

**PARTISAN GERRYMANDER CLAIMS, THE POLITICAL QUESTION
DOCTRINE, AND JUDICIAL PRUDENCE**

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INTRODUCTION

The Supreme Court developed the political question doctrine as a technique to avoid judicial review of an otherwise properly filed case when a judicial decision in the case would be inappropriate or imprudent.¹ It is only when a case is otherwise properly filed that the technique is instrumental in declining judicial review.² Recently, the Supreme Court relied upon the political question doctrine to avoid adjudication of claims alleging unconstitutional partisan gerrymandering in North Carolina and Maryland.³

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1 Mark Tushnet, *Law and Prudence in the Law of Justiciability: The Transformation and Disappearance of the Political Question Doctrine*, 80 N.C. L. REV. 1203, 1204 (2002).

2 Traditional procedural irregularities, such as lack of standing or failure to state a claim, avoid the necessity of invoking the political question doctrine. *See, e.g.*, *Gill v. Whitford*, 138 S. Ct. 1916, 1922 (2018) (avoiding the merits of claims alleging unconstitutional partisan gerrymandering because plaintiffs lacked standing); *Vieth v. Jubelirer*, 541 U.S. 267, 313 (2004) (Kennedy, J., concurring) (dismissing a case alleging unconstitutional partisan gerrymandering for failure to state a claim rather than by invoking the political question doctrine).

3 *See Rucho v. Common Cause*, 139 S. Ct. 2484, 2508 (2019) (dismissing the cases as nonjusticiable political questions).

These claims are, of course, political questions in the colloquial sense that they involve highly sensitive allegations that concern the fundamental values of our democracy. But, if these cases were otherwise properly filed, it is important to consider whether the Court's invocation of the doctrine was a prudent judgment or an abdication of its judicial responsibility. Moreover, if these cases were susceptible to dismissal for a traditional procedural deficiency, why did the Court choose to decide the cases categorically—that all partisan gerrymander claims are political questions—rather than merely dismiss these particular cases? As Professor Louis Henkin cautioned more than fifty years ago, “[a] doctrine that finds some issues exempt from judicial review cries for strict and skeptical scrutiny.”⁴ This caution is as relevant today as it was fifty years ago.

The irony of the Court's invocation of the political question doctrine in partisan gerrymander cases is that it relieves the courts from adjudicating issues that most demand independent judicial review.⁵ Indeed, the independence that is ensured by Article III of the Constitution is intended to protect federal courts when they are called upon to decide sensitive issues that might raise a risk of retaliation, particularly by a co-equal branch of the government.⁶ These protections ensure that federal judges shoulder the constitutional duty of judicial review without fear of reprisal. Yet, in *Rucho v. Common Cause*, the majority refused to adjudicate claims of unconstitutional partisan gerrymandering, instead suggesting that any available remedy lies in the hands of the entrenched political bodies accused of wrongdoing.⁷ This result is troubling, not only because of the futility of expecting the legislative bodies that are responsible for the districting map to police their own alleged misconduct, but also because it sends a signal that the political question doctrine might be utilized as a convenient escape hatch to avoid adjudication of other sensitive issues of our day. Indeed, what is to stop the Court from closing the courthouse doors on large swaths of public law litigation by declaring these cases to be nonjusticiable political questions?

4 Louis Henkin, *Is There a “Political Question” Doctrine?*, 85 YALE L.J. 597, 600 (1976).

5 See *Rucho*, 139 S. Ct. at 2523 (Kagan, J., dissenting) (“[T]he need for judicial review is at its most urgent in cases like these. ‘For here, politicians’ incentives conflict with voters’ interests, leaving citizens without any political remedy for their constitutional harms.’ Those harms arise because politicians want to stay in office. No one can look to them for effective relief.”) (citation omitted).

6 See U.S. CONST. art. III, § 1 (“The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.”).

7 See *Rucho*, 139 S. Ct. at 2508 (“No one can accuse this Court of having a crabbed view of the reach of its competence. But we have no commission to allocate political power and influence in the absence of a constitutional directive or legal standards . . .”).

So what should courts do with cases that involve sensitive “political” questions? In most cases, the answer is simple: courts should treat them like every other dispute by relying upon traditional tools of adjudication to resolve the questions presented. When ordinary constitutional interpretation suggests there is no constitutional violation that is remediable by the courts, there is no need to invoke the political question doctrine because courts may rely upon traditional procedural safeguards that test the adequacy of a complaint—lack of standing or failure to state claim.⁸ If there are extraordinary situations that raise a legitimate reason for courts to avoid judicial review of an otherwise properly filed case, the political question doctrine should be narrowly tailored to satisfy clear legal principles that ensure courts shoulder the hard work of judicial review in all but the most extraordinary circumstances. As the next section illustrates, the criteria that define the modern political question doctrine are not narrowly tailored or clearly defined.⁹

I. HISTORICAL BACKGROUND OF THE POLITICAL QUESTION DOCTRINE

The roots of the modern political question doctrine are found in *Baker v. Carr*, a case in which the Supreme Court held that allegations of unconstitutional vote dilution were not political questions shielded from judicial review.¹⁰ In *Baker*, the Court articulated the defining criteria of the modern political question doctrine as:

A textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the 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

8 See *Vieth*, 541 U.S. at 310 (Kennedy, J., concurring) (preferring to dismiss a partisan gerrymander claim for failure to state a claim upon which relief may be granted, noting that “[o]ur willingness to enter the political thicket of the apportionment process with respect to one-person, one-vote claims makes it particularly difficult to justify a categorical refusal to entertain claims against this other type of gerrymandering.”); see also Tushnet, *supra* note 1, at 1213 (citing courts’ erstwhile reliance on standing instead of the political question doctrine).

9 See, e.g., Robert J. Pushaw, Jr., *Judicial Review and the Political Question Doctrine: Reviving the Federalist “Rebuttable Presumption Analysis,”* 80 N.C. L. REV. 1165, 1196 (2002) (criticizing the modern political question doctrine as dependent “almost entirely on the discretion of the majority of the Justices, untethered to any legal principles rooted in the Constitution’s structure, theory, history or early precedent.”).

10 *Baker v. Carr*, 369 U.S. 186, 208 (1962) (“A citizen’s right to a vote free of arbitrary impairment by state action has been judicially recognized as a right secured by the Constitution, when such impairment resulted from dilution by a false tally . . .”).

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.¹¹

Superficially, the factors appear to be unproblematic—logical restrictions protecting the separation of powers between the politically elected branches of government and the independent judicial branch. Yet, a closer look reveals that these criteria are too elusive to provide a principled limitation for the doctrine and allow courts to abdicate the judicial responsibility too freely.

The first, and arguably most important, of the *Baker* criteria asks if there is a “textually demonstrable constitutional commitment of the issue to a coordinate political department.”¹² The Constitution defines the powers of the executive, legislative and judicial branches, and in *Marbury v. Madison*, the Court declared that the exercise of these powers is subject to judicial review if an issue is presented in a case or controversy that satisfies Article III.¹³ The challenge in applying the first *Baker* criteria, therefore, is identifying a “textually demonstrable constitutional commitment of the issue to a coordinate political department” that excludes the opportunity for judicial review.¹⁴

Imagine a case that involves a constitutional provision that confers discretion on a political branch to carry out constitutional responsibilities. According to *Marbury*, the federal courts have the power, indeed the duty, to interpret the constitutional provision to “say what the law is.”¹⁵ If a federal court interprets the constitutional provision and determines that there has been no abuse of discretion, the court has made a decision on the merits. No political question arises because the court is merely engaging in ordinary constitutional interpretation. Whether the court justifies the conclusion by determining that the constitutional provision imposes no limits on the exercise of discretion, or the provision imposes limits but the political branch has not acted beyond those limits, the court is merely employing ordinary constitutional interpretation to make a determination on the merits. Political questions must require something different than ordinary constitutional interpretation.

11 *Id.* at 217.

12 *Id.*

13 *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (“It is emphatically the province and duty of the judicial department to say what the law is.”).

14 *Baker*, 369 U.S. at 217.

15 *Marbury*, 5 U.S. (1 Cranch) at 177.

Professor Louis Henkin long ago opined that a “textual commitment of the issue to a coordinate political department”¹⁶ might refer to a constitutional provision that is “‘self-monitoring’ and not the subject of judicial review.”¹⁷ Ordinary constitutional interpretation requires courts to answer the question: what is the meaning of a constitutional provision?¹⁸ This is the merits question. Henkin suggests, in some situations, courts may ask a related question: who gets to decide the meaning of the constitutional provision?¹⁸ In *Marbury v. Madison*, the Court emphatically established that it is the judicial responsibility to interpret the meaning of constitutional provisions.¹⁹ While this ordinarily means that the courts get to decide the merits question, in extraordinary situations a court may interpret a constitutional provision as conferring sole power on a political branch to decide the meaning of the constitutional provision. In essence, a court concludes that the issue is a subject for non-judicial finality.²⁰ Under this theory, if the law commits a subject to a non-judicial decisionmaker, the first criteria in *Baker v. Carr* is satisfied and the issue is a nonjusticiable political question.

The second *Baker* criterion “a lack of judicially discoverable and manageable standards for resolving it,”²¹ is inextricably linked to the first criterion.²² When an issue has been committed to a coordinate political branch, it should come as no surprise if there is a “lack of judicially discoverable and manageable standards for resolving”²³ the dispute because the constitutional provision at issue does not intend for judicial review. Conversely, an absence of manageable standards tends to support a conclusion that there is a textually demonstrable commitment of the issue to a coordinate political branch.²⁴ Of course, in most cases courts engage in ordinary constitutional interpretation of the sort contemplated in *Marbury v. Madison*, and it is assumed that they are capable of identifying manageable standards for resolving disputes that meet the requirements of Article

16 *Baker*, 369 U.S. at 217.

17 Henkin, *supra* note 4, at 622-23.

18 *See id.* (summarizing the shortcomings of the political question doctrine).

19 *See Marbury*, 5 U.S. (1 Cranch) at 177 (“It is emphatically the province and duty of the judicial department to say what the law is.”).

20 *See* John Harrison, *The Political Question Doctrines*, 67 AM. U. L. REV. 457, 459 (2017) (explaining that the political question doctrine applies in the unusual circumstances where the law commits final decision of a legal question to a non-judicial decision maker).

21 *Baker*, 369 U.S. at 217.

22 *See Nixon v. United States*, 506 U.S. 224, 228-29 (1993) (describing the two criteria as “not completely separate”).

23 *Baker*, 369 U.S. at 217.

24 *See Nixon*, 506 U.S. at 228-29 (noting that the absence of manageable standards “may strengthen the conclusion that there is a textually demonstrable commitment to a coordinate branch”).

III. Indeed, courts have articulated manageable legal standards for vague constitutional provisions like due process and equal protection and have tackled the most intractable legal disputes in our nation's history.²⁵ Thus, the first two criteria of *Baker* fit together like a hand in a glove.

The remaining *Baker* criteria are rarely independently determinative of the existence of a political question.²⁶ Although the six criteria are listed in the alternative, the suggestion that any one of them alone would be sufficient to refuse judicial review of an otherwise properly filed case is implausible. Take, for example, "the impossibility of deciding [a claim] without an initial policy determination of a kind clearly for nonjudicial discretion."²⁷ This "criterion" is nothing more than a restatement of the question: when is a properly filed case "clearly for nonjudicial discretion"?²⁸ It is equally hard to imagine that judicial review can be denied solely upon a worry about "expressing the lack of respect due coordinate branches of government" or an "unusual need for unquestioning adherence to a political decision," or the "potentiality of embarrassment from multifarious pronouncements by various departments."²⁹ While these considerations may be relevant in the calculus of deciphering when there is a "textual commitment of the issue to a coordinate political department,"³⁰ it is difficult to imagine a court refusing to adjudicate an otherwise properly filed case solely because it may cause embarrassment or show disrespect to a coordinate branch.

Notwithstanding the illusiveness of the modern political question doctrine, one thing is clear: the doctrine does not prevent courts from engaging in ordinary constitutional interpretation.

25 *See id.* at 247 (White, J., concurring) (noting that the word "try" in the Impeachment Trial Clause "presents no greater, and perhaps fewer, interpretive difficulties than some other constitutional standards that have been found amendable to familiar techniques of judicial construction").

26 Tushnet, *supra* note 1, at 1213 ("[T]he Court has not invoked the more obviously flexible criteria articulated in *Baker v. Carr*—the last four of the six on its list—in any recent case, to the point where it seems fair to say that the only real components of the doctrine are the first two: a textually demonstrable commitment to the political branches and the lack of judicially manageable standards.").

27 *Baker*, 369 U.S. at 217.

28 *Id.*

29 *Id.*

30 *Id.*

II. ARE CLAIMS OF UNCONSTITUTIONAL PARTISAN GERRYMANDERING NONJUSTICIABLE POLITICAL QUESTIONS?

In *Rucho v. Common Cause*,³¹ the Supreme Court consolidated two direct appeals from federal district court decisions finding unconstitutional partisan gerrymandering in congressional district maps in North Carolina and Maryland.³² The Court readily admitted that “[t]he districting plans at issue . . . are highly partisan, by any measure”³³ and that excessive partisan gerrymandering is “incompatible with democratic principles”³⁴ but nonetheless focused its analysis on “whether the courts below appropriately exercised judicial power when they found them unconstitutional as well.”³⁵

The majority unequivocally rejected appellants argument that “the Framers set aside electoral issues . . . as questions that only Congress can resolve.”³⁶ Noting that “our cases have held that there is a role for the courts with respect to at least some issues that could arise from a State’s drawing of congressional districts,”³⁷ the majority nonetheless concluded that partisan gerrymander claims present political questions beyond the reach of the federal courts. The majority invoked the doctrine, not because of a textual commitment of the issue to a coordinate political branch, but rather because it could find

no legal standards discernible in the Constitution for making such judgments, let alone limited and precise standards that are clear, manageable, and politically neutral. Any judicial decision on what is “fair” in this context would be an “unmoored determination” of the sort characteristic of a political question beyond the competence of the federal courts.³⁸

31 139 S. Ct. 2484 (2019).

32 *See id.* (adjudicating whether partisan gerrymandering violated the First Amendment, the Equal Protection Clause of the Fourteenth Amendment, the Elections Clause, and Article I, Section 2 of the Constitution).

33 *Id.* at 2491. The evidence of partisanship was overwhelming. In North Carolina, the co-chair of the redistricting committee stated “I think electing Republicans is better than electing Democrats. So I drew this map to help foster what I think is better for the country.” *Id.* In Maryland, the Governor testified that he undertook to redraw the districts “to change the overall composition of Maryland’s congressional delegation to 7 Democrats and 1 Republican by flipping” a district which had been held by a Republican for nearly two decades. *Id.* at 2493.

34 *Id.* at 2506 (quoting *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 135 S. Ct. 2652, 2658 (2015)).

35 *Id.* at 2491.

36 *Id.* at 2495.

37 *Id.* at 2495–96.

38 *Id.* at 2500 (quoting *Zivotofsky v. Clinton*, 566 U.S. 189, 196 (2012)).

Never before has the Court invoked the political question doctrine based solely upon its inability to discover legal standards to resolve a case.³⁹ Although the first two *Baker* criteria are usually satisfied simultaneously, the Court decoupled them in this case.

The majority attempted to support its categorical conclusion that all partisan gerrymander claims are political questions by weaving together analytical threads that fail to carry the heft of the conclusion. While a review of the *Federalist Papers* uncovered no evidence that the Framers intended for the federal courts to play a role in electoral districting issues,⁴⁰ this history stands in stark contrast to the majority's own conclusion that there is a role for the courts with respect to one-person, one-vote and racial gerrymandering relating to a State's drawing of congressional districts.⁴¹ The majority uncovered no evidence that the Framers intended to distinguish between different types of electoral issues, finding some justiciable, while others not.

The majority also noted that "[c]ourts have . . . been called upon to resolve a variety of questions surrounding districting."⁴² Indeed, the Court has answered the call in cases alleging partisan gerrymandering to reach the merits of the allegations.⁴³ While nearly all of these cases have agreed that "extreme partisan gerrymandering . . . violates the constitution,"⁴⁴ the majority concluded that these cases "leave unresolved whether . . . claims [of legal right] may be brought in cases involving allegations of partisan gerrymandering."⁴⁵ These cases, in which the Court adjudicated the merits of partisan gerrymander claims, provide little or no support for the conclusion that it is impossible to find judicially manageable standards for all partisan gerrymander claims.

39 *See id.* at 2509 (Kagan, J., dissenting) ("For the first time ever, this Court refuses to remedy a constitutional violation because it thinks the task beyond judicial capabilities.").

40 *Id.* at 2496 (surveying the Framers' consideration of the electoral districting problem and that though "a discretionary power over elections ought to exist somewhere. . . . [I]t must either have been lodged wholly in the national legislature, or wholly in the State legislatures, or primarily in the latter, and ultimately in the former." [But] [a]t no point was there a suggestion that the federal courts had a role to play.") (quoting THE FEDERALIST NO. 59, at 362 (Clinton Rossiter ed., 1961)).

41 *Id.* at 2495-96.

42 *Id.* at 2496.

43 *See Gaffney v. Cummings*, 412 U.S. 735 (1973) (adjudicating partisan gerrymander claims on the merits); *Davis v. Bandemer*, 478 U.S. 109, 125 (1986) (holding that claims of partisan gerrymandering are not political questions); *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399 (2006) (adjudicating claims of unconstitutional partisan gerrymandering). *But see Vieth v. Jubelirer*, 541 U.S. 267 (2004) (plurality opinion) (dismissing partisan gerrymander claims as nonjusticiable).

44 *Rucho*, 139 S. Ct. at 2515 (Kagan, J., dissenting).

45 *Id.* at 2498 ("Two 'threshold questions' remained: standing, which was addressed in *Gill*, and 'whether [such] claims are justiciable.'").

The majority also reviewed the tests propounded by the lower courts.⁴⁶ Of course, the fact that lower courts have proposed tests does not mean the Supreme Court must accept those tests. But, if lower federal courts, along with state courts, prior Supreme Court Justices and the dissenting Justices in this case are all willing and able to identify standards to decipher whether alleged partisan gerrymandering is unconstitutional, the majority's conclusion that standards are impossible to decipher is not particularly plausible.

Finally, the majority articulates a laundry list of hypothetical questions involving partisan gerrymander issues that might arise in the future and might prove to be challenging to answer.⁴⁷ Undoubtedly, the questions posed by the majority will be challenging to answer should they ever arise in a future case. But, this is beside the point. Article III ensures that courts are empowered to answer only cases or controversies. Indeed, the Constitution precludes federal courts from answering hypothetical questions decoupled from a live case or controversy. It is somewhat ironic, therefore, that the majority relies upon a parade of horrors that have not been raised in a case or controversy, to avoid addressing the questions that have been properly raised.⁴⁸

Instead of threading the needle to reach the anomalous conclusion that there is a role for the courts in deciding some issues arising under the Elections Clause, but no judicially manageable standards to accomplish the task for others, the majority could have rejected the categorical declaration that all partisan gerrymander claims are nonjusticiable political questions and dismissed the specific claims regarding the district maps in North Carolina and Maryland for failure to state a claim upon which judicial relief may be granted. In *Vieth v. Jubelirer*, a case alleging unconstitutional partisan gerrymandering, Justice Kennedy took this position to reject the assertion that all partisan gerrymander claims are political questions.⁴⁹ Applying such reasoning here would have avoided any appearance of judicial abdication and still resolved the cases with the same result, no judicial remedy. So why didn't the majority choose this path?

In order to dismiss these claims for failure to state a claim, a court must accept all of the factual allegations in the complaint as true to determine if

46 *Id.* at 2502-06, 2516. (describing the tests as comprised of three basic elements: intent, effects, and causation).

47 *Id.* at 2501.

48 *See id.* at 2509 (Kagan, J., dissenting) ("After dutifully reciting each case's facts, the majority leaves them forever behind, instead immersing itself in everything that could conceivably go amiss if courts became involved.").

49 *Vieth v. Jubelirer*, 541 U.S. 267, 310, 312 (2004) (Kennedy, J., concurring).

those facts state a plausible legal claim.⁵⁰ Applying this standard, the majority would have had to accept the allegations regarding districting maps in North Carolina⁵¹ and Maryland⁵² as true and conclude that they do not state a plausible claim for relief. The majority may have been hesitant to make this ruling on such egregious allegations of fact. Instead, the majority hangs its hat on the assertion that it is impossible to determine “how much partisan gerrymandering is too much?” The dissent avoids the hypotheticals and concludes quite simply, this much is too much.⁵³ By invoking the political question doctrine, the majority avoided the severity of the facts presented while maintaining that it “does not condone excessive partisan gerrymandering.”⁵⁴

More importantly, the impact of the Court’s decision to invoke the political question doctrine is much greater than the impact of an individualized determination that these particular claims fail to state a claim upon which relief may be granted. By declaring that an entire category of cases—those that allege partisan gerrymandering—are nonjusticiable political questions the majority effectively lays a dead hand over all cases that might have alleged partisan gerrymander claims in the future. This impact is significant. The majority suggests that it is prudent, indeed necessary to categorize all partisan gerrymander claims as nonjusticiable political questions. Yet, as Justice Kennedy stated in *Vieth*:

It is not in our tradition to foreclose the judicial process from the attempt to define standards and remedies where it is alleged that a constitutional right is burdened or denied. . . . Courts, after all, already do so in many instances. A determination by the Court to deny all hopes of intervention could erode confidence in the courts as much as would a premature decision to intervene.⁵⁵

The Court has struggled with partisan gerrymander claims for decades. While political classifications in districting alone do not support a justiciable claim, when such classifications are “applied in an invidious manner or in a way unrelated to a legitimate legislative objective,” they may support a claim

50 See *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) (elaborating upon the standard for pleading in federal court).

51 See *Rucho*, 139 S. Ct. at 2509–2511 (Kagan, J., dissenting) (“In 2012, Republican candidates won 9 of the State’s 13 seats in the U.S. House of Representatives, although they received only 49% of the statewide vote. In 2014, Republican candidates increased their total to 10 of the 13 seats, this time based on 55% of the vote.”).

52 See *id.* (observing that from 2012 through 2018 Democrats “have never received more than 65% of the statewide congressional vote,” yet they have won “7 of 8 House seats”).

53 *Id.* at 2521.

54 *Id.* at 2507.

55 *Vieth v. Jubelirer*, 541 U.S. 267, 309–10 (2004) (Kennedy, J., concurring).

for relief.⁵⁶ After *Rucho*, the justiciability question will depend upon distinctions between partisan gerrymander claims that will likely rest upon the impact felt from political classifications. To the extent that these distinctions are fact based, courts will be required to evaluate factual allegations relating to the types and severity of impact caused by partisan gerrymandering in order to open, or close, the courthouse doors to such claims. In essence, these distinctions will be indistinguishable from the core functions of judicial review.

In *Rucho*, the majority admitted that “[e]xcessive partisanship in districting leads to results that reasonably seem unjust” and “that such gerrymandering is ‘incompatible with democratic principles,’”⁵⁷ yet threw up its hands because it could decipher no legal standards to resolve these admittedly serious problems. We should be thankful that prior justices on the Supreme Court discovered standards to remedy racial gerrymandering and vote dilution. For that matter, we should be thankful that prior justices on the Court discovered standards to decipher unconstitutional conduct in violation of the Equal Protection Clause or the Due Process Clause that have been instrumental in advancing justice. To prevent the Court from expanding the reach of the political question doctrine to shield other sensitive “political” claims from judicial review, the doctrine should be limited to instances in which there is a “textual commitment of the issue to a coordinate political department.”⁵⁸ The remaining criteria announced in *Baker v. Carr* should be relevant only to the extent they bear upon this determination. In this manner, the political question doctrine will be narrowed to its core and applicable to only the most extraordinary situations.

As Professor Henkin cautioned, “a doctrine that finds some issues exempt from judicial review cries for strict and skeptical scrutiny.”⁵⁹ This statement was true 50 years ago, and it remains true today. We should be worried about a Supreme Court that refuses to engage in the hard work of judicial review, particularly in those cases where it is most needed.

56 *Id.* at 307.

57 *Rucho*, 139 S. Ct. at 2506 (quoting *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 135 S. Ct. 2652, 2658 (2015)).

58 *Baker v. Carr*, 369 U.S. 186, 217 (1962).

59 Henkin, *supra* note 4, at 600.

