's assault on the constitutional order. The invocation in the foreign affairs context has led to employment of the doctrine in the domestic law context. The domestic political remedies doctrine rulings played a role in preventing the courts from effectively countering some of President Trump's constitutional abuses. The remainder of this Article suggests that the doctrine has potential to unravel the rule of law domestically just as it has helped unravel the constitutional order respecting the war power.

II. POLITICAL REMEDIES AND THE RULE OF LAW

This Part evaluates the political remedies doctrine's potential to undermine the rule of law. It begins by showing that the doctrine, while framed in neutral terms, only bars review of presidential action, not congressional acts. As a result, it allows the courts to overturn political agreements between Congress and the President resolving separation of powers claims while permitting unilateral presidential usurpation of congressional authority to go unchecked if the President commands enough support in Congress to block legislation. It then evaluates the extent of the doctrine's potential to unravel the rule of law, primarily by analyzing Justice Scalia's dissent in *United States v. Windsor*.[199]

A. The Political Remedies Doctrine's Asymmetry

The courts always frame the political remedies doctrine in neutral terms. Justice Powell articulates it as a principle that a court should not adjudicate a "dispute between Congress and the President . . . until . . . *each branch* has taken action asserting its constitutional authority."[200] This framing indicates that when the President acts, the courts should not intervene until Congress passes legislation seeking to correct an alleged presidential usurpation of power. Conversely, it suggests that the President must act before the courts will review an alleged congressional encroachment on presidential authority.

The federal courts, however, never seriously consider applying the political remedies doctrine to shield congressional action from review. The primary

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[199] 570 U.S. 744, 778–91 (2013) (Scalia, J., dissenting).

[200] Goldwater v. Carter, 444 U.S. 997, 997 (1979) (Powell, J., concurring) (emphasis added).

power that the President has to resist congressional encroachment on his authority is the veto power.[201] The Court has never made exercise of that power a prerequisite to judicial review of legislation alleged to violate the separation of powers.

For example, take *INS v. Chadha*.[202] In that case, the Court held that the one-House veto enacted into law by Congress with presidential consent in hundreds of statutes violates the Constitution.[203] The Court never suggested that repeated presidential decisions over decades not to veto the legislative acts containing a one-House veto precluded judicial review.[204] It did not accept the idea that the politics preference should influence the result in that case. Justice White's dissent pointed out that legislative vetoes constitute a negotiated price for delegations of vast authority to the executive branch.[205] But the *Chadha* Court decided to "determine boundaries" in this case, even though the executive branch took no "action asserting its constitutional authority."[206]

One can easily multiply examples of non-barking dogs.[207] The courts have permitted litigants to challenge federal statutes impinging on claimed executive authority over and over again, even if the President declined to issue a veto. Nor have the courts ever insisted on some other presidential exertion of authority as a prerequisite to judicial review.

This asymmetry does not stem solely from the infrequency with which the executive branch acts as a plaintiff suing Congress. The courts employ the political remedies doctrine to avoid limiting presidential power in cases private parties and states bring, as some of the Emoluments Clause and war powers cases show.[208] While courts often follow the doctrine in the context of

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[201] *See* Grove, *supra* note 14, at 644 (describing the President's powers to veto or refuse to enforce legislation as "mechanisms to assert their constitutional powers").

[202] 462 U.S. 919 (1983).

[203] *Id.* at 967 (White, J., dissenting) (stating the majority decision in *Chadha* "sounds the death knell for nearly 200 . . . statutory provisions" containing a legislative veto).

[204] *Cf.* Grove, *supra* note 14, at 648 (noting that Presidents Carter and Reagan "complained . . . that the veto was unconstitutional" and "threatened to disregard some legislative vetoes of administrative actions").

[205] *See* INS v. Chadha, 462 U.S. 919, 968–69 (1983) (White, J., dissenting) (describing the legislative veto as predicated on a proposal by President Hoover to justify delegation of authority to the executive branch).

[206] *Cf.* Goldwater v. Carter, 444 U.S. 996, 997 (1979) (Powell, J., concurring) (stating that "a dispute between Congress and the President is not ready for judicial review unless. . . . each branch has taken *action asserting its constitutional authority*") (emphasis added); Massachusetts v. Laird, 451 F.2d 26, 34 (1st Cir. 1971) (finding no need for the court to "determin[e] boundaries" when Congress has not sought to stop a war that the President initiated).

[207] *See infra* notes 264-68.

[208] *See, e.g.*, Citizens for Resp. and Ethics in Wash. v. Trump, 276 F. Supp. 3d 174, 195 (S.D.N.Y. 2017), *vacated*, 939 F.3d 131 (2019), *modified*, 953 F.3d 178 (2d Cir. 2019), *vacated as moot* 141 S. Ct. 1262 (2021)

congressional standing rulings, they also use it in rulings invoking ripeness, standing, and equitable discretion. Nothing in the doctrine formally precludes its use to stop private lawsuits challenging congressional actions, but the courts simply never apply it in that context.[209]

This asymmetry tilts the constitutional balance of power toward the President.[210] And presidential power over the last century has been growing for a host of reasons identified by historians and, for that matter, by Justice Jackson in his *Youngstown* concurrence—delegation of vast authority to the President, presidential exploitation of mass communication technologies, the President's role as party leader, the challenges of the Cold War and the War on Terror, and the emergence of the United States as a world power.[211] So, the Court's political remedies doctrine exacerbates a trend toward aggrandizement of presidential power.[212]

B. The Rule of Law and the Windsor Dissent

Part II suggests that some federal courts have gone quite far in using the political remedies doctrine to liberate the President from the rule of law. It canvasses the doctrine's use to evade enforcement of statutes limiting executive branch expenditures, congressional subpoenas, the Constitution's ethics requirements, and a federal statute implementing the congressional power to

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(invoking the political remedies doctrine to deny a private non-profit a request for enforcement of the Emoluments Clause); Smith v. Obama, 217 F. Supp. 3d 283, 302–03 (D.D.C. 2016), *vacated as moot*, Smith v. Trump, 731 F. App'x 8 (D.C. Cir. 2018) (employing the political remedies doctrine to help justify dismissal in a case brought by an army captain); Doe v. Bush, 323 F.3d 133, 134, 137 (1st Cir. 2003) (invoking the doctrine in a case brought by soldiers, soldiers' parents, and congressmen); Massachusetts v. Laird, 451 F.2d 26, 28, 34 (1st Cir. 1971) (invoking the political remedies doctrine idea in a case brought by a state and individual soldiers).

[209] *See, e.g.*, Seila Law L.L.C. v. Consumer Fin. Prot. Bureau (CFPB), 140 S. Ct. 2183, 2196–97 (2020) (not invoking the political remedies doctrine and rejecting justiciability objections to adjudicating the constitutionality of statutory restrictions on presidential removal authority even though the President did not seek to remove the CFPB Director).

[210] *See* Wagner, *supra* note 15, at 538–39 (broad judicial abstention from congressional lawsuits encourages Presidents to "usurp congressional authority" adding to executive authority and "weakening of the separation of powers").

[211] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 653–54 (1952) (Jackson, J., concurring) (describing the President's power as more potent than the Framers envisioned because of his command of mass communication and his role as a party leader); ARTHUR M. SCHLESINGER, JR., THE IMPERIAL PRESIDENCY 105–07, 135 (1973) (finding the President's powers "dangerously enlarged" because of US influence on foreign affairs and delegation of authority by Congress).

[212] *See* Neal Kumar Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 YALE L.J. 2314, 2322 n.21 (2006) (describing how severely divided government has led to "a massive increase in executive power"); *see, e.g.*, NLRB v. Noel Canning, 573 U.S. 513, 589–91 (2014) (Scalia, J., concurring) (noting increased recent use of recess appointments in response to a single Attorney General's legal opinion).

declare war. Some courts have resisted the domestic applications, but these applications reveal that the doctrine's potential to unravel the rule of law is quite great. One wonders whether the President can escape his duty to faithfully execute any law by simply claiming that Congress could employ political remedies.

As it happens, Justice Scalia's dissent in *United States v. Windsor* advocates an approach to the political remedies doctrine that proves almost that broad.[213] In *Windsor*, a same sex couple successfully challenged the Defense of Marriage Act (DOMA), which forbade federal recognition of state sanctioned same sex marriages as incompatible with equal protection of the laws and due process.[214] The case presented a justiciability issue because the Obama administration refused to defend DOMA in the Supreme Court, thereby creating a question about whether a case or controversy existed.[215] Justice Scalia's dissent from the Court's decision to find a case or controversy suggested that the judiciary should not remedy presidential abrogation of statutes.

Scalia's *Windsor* dissent claims that the President may properly decline to enforce or defend a statute that he finds unconstitutional.[216] The failure to implement the statute deprives the people it injures of standing, but that is fine, wrote Justice Scalia, because it leaves matters to Congress, "which has innumerable means (up to and including impeachment) of compelling the President to enforce the laws it has written."[217] Thus, he would use the political remedies doctrine to authorize a President to fail to enforce any statute, as long as he can gin up a constitutional argument against it.[218]

Justice Scalia offered this attack on the rule of law to support a narrow proposition—that the Court ought not to adjudicate friendly appeals by the government of cases the government has won below by siding with the plaintiff.[219] But he goes much further, explaining that where a President *does*

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213 *See* United States v. Windsor, 570 U.S. 744, 778–91 (2013) (Scalia, J., dissenting).

214 *See id.* at 769 (majority opinion).

215 *See id.* at 756 (describing the argument that the Obama administration's decision not to defend the statute in the Supreme Court deprived the Court of jurisdiction because no party to the appeal could get redress at that point).

216 *See id.* at 786–87 (Scalia, J., dissenting).

217 *See id.* at 787.

218 Jamal Greene, *The Supreme Court as a Constitutional Court*, 128 HARV. L. REV. 124, 145 (2014) (noting that an executive branch decision not to defend a statute allegedly infringing on executive prerogative is a form of "*executive nonfeasance*") (emphasis added).

219 *See Windsor*, 570 U.S. at 781–82 (Scalia, J., dissenting) (stating that since Windsor won in the District Court and the government endorses the win, neither the court of appeals nor the Supreme Court have jurisdiction).

enforce a statute and then declines to defend its constitutionality, the court should use the judicial power to cement the President's decision to abrogate a statute into law.[220] He states that cases like this "should end in a[] [judicial] order or consent decree enjoining enforcement."[221] So, a court lacking jurisdiction because of a lack of adverse parties, according to Scalia, should still act to affirm presidential power to nullify an act of Congress apparently without looking at whether the President's decision to cancel the law has an adequate constitutional basis.[222] Thus, the political remedies doctrine, in Scalia's view, would allow a President to abrogate statutes without any court taking a look at whether the Constitution justifies the abrogation.

This view matters for a number of reasons: (1) Chief Justice Roberts and Justice Thomas joined Scalia's *Windsor* dissent and remain on the Court; (2) the current conservative majority may find Justice Scalia's ideas persuasive; (3) lower courts have begun to follow the *Windsor* dissent's logic to unravel congressional power; and (4) the executive branch has treated it as an invitation to defy the law. For example, the district court judge denying the House standing to contest use of emergency powers to circumvent appropriation limits on wall-building relied on the *Windsor* dissent.[223] And President Trump's administration accepted this invitation to nullify the law, by pursuing a policy of declining to comply with subpoenas based on the idea that separation of powers principles prohibited their enforcement.[224]

Yet, Scalia claimed that his approach would only render "some" presidentially negated statutes beyond judicial review.[225] He likely made this concession to the power of the courts to check presidential decisions to abrogate statutes because of the possibility that statutory beneficiaries might have standing to sue to challenge presidential nullification of law. On the other hand, Justice Scalia has noted that statutory beneficiaries face high burdens to establishing standing.[226] Furthermore, under Scalia's approach in *Windsor*, a

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220 *Id.* at 786.

221 *Id*.

222 *Id.* at 786–87.

223 *See* U.S. House of Representatives v. Mnuchin, 379 F. Supp. 3d 8, 16 (D.D.C. 2019), *rev'd*, 969 F.3d 353 (D.C. Cir. 2020) (en banc) (citing *Windsor* to justify declining to adjudicate the House of Representative's claim that the President usurped the House's appropriations power by building a wall unauthorized by statute).

224 Trump v. Vance, 140 S. Ct. 2412, 2425 (2020) (noting President Trump argued that he is absolutely immune from criminal process); Trump v. Mazars, 140 S. Ct. 2019, 2028 (2020) (noting President Trump argued that congressional subpoenas "violated the separation of powers").

225 *See Windsor*, 570 U.S. at 786 (Scalia, J., dissenting) (acknowledging that his arguments imply that "some Presidential determinations that statutes are unconstitutional will not be subject to our review").

226 *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 561–62 (1992) (citation omitted) (stating that it is "substantially more difficult" for a statutory beneficiary than for a regulated party to establish standing); *cf.*

statutory beneficiary would have to rush to the courthouse before a court entered a consent decree ratifying presidential statutory nullification in order to make sure that she had a chance.[227] And if a court declares a statute unconstitutional, it would greatly add to the collective action barriers that make sole reliance on congressional efforts to "compel[] the President to enforce the laws"[228] unrealistic in many cases.

The lower court cases and some older Supreme Court cases reveal that Scalia's approach to the political remedies doctrine coupled with an aggressive President willing to assert broad separation of powers claims may severely mar the rule of law. An early example comes from *Kendall v. United States* ex rel. *Stokes*.[229] In this case, William Stokes sought payment for carrying the mail pursuant to a statute giving the Solicitor of the Treasury the power to settle his claim.[230] The Postmaster General resisted enforcement of the statute by creating a constitutional claim that the President, not the Solicitor, had the power to direct the outcome.[231] Since no political remedies doctrine existed, the Court resolved the separation of powers claim the Postmaster General had created, holding that Congress may constitutionally assign the adjustment of a claim to the Solicitor of the Treasury.[232] Under Scalia's extension of the political remedies doctrine,

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Wagner, *supra* note 15, at 526 (noting that congressmen often bring suits on issues that would otherwise prove unreviewable).

[227] The plaintiff might have a chance to challenge nonenforcement after an adverse ruling if the court issued a narrow injunction and the decision had limited precedential value, but generally cannot know in advance whether the injunction will be narrow or how high a case may go up the appellate ladder. *Cf.* Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417, 420 (2017) (characterizing nationwide injunctions as a recent invention and arguing for injunctions granting relief only to the plaintiff); Amanda Frost, *In Defense of Nationwide Injunctions*, 93 N.Y.U. L. REV. 1065, 1069 (2018) (arguing that nationwide injunctions are sometimes appropriate); Michael T. Morley, *Nationwide Injunctions, Rule 23(b)(2), and the Remedial Powers of the Lower Courts*, 97 B.U. L. REV. 615, 620 (2017) (arguing for only enjoining federal actions in "narrow circumstances"); Zayn Siddique, *Nationwide Injunctions*, 117 COLUM. L. REV. 2095, 2101 (2017) (arguing that the courts should only issue injunctions broad enough to provide "complete relief" to the plaintiffs); Mila Sohoni, *The Lost History of the "Universal" Injunction*, 133 HARV. L. REV. 920, 924 (2020) (arguing that at least since 1913 the courts have issued universal injunctions); Alan M. Trammell, *Demystifying Nationwide Injunctions*, 98 TEX. L. REV. 67, 72 (2019) (arguing that nationwide injunctions are "most necessary and appropriate . . . when the government . . . refus[es] to abide by settled law"); Howard M. Wasserman, *"Nationwide" Injunctions Are Really "Universal" Injunctions and They Are Never Appropriate*, 22 LEWIS & CLARK L. REV. 335, 340 (2018) (arguing that nationwide injunctions are "inappropriate"); Zachary D. Clopton, *National Injunctions and Preclusion*, 118 MICH. L. REV. 1, 3–7 (2019) (discussing the role of preclusion in the context of nationwide injunctions).

[228] *Windsor*, 570 U.S. at 787 (Scalia, J., dissenting).

[229] 37 U.S. 524 (1838).

[230] *See id.* at 608–09 (discussing contracts for "transportation of the mail" and a law passed in 1836 directing the Solicitor of the Treasury to settle and adjust claims under that contract).

[231] *See id.* at 612–13 (discussing the argument that the Solicitor is "subject to the direction and control of the President").

[232] *See id.* (rejecting the argument "that the postmaster general was alone subject to the direction and

the Postmaster General might have escaped judicial review of his failure to abide by the statute by claiming that the statute unconstitutionally infringed on presidential prerogatives.

Presidential attempts to convert ordinary cases into separation of powers test cases have the capacity to cloak presidential lawbreaking with political remedies doctrine protection. For example, well-settled law authorizes Congress and its committees to issue and enforce subpoenas.[233] The Trump administration, however, resisted an effort to secure the testimony of White House counsel Donald McGahn, arguing, contrary to applicable precedent, that presidential advisors enjoy "absolute testimonial immunity."[234] By converting a routine subpoena case into a separation of powers case, the DOJ brought this matter within the scope of the political remedies doctrine. When the House of Representatives sought to enforce statutory restrictions on the President's use of funds to build his wall, the District Court for the District of Columbia also invoked the political remedies doctrine, even without a separation of powers claim from the executive branch.[235] Because the statutory issue arose in the aftermath of a constitutional impasse, the District Court still treated this issue as one of inappropriate intervention in a "power contest" between the President and Congress.[236]

Thus, taken to its logical extreme, the political remedies doctrine has the potential to seriously undermine the rule of law. For the rule of law requires that the President faithfully execute the law, and the political remedies doctrine might, if applied too vigorously and out of context, greatly limit law as a constraining force on the executive branch of government.

III. THE POLITICAL REMEDIES DOCTRINE: A CRITIQUE

A major problem with the political remedies doctrine stems from its selective application. The courts have not applied the doctrine to most cases involving questions about the relative powers of the President and Congress, but only to some of these cases.[237] Nor have the courts explained why they apply it in some

control of the President").

233 *See* Comm. on the Judiciary v. McGahn, 951 F.3d 510, 553 (D.C. Cir. 2020) (stating that Congress can "act unilaterally to enforce a subpoena").

234 *Id.* at 513.

235 *See* U.S. House of Representatives v. Mnuchin, 379 F. Supp. 3d 8, 12, 22 (D.D.C. 2019) (rejecting the political remedies doctrine and noting that the House argues that 10 U.S.C. §§ 284, 2808 does not authorize the wall construction).

236 *See id.* at 22 (quoting Raines v. Byrd, 521 U.S. 833 (1997)).

237 *See* United States v. AT&T, 551 F.2d 384, 390 (D.C. Cir. 1976) (explaining that the mere existence of

contexts while ignoring it in most contexts, including all cases involving alleged congressional encroachment on presidential power.

This Part argues that the politics preference justifies application of the political remedies doctrine most strongly in cases where the political branches have reached a bipartisan agreement through law. In other contexts, the case for the political remedies doctrine is quite weak. It uses a property rights framework to show that dismissal of a case challenging alleged unilateral usurpations of power based on the political remedies doctrine establishes a baseline power allocation, just as an explicit ruling on the merits would. Neither an implicit nor an explicit power allocation precludes subsequent bargaining between the political branches. For that reason, political remedies dismissals do not so much avoid interfering with political bargaining as change the terms of bargains by allocating power among the political branches.

It then explains that the politics preference is inconsistent with formalism in separation of powers and with the notion that the Constitution's power allocations protect liberty, and thus with much relevant precedent. It also shows that the doctrine relies on a dangerously naïve Madisonian vision of politics that no longer describes congressional behavior. It continues by acknowledging that the political remedies doctrine does help avoid the problem of unwise judicial merits reasoning. It then argues that if the doctrine continues to exist, the lower courts should not follow Justice Scalia's suggestion to broaden its scope beyond the contours of pure separation of powers disputes.

A. The Politics Preference and Political Agreement

The politics preference better justifies refusing to review bipartisan political compromises enjoying the full support of Congress and at least one President than it does refusing to review allegedly unconstitutional presidential action not actively opposed by Congress as an institution.[238] We saw in Part II that courts sometimes struggle with determining whether a constitutional impasse allowing merits adjudication under the political remedies doctrine has occurred. My analysis suggested that a political impasse had occurred in *Zivotofsky* and in the case on wall funding, but some judges in those cases thought the political

a conflict between Congress and the President "does not preclude" a judicial decision).

[238] Like most legal concepts, the concept of bipartisan political compromise proves easy to apply in some contexts and less easy in others. Congress does sometimes pass legislation with overwhelming majorities from both parties, which surely implies a bipartisan compromise. On the other hand, legislation passed with few or no votes from the minority party does not qualify. Some judgment may be necessary for in-between cases, but generally legislation with substantial support from the minority party should qualify as bipartisan.

remedies doctrine should apply anyway. Agreement between Congress and the President in a statute, however, surely shows that no constitutional impasse justifying judicial review under the political remedies doctrine exists.

In *McCulloch v. Maryland*, the Supreme Court treated a question about the National Bank's constitutionality as "scarcely . . . open" in light of the political branches' agreement to create it.[239] More recently, the Court has stated that judges should "hesitate to upset the compromises and working arrangement that the elected branches . . . have reached."[240] And the Court has frequently said that statutes come before the Court with a heavy presumption of constitutionality.[241] It would be but one step further for the Court to say that presidential and congressional agreement about the distribution of powers among themselves forecloses judicial review. To be sure, this step would require a justification. But if it really is more normatively desirable to resolve separation of powers disputes politically, as Powell claims, then surely the Court must refrain from disturbing bipartisan political resolution of conflicts.[242]

In saying this, I do not mean to take a stand on the debate in the literature between advocates of respecting political separation of powers bargains and those more skeptical of them.[243] Instead, this argument simply affirms that the courts should be more reluctant to disturb bipartisan political agreements than unilateral assertions of political power.[244]

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[239] McCulloch v. Maryland, 17 U.S. 316, 401 (1819).

[240] NLRB v. Noel Canning, 573 U.S. 513, 526 (2014).

[241] *See* James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 144 (1893) (explaining that a court should only invalidate a statute if its unconstitutionality is "so clear that it is not open to rational question").

[242] *Cf.* William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1, 36–41 (2019) (discussing similarities between Madison's understanding of legislative precedents liquidating the meaning of the Constitution and the early Republic's understanding of judicial precedent).

[243] *Compare* JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT 263 (1980) (advocating for remittance of separation of powers questions involving the President and Congress to the "interplay of the national political process"), *and* Huq, *supra* note 15 (advocating politically negotiated resolutions of separation of powers (and federalism) claims), *with* Posner & Vermeule, *supra* note 3, at 993 (suggesting that politically negotiated resolutions of separation of powers cases produces "too much uncertainty" about power allocation).

[244] Harlan Grant Cohen appears to disagree. He sees political agreement as a sign that healthy deliberation has ended and suggests that courts should reopen it by striking down agreements. *See* Cohen, *supra* note 53, at 42. This argument turns debate into a fetish, as the end of a debate may suggest that a good solution has been struck establishing stable law and Congress and the President can go on to debate something else. But the relationship between this idea and my suggestion that the courts should be especially reluctant to undermine statutes is not clear. *See id.* at 48 (suggesting political intervention when an individual right is at issue, not when a statute settles separation of powers claims generally).

B. Political Remedies Decisions and Baselines for Bargaining: Implications of Treating Constitutional Power Allocations as Institutional Property

Furthermore, Justice Powell's suggestion that judicial review of alleged presidential usurpation of power cuts off opportunities for political resolution of conflicts proves incorrect. A property rights framework helps us see that merits rulings establish allocations of power, which serve as baselines for future negotiations. The framework also reveals that dismissals under the political remedies doctrine likewise establish allocations of power, which also provide baselines for negotiations. Political remedies dismissals establish *de facto* presidential rights rather than keep the judiciary from displacing political decision-making.

The political remedies doctrine treats political power as a kind of institutional property right.[245] And it allows the property to shift hands through adverse possession.[246] The war powers cases invoking the doctrine perhaps best illustrate the point that the doctrine basically treats constitutional power as a property right subject to adverse possession. The doctrine suggests that the war power, like a piece of property, can be transferred between parties by mutual agreement. And the denial of judicial review when plaintiffs challenge the President's unilateral seizure of the property allows the President to seize war power if Congress does not vigorously object, much as an occupier of land might acquire a parcel by possessing it without objection from the original property owner.

Judicial rulings on political remedies allocate the baseline property rights that influence political bargains.[247] To see this, it will help to analyze the property rights problem in separation of powers a little more closely.

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[245] *See* Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513, 1518–19 (1991) (describing the Court's "ultimate goal" in separation of powers cases as protecting each branch's "'turf' . . . against encroachment by the others"); David A. Strauss, *Article III Courts and the Constitutional Structure*, 65 IND. L.J. 307, 309–10 (1990) (describing the property rights approach as a "troubling tendency in separation of powers law"); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 115 (1994) (characterizing the Court's approach as a "'turf protection' model").

[246] *See* NLRB v. Noel Canning, 573 U.S. 513, 570 (2014) (Scalia, J., concurring) (accusing the majority of relying upon an "adverse-possession theory" of separation of powers by expanding the recess appointments power based on frequent presidential assertions of broad authority). That is not to say that the Supreme Court's employment of constitutional custom to resolve separation of powers claims on the merits necessarily recognizes adverse possession. *Cf.* Huq, *supra* note 15, at 1625 ("[T]he theory of historical gloss . . . is not a constitutional analogue to adverse possession."). But if the politics preference leads to consistent dismissal of separation of powers claims, as it has in the war powers area, then adverse possession does take place.

[247] *See, e.g.*, Koh, *supra* note 29, at 437 (stating that since the *Goldwater* decision, the President has terminated almost all treaties which he decided to abrogate unilaterally).

The Constitution allocates the relevant property rights partly in order to create friction, not to eliminate transaction costs.[248] Thus, the Constitution divides the legislature into two houses and gives the President a veto power in order to impede improvident legislation through the generation of transaction costs.[249] Conversely, the Framers opted to give the President the executive power, rather than vest it in a council, as many states had, partly to lessen the transaction costs of faithful law execution.[250]

Since the Constitution generates transaction costs, the preexisting allocation of property rights strongly influences the bargains that the political branches may strike. Students of law and economics often study the Coase theorem, which teaches that, absent transaction costs, the initial property rights allocation does not affect the efficient outcome.[251] But conversely, the Coase theorem strongly suggests that the initial allocation of property rights does affect the efficient outcome when transaction costs are significant.[252] Although the Framers evinced no concern with efficient outcomes, they did distribute the relevant institutional property rights to discourage some kinds of bargains.[253]

It follows that when a court rules on a political remedies doctrine claim, it necessarily endorses a baseline property rights allocation for bargains. One might say that it makes, in essence, a merits ruling on the allocation of power between the executive and legislative branches.

The war power cases illustrate the point. A judicial decision to demand a political remedy before adjudicating a challenge to unilateral presidential war making gives the President the relevant property right. Congress, to be sure, can

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[248] *See* Levinson & Pildes, *supra* note 22, at 2338 (describing raising transaction costs to preserve liberty as the "cardinal virtue" associated with separation of powers).

[249] *See* Seila Law L.L.C. v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2203 (2020); Posner & Vermeule, *supra* note 3, at 1035 (noting that "legislators face severe problems of collective action in organizing to oppose the executive").

[250] *See Seila Law*, 140 S. Ct. at 2203 (linking the vesting of executive power in the President to securing "energetic" law execution).

[251] *See* R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 8 (1960); *see also* GEORGE J. STIGLER, THE THEORY OF PRICE 113 (3rd ed. 1966) (coining the term "Coase theorem").

[252] *See* Dierdre McCloskey, *Other Things Equal: The So-Called Coase Theorem*, 24 E. ECON. J. 367, 368 (1998) (if transaction costs are high, "then it *does* matter where the liability" is placed); Huq, *supra* note 15, at 1603–04 (noting that the initial rights allocation affects outcomes); Adrian Vermeule, *The Invisible Hand in Legal and Political Theory*, 96 VA. L. REV. 1417, 1428 (2010) (explaining why the Coase theorem does not apply to bargains over the separation of powers).

[253] *See* Levinson & Pildes, *supra* note 22, at 2328 (treating inefficiency as a characteristic of having competing institutions share lawmaking authority); *cf.* Huq, *supra* note 15, at 1603 (developing a property rights framework for analyzing negotiation among branches of government but not claiming that the deals arrived at are efficient).

purchase the right. But the cost is high. To terminate a war once begun, Congress may need to secure two-thirds of votes in both Houses and must accept the costs of withdrawing troops already involved in combat (which might raise questions about American reliability).[254]

Those challenging unilateral presidential war maintain that Congress must declare war before the President may initiate it. That claim argues for a different property rights baseline—one with Congress in possession of the property right. If the courts recognize this property rights baseline and do not erect a justiciability barrier, the President can still bargain with Congress. But he must persuade a majority of Congress to affirmatively endorse his war plan before he can send in the troops. This property rights allocation makes it hard for Congress to evade responsibility and therefore raises the transaction costs associated with deciding to go to war.[255] A dismissal of a war power claim functions as a ruling denying the merits of the congressional claim to possess the relevant property right. It leaves the property right in the hands of the President, thereby making it easier to go to war and lowering the transaction costs impeding war that advocates of a congressional war power see as part of the original intent of the Constitution.[256]

Similarly, the recent lower court rulings employing the political remedies doctrine to deny enforcement of congressional subpoenas do not eschew judicial decision-making in favor of political decision-making. They instead constitute merits rulings changing the constitutional allocation of power in ways likely to influence the results of bargaining. By dismissing enforcement demands, they deny the argument that subpoenas are mandatory and give the President the right to resist a subpoena. Congress remains free to try to persuade the President and

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[254] *See* Neumeister, *supra* note 85 at 2522 (mentioning the "high . . . political price of being accused of abandoning troops in the field") (internal quotation marks omitted).

[255] Scholars do not agree upon the definition of transaction costs. David M. Driesen & Shubha Ghosh, *The Function of Transaction Costs: Rethinking Transaction Cost Minimization in a World of Fiction*, 47 ARIZ. L. REV. 61, 84 (2005). The analysis here focuses on the bargaining costs of reaching a decision about whether to go to war, an analogue to private costs incurred in reaching an agreement. *See id.* at 62 (developing the public analogy to private transaction costs). The property rights assignment in the war powers case will also allocate the political costs associated with decisions. If the President possesses the property right to decide whether to go to war alone, he alone bears the political costs. If Congress has the property right, those costs are shared between the President and the Congress. I do not characterize the political costs of going (or not going) to war as a transaction cost. Rather, these costs appear similar to the reputational costs of producing a shoddy product (or the reputational benefits of producing a good one), which are not usually considered transaction costs. One might, however, argue that these political costs constitute transaction costs by pointing out that political actors will consider *ex ante* estimates of the political costs of going to war in deciding whether to arrive at a bargain.

[256] *See, e.g.*, Neumeister, *supra* note 85, at 2521–22 (explaining that Congress could not cut off funds in spite of the House's opposition to President Obama's war in Libya because doing so would require a two-thirds majority to overcome a veto and is politically impossible once war has begun).

to employ other remedies, but the costs of getting compliance become much higher when the courts refuse to enforce subpoenas. Conversely, when the courts enforce subpoenas, as they usually do, they do not preclude bargaining about the scope of disclosure or use of presidential powers (e.g., the veto of other bills) to kill them. The merits rulings in favor of Congress just raise the cost of presidential resistance.

Ironically, when courts defer to the possibility of bargaining in making decisions favoring the President, they may discourage bargaining in favor of presidential defiance. Thus, by dismissing a suit against Don McGahn, the court may have encouraged future presidents to do what President Trump did—forbid any witnesses to testify in an impeachment proceeding.[257] In *Trump v. Mazars*, the Supreme Court based its decision to erect fresh restraints on congressional subpoena power in a case seeking the President's tax returns and other financial information, in part, on its desire to encourage political bargaining.[258] It feared that a judicial willingness to enforce subpoenas would encourage Congress to go to court instead of bargain.[259] But its decision changed the terms of bargaining and may have made political bargaining less likely by encouraging presidential defiance of congressional subpoenas. Against a background norm requiring compliance with reasonable requests for information, the executive branch and Congress had generally resolved disputes about requests for information through negotiation—until Donald Trump.[260] *Mazars* changed the power allocation by requiring fairly demanding judicial scrutiny of the congressional need for information.[261] It therefore potentially encouraged presidential defiance of subpoenas.

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[257] Comm. on the Judiciary v. McGahn, 968 F.3d 755, 771 (D.C. Cir. 2020) (en banc) (noting that President Trump "direct[ed] widescale non-compliance with lawful" congressional inquiries).

[258] Trump v. Mazars, 140 S. Ct. 2019, 2035 (2020) (explaining that unlimited judicial enforcement of congressional power to obtain a President's private information would "transform" the custom of negotiating demands for information).

[259] *Id.*

[260] *See id.* (citing a two centuries old custom of resolving interbranch information disputes through negotiation).

[261] *See id.* at 2035–36 (outlining a test requiring a showing that the information requested is necessary for legislation); David M. Driesen, *Stealth Executive Privilege:* Trump v. Mazars, JURIST (July 28, 2020, 07:30:38 PM), https://www.jurist.org/commentary/2020/07/david-driesen-trump-mazars/ (showing that the *Mazars* test is more demanding than the test governing information protected by executive privilege); Victoria Nourse, *The Dark Side of* Mazars*—Should a New York Prosecutor Have More Power to Check a President than the House of Representatives?*, AM. CONST. SOC'Y: EXPERT F. (July 13, 2020), https://www.acslaw.org/expertforum/the-dark-side-of-mazars-should-a-new-york-prosecutor-have-more-power-to-check-the-president-than-the-house-of-representatives.

Thus, the political remedies doctrine provides no escape from making merits rulings on the allocation of power, merely allowing courts to avoid providing reasoning for their merits rulings. And explicit merits rulings do not cut off opportunities for political resolution of specific disputes, as they likewise just establish the baselines for bargains.

In theory, the political remedies doctrine might permit periodic fluctuations in baseline power allocations, which an explicit merits ruling might take off the table.[262] But in light of the low transaction costs facing the executive branch and the high transaction costs facing the legislature, the doctrine, even if applied even-handedly, would tend to support further aggrandizement of presidential power.[263]

C. Formalism and Liberty: The Conflict with Precedent

The political remedies doctrine conflicts with precedent claiming that the Supreme Court has the right to invalidate legislation agreed to by the President and Congress. This precedent frequently relies on formalist line drawing rather than acceptance of political agreements to determine constitutional outcomes, sometimes citing the need to serve the liberty interests that separation of powers protects.

This precedent suggests a weak judicial commitment to the politics preference. Wide application of the doctrine would lead to adoption of Jesse Choper's proposal to make all separation of powers claims implicating the relative powers of Congress and the President unreviewable, except in the rare case of a constitutional impasse.[264] The President failed to veto any of the legislation that has led to modern Supreme Court decisions about statutes alleged to violate separation of powers, so the political remedies doctrine, properly applied, would have barred judicial review of an awful lot of cases.[265] An even-

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[262] *See, e.g.*, Koh, *supra* note 29, at 435 (arguing that the President does not have a formal power to unilaterally terminate a treaty under *Goldwater*).

[263] *See* Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411, 440–47 (2012) (explaining in detail the impediments to collective action in Congress and the incentives favoring presidential amassing of power); Terry M. Moe & William G. Howell, *The Presidential Power of Unilateral Action*, 15 J.L. ECON. & ORG. 132, 138, 144 (1999) (explaining why the President is much better positioned than congressmen to advance institutional interests).

[264] *See* CHOPER, *supra* note 243, at 263; Zivotofsky v. Kerry, 576 U.S. 1, 61 (2015) (Roberts, J., dissenting) (noting that the Court has never before "accepted a President's . . . defiance of an Act of Congress in the field of foreign affairs").

[265] *See, e.g.*, Seila Law L.L.C. v. Consumer Fin. Prot. Bureau (CFPB), 140 S. Ct. 2183, 2238 (2020) (Kagan, J., dissenting) (noting that the President proposed the legislation creating the CFPB); *Zivotofsky v. Kerry*, 576 U.S. at 7–8 (noting that President Bush signed the Act creating a right of American citizens living in

handed political remedies doctrine would have rendered nonjusticiable not only *INS v. Chadha*, but also cases reviewing the delegation of budget cutting authority to the Comptroller General,[266] for-cause removal protections for various federal officials,[267] a line item veto,[268] establishment of a congressional review board overseeing the Washington D.C. area airports,[269] and the congressional role in appointing members of the Federal Election Commission.[270] In all of these cases and many more, the Court, to put it mildly, does not exhibit a commitment to the political resolution of separation of powers disputes. Instead, it asserts judicial supremacy and claims a responsibility to "say what the law is."[271]

The political remedies doctrine, therefore, conflicts with a lot of precedent. That does not mean that it is wrong. Perhaps the precedent is wrong.

The normative value of the political remedies doctrine, however, depends on one's conception of separation of powers more generally.[272] The politics preference basically adopts a functional theory of separation of powers,

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Jerusalem to list Israel as the place of birth in their passports, but objected in a signing statement); Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 523 (2010) (Breyer, J., dissenting) (pointing out that the President signed the Sarbanes-Oxley Act and issued a signing statement objecting to over 500 provisions but did not raise separation of powers concerns); Clinton v. New York, 524 U.S. 417, 447 (1998) (explaining that the Line Item Veto Act was the "product of much debate and deliberation in both Houses of Congress and . . . signed into law by the President"); Bowsher v. Synar, 478 U.S. 714, 717 (1986) (stating that the President signed the Balanced Budget and Emergency Deficit Control Act into law); INS v. Chadha, 462 U.S. 919, 968–74 (1983) (White, J., dissenting) (noting that presidents have generally accepted legislative vetoes but sometimes objected to specific ones, usually those that allow a committee of Congress to veto an administrative measure); Buckley v. Valeo, 424 U.S. 1, 261 (1976) (White, J., dissenting) (noting that the President signed the campaign finance legislation before the Court); Citizens for the Abatement of Aircraft Noise v. Metro. Wash. Airports Auth. (MWAA), 917 F.2d 48, 51 (D.C. Cir. 1990), *aff'd*, 501 U.S. 252 (1991) (noting that the President signed the MWAA of 1986 into law); *cf.* Citizens for the Abatement of Aircraft Noise v. Metro. Wash. Airports Auth. (MWAA), 501 U.S. 252, 278 (1991) (White, J., dissenting) (arguing that state law created the review board invalidated on separation of powers grounds in the case); *Chadha*, 462 U.S. at 969 n.5 (White, J., dissenting) (noting that President Nixon vetoed the War Powers Resolution).

266 *Cf. Bowsher*, 478 U.S. at 717–19 (not invoking the political remedies doctrine and reviewing delegation of budget cutting authority to the Comproller General).

267 *Cf. Seila Law*, 140 S. Ct. at 2192 (striking down for-cause removal protection for the CFPB Director); *Free Enter. Fund*, 561 U.S. at 484 (invalidating removal protections for members of the PCOAB).

268 *Cf.* Clinton v. City of New York, 524 U.S. 417, 421 (1998) (holding that the Line Item Veto Act violates the Constitution's Presentment Clause).

269 *Cf. Citizens*, 501 U.S. at 255 (evaluating whether a Board of Review consisting of nine congressmen "violates the constitutional principle of separation of powers").

270 *Cf. Buckley*, 424 U.S. at 109–12 (describing the FEC's structure and powers before finding its structure unconstitutional).

271 Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

272 *Cf.* Nash, *supra* note 14, at 368 (articulating a functionalist approach to congressional standing and contrasting it with a "formalist . . . understanding of separation of powers").

eschewing formal line drawing in favor of political problem solving.[273] As such, the conception of power as property subject to sale through a negotiation is at odds with a formalist view of separation of powers.[274]

The politics preference justifying the political remedies doctrine also conflicts with the notion of separation of powers as a protector of liberty.[275] The liberty view calls into question a separation of powers philosophy that treats a branch's power as a kind of institutional property right to be lost by adverse possession in the absence of institutional defense.[276] The Supreme Court has invoked the liberty idea to justify demarcating lines between the branches in order to protect citizens, in spite of the existence of political remedies.[277]

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[273] *See* John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 1950–71 (2011) (contrasting formalism and functionalism in separation-of-powers approaches); Peter L. Strauss, *Formal and Functional Approaches to Separation of Powers Questions—A Foolish Inconsistency?*, 72 CORNELL L. REV. 488, 491–92 (1987). The claim that the politics preference is "basically" functional does not mean that all decisions refusing judicial review in favor of political remedies are functional. For example, refusing to adjudicate challenges to the procedural mechanisms Congress employs on the ground that the Constitution assigns decisions about impeachment procedures to the Congress is formalist rather than functional. *See, e.g.*, Nixon v. United States, 506 U.S. 224, 228–36 (1993) (reading the Constitution's granting of the "sole" power to try impeachments to the Senate as precluding judicial review under the political question doctrine). The political remedies doctrine refers to the idea that the possibility of political remedies generally justifies dismissal of separation of powers claims, not to narrower claims grounded in a more particularized, and sometimes formalist, reason to favor politics over adjudication.

[274] *See* John C. Dehn, *War is More than a Political Question: Reestablishing Original Constitutional Norms*, 51 LOY. U. CHI. L.J. 485, 512 (2019) (criticizing the idea that the political branches informally amend the Constitution's text governing separation of powers); *see, e.g.*, Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 497 (2010) (declaring the President's views about the separation of power irrelevant in a case seeking enhancement of presidential authority). *But see* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610–11 (1952) (Frankfurter, J., concurring) (suggesting that executive branch custom acquiesced in by Congress may put a gloss on constitutional meaning and thereby augment presidential power).

[275] *See* Dehn, *supra* note 274, at 512 (arguing that elected branch alteration of the Constitution is especially "suspect" when it "alters the functional constitutional basis for invading fundamental individual rights").

[276] *See, e.g.*, NLRB v. Noel Canning, 573 U.S. 513, 571 (2014) (Scalia, J., concurring) (citations omitted) ("Since the separation of powers exists for the protection of individual liberty, its vitality does not depend on whether the encroached-upon branch approves the encroachment."); *cf.* Baude, *supra* note 242, at 49–50 (explaining *McCullogh* suggests that otherwise binding legislative precedent about the scope of congressional power might not apply where "the great principles of liberty" are at stake (citations and quotations marks omitted)).

[277] Seila Law L.L.C. v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2202 (2020) ("The Framers recognized that . . . structural protections against abuse of power were critical to preserving liberty." (citation and quotation marks omitted)); Bond v. United States, 564 U.S. 211, 222 (2011) (stating that the separation of powers and checks and balances aim to protect individuals); Loving v. United States, 517 U.S. 748, 756 (1996) (stating that separation of powers protects liberty); Metro. Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noise, Inc., 501 U.S. 252, 272 (1991) (characterizing protecting liberty as "the ultimate purpose of . . . separation of powers"); *see also Noel Canning*, 573 U.S. at 570 (Scalia, J., concurring) (finding the Constitution's "government-structuring provisions . . . critical to preserving liberty"); Clinton v. City of New York, 524 U.S. 417, 450 (1998) (Kennedy, J., concurring) (finding "[l]iberty . . . always at stake" in separation of powers cases); *Youngstown*, 343 U.S. at 635 (Jackson, J., concurring) ("[T]he Constitution diffuses power . . .

To examine this liberty idea critically, it will help to make the liberty claim concrete. The decision to go to war poses a great threat to the liberty and life of soldiers.[278] Jesse Choper pointed out decades ago, however, that the due process claim available to a soldier in a war powers case does not constitute a classic individual rights claim against the whole government.[279] The federal government can force a citizen to fight in a war through a draft and a war declaration. The due process claim advanced by the Massachusetts soldiers in *Laird* adds nothing of substance to a separation of powers claim. The Massachusetts soldiers claimed that the process due was a declaration of war and that the failure to provide that process violated their rights.[280] The government violated their rights if and only if their separation of powers claim that Congress possesses the war power is correct.[281]

Yet, soldiers have a liberty interest in the proper separation of powers with respect to the war power. If a President can start a war unilaterally, young people will lose their freedom for their period of service and some will die. If the President can only go to war after both Houses of Congress approve, many more people keep their liberty and avoid death. Moreover, the Framers lodged the war power in Congress in part because it saw resort to war as threatening to liberty more broadly, potentially leading to loss of freedom among the general population.[282] Hence, separation of powers here does protect individual liberty, not by completely guaranteeing it, but by making its infringement contingent on a state interest in war so compelling that all of the political branches agree that our young people must make the ultimate sacrifice. Of course, the government can take away individual rights that we speak of as absolutely guaranteed when a compelling state interest justifies their infringement.[283] So, the claim that

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to secure liberty . . . .").

[278] *Cf.* Dehn, *supra* note 274, at 516–17 (explaining why the war power "implicates fundamental liberty interests").

[279] *See* CHOPER, *supra* note 243, at 329–30.

[280] Massachusetts v. Laird, 451 F.2d 26, 28 (1st Cir. 1971).

[281] *See id*.

[282] *See* THOMAS JEFFERSON, THE PAPERS OF THOMAS JEFFERSON 397 (Julian P. Boyd ed., Princeton Univ. Press 1958); THE FEDERALIST NO. 69, at 465 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

[283] *See, e.g.*, Barenblatt v. United States, 360 U.S. 109, 127–34 (1959) (rejecting a free speech claim from a witness refusing to reveal his communist associations to a House committee because of the compelling state interest in combatting communism); Uphaus v. Wyman, 360 U.S. 72, 79–81 (1959) (finding that the state's interest in self-preservation justified an attorney general's demand for information aimed at identifying communists and their supporters, which would otherwise violate freedom of association under the First Amendment). *See generally* Stephen A. Siegel, *The Origin of the Compelling State Interest Test and Strict Scrutiny*, 48 AM. J. LEG. HIST. 355, 355 (2006) (noting the compelling state interest test's centrality to constitutional law and its use when government discriminates against a suspect class, burdens a fundamental interest, or adopts a content-based regulation of speech).

violation of separation of powers with respect to the war power infringes due process resembles a classic individual rights claim in substance if not in form.[284] Therefore, individual liberty considerations and original intent do not support allowing political agreements to reallocate the war power.

The war powers example, however, does not establish that the proper resolution of every separation of powers claim necessarily advances individual rights, as the particulars of an arrangement of power often bear an uncertain relationship to liberty.[285] Consider *Chadha* again. Perhaps the Supreme Court advanced individual liberty in that case by invalidating the House's veto of an executive branch decision to allow Chadha to remain in the United States. But by establishing a rule against all one-house vetoes, it removed a check on other liberty infringing actions (including going to war, as the War Powers Resolution contains a legislative veto provision).[286]

The primary threat to liberty, though, comes not from a particular rearrangement of powers, but rather from the collapse of checks and balances leading to concentration of power in a single branch of government. Given the President's power and ability to enhance his own power with limited transaction costs, the primary risk currently stems from presidential aggrandizement of power over time, as Justice Jackson recognized in his *Youngstown* concurrence and as recent destruction of democracies in other countries confirms.[287] From that perspective, the political remedies doctrine, as currently used, creates more of a risk to democracy than many unwise merits rulings.

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[284] A compelling state interest can abrogate both the soldier's claim and any other individual rights claim. The soldier's claim differs from other individual rights claims only in how the compelling state interest is identified. In a classic individual rights case, the court makes a policy judgment based on judges' views of what state interests are compelling. In the war powers case, the political process determines whether a compelling state interest exists.

[285] *See, e.g.*, Driesen, *supra* note 47, at 862 (explaining why "[o]ne can rarely know whether relocating power to a different branch . . . of government would obviate or exacerbate" claimed injuries); Aziz Z. Huq, *Standing for the Structural Constitution*, 99 VA. L. REV. 1435, 1484–85, 1488 (2013) (finding no strong relationship between separation of powers and liberty based on comparative law and the uncertain proclivities of actors empowered by separation of powers decisions); Aziz Z. Huq, *Libertarian Separation of Powers*, 8 N.Y.U. J.L. & LIBERTY 1006, 1036 (2014) (finding the line item veto "orthogonal to libertarian goals").

[286] *See* Huq, *supra* note 15, at 1682 (the legislative veto, sequester, and line-item veto struck down by the Court may have augmented rather than diminished liberty).

[287] *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 653–54 (1952) (Jackson, J., concurring) (explaining that implied emergency powers provide a step toward dictatorship and that, in light of the President's enhanced power, more danger comes from authorizing its enhancement than from limiting it); DAVID M. DRIESEN, THE SPECTER OF DICTATORSHIP AND JUDICIAL ENABLING OF AUTOCRACY 50–51, 95–120 (2021) (forthcoming); TOM GINSBURG & AZIZ Z. HUQ, HOW TO SAVE A CONSTITUTIONAL DEMOCRACY 212 (2018) (characterizing a "strong executive" as the "principal" risk to democracy).

The political remedies doctrine's functional property rights conception of separation of powers is at odds with the liberty protection justification and formalism often employed in deciding cases.[288] In practice, the Supreme Court vacillates between formalist and functional views of separation of powers, frequently using a formalist approach to cabin congressional power, whilst using functional approaches to enlarge presidential power.[289] Similarly, the Court sometimes justifies separation of powers rulings by reference to liberty protection, but usually does not.[290] But dismissing cases because of the politics preference underlying the political remedies doctrine conflicts with the many precedents asserting judicial supremacy even over agreed upon bargains.

D. Political Remedies and National Politics

The political remedies doctrine not only fails to avoid the merits and conflicts with precedent rejecting the politics preference; it also depends upon an outmoded Madisonian conception of politics.[291] Madison envisioned the political branches zealously guarding their institutional prerogatives and thereby keeping each other in check.[292] If one assumes that Congress remains a principled institution zealously and consistently guarding its political prerogatives, then the mere existence of political remedies may make judicial review of presidential action appear unnecessary, at least to a functionalist seeing no threat to liberty in the likely political solutions.

But commentators generally recognize that federal legislators these days often have much more loyalty to their political party than to Congress as an institution.[293] The Framers of our Constitution sought to avoid the creation of

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[288] *Cf.* Meyer, *supra* note 42, at 108 (accusing Justice Scalia and Judge Bork of "inexplicably relax[ing]" boundary formalism when it comes to recognizing executive power).

[289] *See* Barry L. Cushman, *Formalism and Realism in Commerce Clause Jurisprudence*, 67 U. CHI. L. REV. 1089, 1099–26 (2000) (discussing the inconsistency); Strauss, *supra* note 273, at 489; *see also* David M. Driesen & William Banks, *Implied Presidential and Congressional Powers*, 41 CARDOZO L. REV. 1301, 1324–25 (2020) (discussing how the Court favors presidential over congressional implied power).

[290] *See* Grove, *supra* note 14, at 625 (noting that liberty interests "rarely factor into the Court's analysis in" separation of powers cases).

[291] *See* Levinson & Pildes, *supra* note 22, at 2313 (characterizing the Madisonian vision of politics as "clearly anachronistic").

[292] *See id.* at 2312–13.

[293] *See, e.g.*, Kenneth Barnett, *Standing for (and up to) Separation of Powers*, 91 IND. L.J. 665, 670, 687 (2016) (policy and partisan concerns drive the political branches rather than defense of "structural prerogatives"); Bradley & Morrison, *supra* note 263, at 414–15 ("Congress . . . does not systematically . . . protect its prerogatives . . . ."); Levinson & Pildes, *supra* note 22, at 2313 (loyalty to political parties has displaced loyalty to one's branch of government); *cf.* Posner & Vermeule, *supra* note 3, at 997 (assuming that legislators sometimes are "motivated to promote the interests of institutions to which they belong, although in other cases they are not").

faction and thought that their design of the legislature would provide a check on faction and demagoguery.[294] Political parties, however, have arisen and, in many ways, abandoned the Madisonian vision.[295] Hence, the political assumptions underlying the political remedies doctrine, while perhaps plausible at the time of *Goldwater*, now seem out of date.[296]

During periods of divided government, one might expect Congress and the President to still clash on ideological grounds.[297] These clashes might result in adequate checks and balances.[298]

The Founders (meaning the Constitution's Framers and ratifiers) endorsed separation of powers to avoid having so much power in one branch of government that it posed a threat to democracy and the rule of law. Given the current strength of the presidency and weakness in Congress, the risk of a President achieving too much power seems most serious.[299] And the analysis above suggests that the lack of transaction cost impediments to executive power can aid presidential power grabs. This suggests that the President's opportunities to amass a dangerous amount of power will likely arise when he enjoys sufficient ideological support in Congress to avoid political checks.[300]

The history of democracy loss abroad confirms that the separation of powers problems that truly threaten the Republic likely will not arise from a President defying an active and engaged legislative assembly defending its institutional prerogatives, the scenario which informs Choper's views and the political remedies doctrine. Heads of state usually convert democracies to autocracies when a political party supporting the head of state backs him with lock-step votes in order to dismantle at least some checks and balances, while declining to take action to stop the autocrat's own measures decimating the remainder.[301]

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294 *See, e.g.*, THE FEDERALIST NO. 9, at 38 (Alexander Hamilton), NO. 10, at 43 (James Madison).

295 Levinson & Pildes, *supra* note 22, at 2320–22 (explaining how political parties first arose and disrupted the Madisonian vision).

296 *Cf.* CHOPER, *supra* note 243, at 275 (assuming that Congress and the President will "jealously" guard their "prerogatives against invasion").

297 *See* Levinson & Pildes, *supra* note 22, at 2327 (noting that when control of the government is divided between parties "we should expect . . . interbranch political competition resembling the Madisonian dynamic of rivalrous branches").

298 *See* Landau, *supra* note 20, at 1111–12 (stating that where different parties control the legislature and the presidency, "the self-enforcing story of separation of powers may approximate reality").

299 *See* Levinson & Pildes, *supra* note 22, at 2343 (noting that the "great[est] fears of unchecked exercises of power center on the imperial presidency").

300 *See id.* at 2338–39 (explaining that unified governments pose the "greatest threat to . . . liberty").

301 *See* GINSBURG & HUQ, *supra* note 287, at 97–98 (discussing dismantling of interbranch checks as eroding democracy); Kim Lane Scheppele, *Autocratic Legalism*, 85 U. CHI. L. REV. 545, 549–50 (2018) (discussing how an "autocratic legalist[]" defeats checks and balances and changes parliamentary procedure to

Antifederalists feared a "cabal" between the President and the Senate.[302] Given the vast scope of delegated presidential authority, a President may do in our constitutional democracy with a Senate majority sufficient to put in appointees more loyal to an autocratic President than to the law and to thwart any attempted impeachment aimed at executive branch abuses.[303]

Furthermore, political science teaches us that autocrats come to power when partisan polarization makes legislative assemblies incapable of addressing societal problems adequately.[304] During such periods, Congress may prove especially incapable of adopting the political remedies needed to safeguard its powers.[305] The political remedies doctrine, at least insofar as it relies on the formal availability of remedies rather than the likelihood of their use, disables judicial review when preservation of the Republic most needs judicial involvement.

Because a partisan Congress may support a President by passing legislation systematically demolishing constitutional constraints, the courts should review partisan legislation aggrandizing presidential power.[306] That is why my proposal only suggests applying the political remedies doctrine to bipartisan legislation.[307]

From this perspective, the current asymmetric application of the political remedies doctrine seems not just unprincipled, but potentially dangerous. It allows the courts to strike down statutes checking presidential power, while permitting dismissal of cases of presidential usurpation.

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deny the opposition party rights to speak about or amend bills).

[302] *See, e.g.*, 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 508 (Merill Jenson, et al. eds., 1976).

[303] *See* DRIESEN, *supra* note 287, at 135–36 (explaining how control of the Senate can enable a President to persecute opponents, thwart impeachment, and prevent enactment of legislative restraints checking a drive to autocracy).

[304] *See* LEVITSKY & ZIBLATT, *supra* note 22, at 113–17.

[305] This does not mean that the legislature is incapable of addressing societal problems during every period when one party does not control the House, Senate, and presidency. *Cf.* DAVID R. MAYHEW, DIVIDED WE GOVERN: PARTY CONTROL, LAWMAKING, AND INVESTIGATIONS, 1946–1990, at 4 (2d ed. 1991) (pointing out that divided government did not greatly slow the pace of investigations or legislation in the period studied). But extreme polarization can cause a breakdown of the legislative process or passage of legislation on party line votes, rather than through compromises. *See* SARAH BINDER, POLARIZED WE GOVERN? 14–15 (May 2014), https://www.brookings.edu/wp-content/uploads/2016/06/BrookingsCEPM_Polarized_figReplacedTextRev TableRev.pdf (suggesting that gridlock may have increased as party polarization deepened).

[306] *Cf.* Huq, *supra* note 15, at 1604 (suggesting that courts should review bargains where Congress sells its own institutional interests short because of collective action problems).

[307] *Cf.* Levinson & Pildes, *supra* note 22, at 2354–55 (suggesting more skepticism toward the executive power when the president's party controls Congress than when it does not, but acknowledging that this proposal might challenge judicial "capacity and inclination").

Of course, when a President with support from his party starts dismantling checks and balances, judges may doubt their capacity to reign in a despotic President. But the courts in Colombia and South Africa did play a role in preserving their countries' threatened democracies through rulings questioning executive powers.[308] And the United States Supreme Court helped support popular forces struggling against autocracy in the southern United States with its voting rights rulings.[309] While political forces matter much more than the judiciary in stemming democracy loss, courts have a role to play.[310] Courts can aid political forces fighting an autocracy by using their institutional authority to condemn breaches of constitutional norms, thereby creating a credible signal of illegitimacy cutting through the noise of partisan claims and counterclaims about legality.[311]

E. The Problem of Unwise Judicial Reasoning on the Merits

The best reason to support a strong symmetric political remedies doctrine involves the difficulties in appropriate judicial resolution of separation of powers claims.[312] Courts struggle to reconcile conflicts between separation of powers and checks and balances in a context of frequently overlapping powers only vaguely specified in the Constitution.[313] While originalists claim to have a

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[308] *See* Landau, *supra* note 20, at 1107–08 (explaining how Colombia's constitutional Court may have saved Colombian democracy by issuing a ruling prohibiting President Uribe from running for a third term).

[309] *See* GINSBURG & HUQ, *supra* note 287, at 37–39; MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 238–48 (2004); LEVITSKY & ZIBLATT, *supra* note 22, at 89–90.

[310] *See* DRIESEN, *supra* note 287, at 144–50 (analyzing the judiciary's ability to help prevent autocracy); Tom Ginsburg & Aziz Huq, *Democracy's "Near Misses,"* 29 J. DEMOCRACY 16 (2018) (discussing cases where court rulings have played a role in preserving democracy).

[311] *See* Posner & Vermeule, *supra* note 3, at 1022 (claiming that "[g]overnment violation of a clear allocation of power can trigger general resistance because the stipulated allocation serves as a focal point for resistance"). *But see* Landau, *supra* note 20, at 1072 (suggesting that structural constitutional rulings require political or popular support to be successful).

[312] *See* Ryan, *supra* note 10, at 6 n.10 (finding that "interpretive uncertainty" in the separation of powers context undercuts claims of judicial "interpretive supremacy"); Huq, *supra* note 15, at 1676 (doubting the Supreme Court's capacity to sensibly resolve interbranch disputes, partly because of pro-presidential bias); Vicki Jackson, *Congressional Standing to Sue: The Role of the Courts and Congress in U.S. Constitutional Democracy*, 93 IND. LJ. 845, 890 (2018) (stating that "[t]he risks of courts getting structural issues wrong is high").

[313] *See* Huq, *supra* note 15, at 1606 (mentioning "inclusive constitutional texts" and "open-ended historical evidence" respecting separation of powers); M. Elizabeth Magill, *Beyond Powers and Branches in Separation of Powers Law*, 150 U. PA. L. REV. 603, 604 (2001) (trying to achieve balance among three branches of government fails because we cannot distinguish among the relevant powers in contested cases nor identify an appropriate balance); M. Elizabeth Magill, *The Real Separation in Separation of Powers Law*, 86 VA. L. REV. 1127, 1194 (2000) (stating that "[w]e do not know what 'balance' means, and we do not know how it is achieved or maintained").

method for giving fixed meanings to some of these questions, recent scholarship suggests that originalism provides a constellation of approaches providing varying answers depending on both methodological choices and the weighing of usually conflicting evidence regarding original intent.[314]

It would require another article to thoroughly analyze whether the courts' rulings in this area have much merit as constitutional law. It is possible that leaving questions like this to the judiciary just substitutes unelected political actors for elected ones without producing credible authority.[315]

The political remedies doctrine's principal virtue involves avoidance of unwise judicial merits reasoning. That virtue might well justify declining to review bipartisan legislation signed by a President, at least when the agreed upon allocation does not systematically impair liberty interests. But, arguably, the doctrine's problems outweigh its virtues in other contexts, as it does not avoid unwise decisions, just bad rationales. Furthermore, the political question doctrine provides a better and less blunt tool for separating questions likely to trigger poor judicial decisions from less problematic questions.

Thus, the Supreme Court may have been wise to avoid adopting the political remedies doctrine as currently used. As currently applied, it conflicts with its precedent, has a questionable normative foundation, relies on very problematic political assumptions, and may end up supporting political efforts to dismantle separation of powers.

F. Narrowing the Doctrine

If the courts do not abandon the doctrine or confine it to cases involving separation of powers challenges to bipartisan political compromises agreed to by both branches of government, they should at least avoid applying it so broadly

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[314] *See* George C. Christie, *The Well-Intentioned Purpose but Weak Epistemological Foundation of Originalism*, 51 CONN. L. REV. 451, 459 (2019) (characterizing the Constitution's original meaning as "often . . . highly contested"); Heidi Kitrosser, *Interpretive Modesty*, 104 GEO. L.J. 459, 462 (2016) ("new originalists" challenge the notion that original meaning provides determinate answers to constitutional questions); Lawrence B. Solum, *Cooley's Constitutional Limitations and Constitutional Originalism*, 18 GEO. J.L. & PUB. POL'Y 49, 54–56 (2020) (discussing forms of originalism).

[315] *See* Seila Law L.L.C. v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2225–26 (2020) (Kagan, J., dissenting) (stating that "the judiciary possesses an inferior understanding of . . . the way political power operates" compared to that of Congress and the President (citation and quotation marks omitted)); Brown, *supra* note 245, at 1517 (characterizing the Supreme Court's separation of powers jurisprudence as an "incoherent muddle"); *cf.* Vicki C. Jackson, *Honoring Dan Meltzer-Congressional Standing and the Institutional Framework of Article III: A Comparative Perspective*, 91 NOTRE DAME L. REV. 1783, 1801 (2016) (noting that U.S. Supreme Court justices lack "serious experience in political processes").

that it severely undermines the rule of law. The political remedies doctrine should not apply to efforts to force the executive branch to comply with or enforce statutes. That limitation is consistent with Justice Powell's articulation of the doctrine, as limited to interbranch disputes over separation of powers.[316]

The question of whether a statute is enforced properly should not depend upon whether the current Congress cares enough to enforce it. The courts and the executive have duties to implement a law passed by Congress, even if the current Congress does not have majorities in both houses to support it anymore. The constitutional remedy for changing the law to respond to political needs is amendment or repeal of a statute with presentment to the President, not failure by the executive and the courts to properly enforce the law. Congress has vast responsibilities and should not have to discuss and pass fresh legislation before laws it has already passed get implemented.[317] Requiring political remedies in this context severely undermines the rule of law by substituting demands for political transactions for the responsibility to operate under a stable legal framework established in the past.

The property rights framework developed to analyze constitutional separation of powers dismissals also implies that permitting legislators, or at least a House of Congress, to secure proper enforcement of statutes in court does not risk "undermining" deliberation in Congress if more discussion of an existing statute is desirable.[318] Whether a suit is dismissed or not, Congress remains free to discuss whether to amend the statute in light of developing implementation problems.

Much less should a Court approve a consent decree with the government to abrogate a statute without carefully examining the validity of the constitutional claim said to justify presidential nullification. Justice Scalia's application of the political remedies doctrine would invoke the capacity of Congress to enforce the law to justify dismissal of legal challenges to the President's nullification of a statute while simultaneously making the law unenforceable through a consent decree, thereby probably making a congressional remedy impossible. Scalia's approach would invite an ideologically motivated or power-hungry president to assert bogus constitutional claims to generate consent decrees abrogating

316 *See generally* Dalton v. Spencer, 511 U.S. 462, 471–74 (1994) (distinguishing between violation of separation of powers and violation of a statute).

317 *Cf.* Sant'Ambrogio, *supra* note 17, at 1314–15 (arguing that barring congressional suits to secure proper law enforcement advances "the deliberative function of interbranch conflict").

318 *Cf. id.*; Cohen, *supra* note 53, at 41 (assuming that "delineating the exact boundaries between congressional and presidential power" cuts off political debate).

statutes he does not like. Furthermore, as Professor Sant'Ambrogio points out, legislative remedies may prove unavailing or extremely costly if the President refuses to implement a statute on constitutional grounds.[319]

IV. BROADER IMPLICATIONS

The analysis so far has focused on the political remedies doctrine, not the other justiciability doctrines surrounding it. Even the abandonment of the political remedies doctrine, however, leaves open the possibility of dismissing separation of powers cases on other grounds.[320]

While the political remedies doctrine squarely raises the question of when the Court should eschew adjudication in favor of political resolution of controversies, the idea permeates the other justiciability doctrines as well.[321] Indeed, the cases applying the political remedies doctrine do so under the rubrics of ripeness, standing, the political question doctrine, or equitable discretion. The Court now identifies its justiciability doctrines with separation of powers and a little more specifically with the properly limited role of the judiciary in a democratic society.[322]

The property rights analysis suggests that the courts should recognize that they do not avoid interfering with political processes when they eschew judicial review of separation of powers cases.[323] If a justiciability dismissal precludes later judicial review of a separation of powers question, as in a political question doctrine ruling or a standing ruling leaving no other parties with likely standing, it also functions like a merits ruling.[324]

As a positive matter, the analysis above suggests that if the courts want to avoid "improper interference" in the political branches' decision-making, they

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[319] *See* Sant'Ambrogio, *supra* note 17, at 1317–19. *See generally* Grove, *supra* note 14, at 647 n.183 (scholars have found the impeachment and appropriation remedies especially costly).

[320] *See, e.g.*, Sant'Ambrogio, *supra* note 17, at 1276–78 (discussing the question of whether Congress or its members suffer an injury justifying standing when the executive allegedly fails to properly enforce a statute); Wagner, *supra* note 15, at 541–50 (discussing whether various types of injuries alleged by congressmen justify standing after having argued against the political remedies doctrine to dispose of congressional lawsuits).

[321] *See, e.g.*, William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 222 (1988) (describing avoiding judicial usurpation of the political branches' policy-making function as the standing doctrine's purpose).

[322] *See* Allen v. Wright, 468 U.S. 737, 750 (1984).

[323] *See* Louis Michael Seidman, *The Secret Life of the Political Question Doctrine*, 37 J. MARSHALL L. REV. 441, 442 (2004) (stating that application of the political question doctrine requires political decisions).

[324] *Cf.* Jack L. Goldsmith, *The New Formalism in United States Foreign Relations Law*, 70 U. COLO. L. REV. 1395, 1396 (1999) (the courts have used the political question doctrine "under the guise of judicial modesty to alter the scope of federal foreign relations law").

should usually apply justiciability limits more strictly to cases seeking to upset existing political compromises embedded in statutes and less strictly to cases adjudicating alleged presidential usurpation of power.[325] The fact that Congress faces higher transaction costs than the President likewise supports lower justiciability barriers to challenges to presidential usurpation. The analysis also suggests that the courts should not take the existence of a democratic society for granted in deciding what proper limits circumscribe the judicial function. Judicial review can play a role in preserving a democratic society. Scholars should use this Article's analysis of the political remedies doctrine to more precisely figure out how justiciability doctrines should change.

The notion that justiciability doctrines allow the courts to avoid "becoming embroiled in . . . partisan" controversies seems suspect.[326] The courts have embroiled themselves in partisan controversies by finding complaints about political gerrymandering nonjusticiable and dismissing subpoena enforcement actions under the political remedies doctrine.[327] The courts can foster bipartisanship by limiting their opportunities to strike down key bipartisan achievements, like the Voting Rights Act and campaign finance legislation.[328] Limiting justiciability in interbranch disputes does little to protect the court's reputation.[329] A case's potential to embroil a court in partisan conflict depends

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[325] *Cf.* Ariz. State Legis. v. Ariz. Ind. Redistricting Comm'n, 576 U.S. 787, 803 n.12 (2015) (claiming that the Court has applied its standing doctrine with special rigor when asked to decide "whether an action by one of the other two branches of the Federal Government was unconstitutional" (citations and quotations marks omitted)); Barnett, *supra* note 293, at 670 (causation and redressability to contest structural arrangements should be "inapplicable or significantly relaxed" as they are for "run-of-the mill . . . procedural challenges"); Nash, *supra* note 14, at 355 (finding "clear justification" for especially rigorous standing doctrine in "cases raising interbranch disputes"). *But see* Metro. Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, 501 U.S. 252, 264–65 (1991) (liberally interpreting standing requirements by finding a citizen group's noise related injuries fairly traceable to a Review Board's structure because the Review Board's unexercised veto power "undoubtedly influenced" the body drawing up the plan); Bowsher v. Synar, 478 U.S. 714, 727 n.5 (1986) (not even considering the ripeness of a challenge to an unexercised removal provision, even though its constitutionality depended on predictions about how it would work in practice).

[326] *See* Devins, *supra* note 22, at 79 (arguing that "congressional lawsuits . . . embroil the courts in highly partisan . . . fights," which harm the courts); Grove, *supra* note 14, at 658 (mentioning this goal in an argument against congressional standing in separation of powers cases).

[327] *See* Rucho v. Common Cause, 139 S. Ct. 2484, 2506–07 (2019) (5-4) (holding that "partisan gerrymandering claims present political questions beyond the reach of the federal courts"); Comm. on the Judiciary v. McGahn, 951 F.3d 510, 519 (D.C. Cir. 2020) (2-1), *rev'd sub nom.* United States House of Representatives v. Mnuchin, 969 F.3d 353, 354 (D.C. Cir. 2020) (en banc) (denying enforcement of a subpoena favored by Democrats based on the political remedies doctrine and standing, even though courts have generally ruled on the merits of subpoena cases brought by a congressional body with subpoena power).

[328] *Cf.* Shelby County v. Holder, 570 U.S. 529, 556–57 (2013) (5-4 on partisan lines) (striking down the Voting Rights Act's preclearance provisions); Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 365–66 (2010) (5-4) (overruling precedent in order to strike down restrictions on corporate campaign expenditures).

[329] *See* Wagner, *supra* note 15, at 536 (noting that the press and the public "may well equate judicial

much more on the issues presented than on the identity of the litigants or whether the courts resolve the case on the merits or through a justiciability ruling. Furthermore, while the judges' anxiety to protect the courts' reputation is understandable, it may be dangerous if it neglects wider separation of powers problems in the political branches.[330]

CONCLUSION

The political remedies doctrine has played a role in significant judicial decisions, especially in the lower courts. While articulated as a neutral rule protecting both political branches, its current applications always support expanding already great presidential power at the expense of a decrepit Congress.[331] Furthermore, it has great potential to unravel the rule of law.

The doctrine, if it survives, should apply only to avoid adjudication of statutes alleged to violate separation of powers, as these often reflect bipartisan political compromises of the sort that the doctrine's rationale supports. Political remedies doctrine dismissals, however, resolve the merits of separation of powers cases without merits reasoning. Judicial opinions admitting to resolution of the merits do not end political bargaining; they simply change the property rights baseline and therefore the likely resolutions. The Supreme Court was probably wise to avoid adopting the doctrine for this reason and because it conflicts with its precedent. Furthermore, the political remedies doctrine reflects an outmoded view of politics that makes application of its precepts potentially dangerous, as it takes the courts off the stage when the political process breaks down in a way that threatens the collapse of separation of powers.

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abstention with informal approval").

[330] *See* Posner & Vermeule, *supra* note 3, at 1042 (noting that a myopic focus on the judiciary's welfare ignores the "overall . . . costs and benefits" of exercising the "passive virtues").

[331] *See* Grove, *supra* note 14, at 623 (linking complaints of congressional gridlock to concerns about presidential power filling the void).